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COMMENTS

CASENOTES

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RECENT DEVELOPMENTS

Broken Promises: The Failure of the 1920's Native American Irrigation and Assimilation Policies

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The history of the government connections with the Indians is a shameful record of broken treaties and unfulfilled promises.[1]

Man is explicable by nothing less than all his history. Without hurry, without rest, the human spirit goes forth.[2]

I. INTRODUCTION

The history of Indian-white relations has generally been one focused upon ownership of land and the rights appurtenant to land ownership.[3] Land claims, mineral rights, and rights to water have characterized the binary relationship between Indian and white societies.[4] The purpose of Indian policy has been to deal with this traditionally adversarial relationship. In 1868, the Commissioner of Indian Affairs, Nathaniel Taylor, posed the following question. "How can the Indian problem be solved so as best to protect and secure the rights of the Indians, and at the same time promote the highest interests of both races?"[5] This question has underlined the development of

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[1] REPORT OF THE BOARD OF INDIAN COMMISSIONERS (Nov. 23,1869), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 131 (Francis P. Prucha ed.,1975).

[2] RALPH WALDO EMERSON, ESSAYS 9 (Houghton Co. 1883).

[3] ROLAND W. FORCE & MARYANNE TEFFT FORCE, THE AMERICAN INDIANS 97 (1991). "The history of Indian-white relations can be viewed as the story of land and its use and control." *Id.*

[4] David A. Ezzo & Michael Moskowitz, *Stockbridge Munsee Land Claim: A Historical and Legal Perspective, in* 23 PAPERS OF THE TWENTY-THIRD ALGONQUIN CONFERENCE (William Cowen ed.,1993) (presenting an interesting case analysis of Indian land claims).

[5] FORCE & FORCE, *supra* note 3, at 123. ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (Nov. 23, 1868). For a comparative analysis *se* Ralph W. Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians,* 66 WASH. L. REV. 643 (1991).

Indian policy for centuries. One response was to assimilate the Indians[6] into the more dominant white society. This article will examine one facet of the federal government's assimilationist policy. The irrigation program instituted by the Bureau of Indian Affairs beginning at the turn of the century had as its philosophical mandate, the creation of the Indian farmer. The irrigation program can be seen as the step-child of the more infamous allotment policy as initiated by the General Allotment or Dawes Act of 1887.[7] The allotment of Indian lands has generally been held to be misguided and destructive of Indian interests. This article will focus attention on the less well studied but equally misguided Indian irrigation program.

The Indian irrigation program of the 1920's is a testament to the failure of federal Indian policy to assimilate[8] Native Americans. At the turn of the century, the Bureau of Indian Affairs[9] pursued two programs that proved disastrous to the Indian population that they were empowered to protect. The first was the allotment of Indian lands under the Dawes Act. An ancillary program, the construction of irrigation systems, was intended to nourish and fertilize those lands. The philosophical foundation for these policies was the

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[6] The author would like to state clearly that the term "Indians" is not meant to oversimplify a widely varied group. The fact remains that the federal government has generally framed "Indian policy" as if it was dealing with a homogeneous group. One commentator explains this homogeneous-heterogeneous duality. "They are not homogeneous. Rather, they were loosely formed bands and tribes, speaking nearly 300 languages and thousands of dialects. The collective identity felt by Indians today is a result of their common experiences of defeat and/or mistreatment at the hands of whites." Frank W. Porter, III, *Indians of North America: Conflict and Survival, in* A. LAVONNE BROWN RUOFF, LITERATURES OF THE AMERICAN INDIAN 9 (1991).

[7] Also known as the General Allotment Act which allocated 160 acres to each head of a household and 80 acres to individuals. Indian General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 336, 339, 341-342, 348-349, 381 (1988)).

[8] The contact between two cultures may lead to the creation of a blended and distinct third culture. "Assimilation" will refer in this article to the absorption of a weaker group or culture by a more dominant one whereby the weaker one ceases to exist. "The former normally leads either to *cultural fusion* (generation of a *genuine third sociocultural system*) or *assimilation* (one group's complete absorption of another)." SCOTT RUSHFORTH & STEADMAN UPHAM, A HOPI SOCIAL HISTORY 208 (1992). For a further explanation of "acculturation" theory and "dependency" theory, *see id.* at 205-211. Dependency theory "focuses on exploitive external relationships between societies or nations." *Id* at 211. This concept can be used to describe the relationship between European-American and Indian societies. "From the European perspective, if a culture was different, it was simply inferior." John W. Friesen, *Formal Schooling Among the Ancient Ones: The Mystique of the Kiva,* 17 AM. INDIAN CULT. & RESEARCH J. 55 (1993). *See also* RALPH LINTON, ACCULTURATION IN SEVEN AMERICAN INDIAN TRIBES (1940); Homer G. Barnett, et al., *Acculturation: An Exploratory Formulation,* 56 AM. ANTHRO. 973 (1954).

[9] *See infra* notes 9-17 and accompanying text. *See generally* FRANK W. PORTER, THE BUREAU OF INDIAN AFFAIRS (1988).

hope that they would provide the means by which the Indians could be assimilated by their conversion to farming. It was believed that "contact with whites and ownership of land [would] teach [the Indians] to become educated, civilized, and self-supporting."[10] By 1930, it became clear that the irrigation program and the metamorphosis of the Indian *qua* farmer were unconditional failures.

II. THE BUREAU OF INDIAN AFFAIRS AND THE "AMERICANIZATION" OF THE INDIANS

A. History of the Bureau of Indian Affairs

The Bureau of Indian Affairs was a 1824 creation of the Secretary of War.[11] It was transferred to the newly formed Interior Department in 1849. From a meager staff of three in 1824, the Bureau reached a staff of over twelve thousand in 1934.[12] Between the years 1911 and 1933 the number of employees had doubled. This proliferation of staff can be attributed directly to the irrigation and allotment programs of the early twentieth century. "The effects of the Allotment Act [resulted in tremendous growth] showing up [with the formation of] an irrigation service and an allotment service."[13] Education, irrigation, farming, and allotment were all devices to be used to assimilate the Indians into American society. Assimilate was a code word for "civilizing" the Indians.[14] The process of Americanization[15] was considered the way to remove the "Indianness" from the Indians. "Everything *Indian*

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[10] THE INDIAN: AMERICA'S UNFINISHED BUSINESS 19 (William A. Brophy & Sophie D. Aberle eds., 1966).

[11] THEODORE W. TAYLOR, THE BUREAU OF INDIAN AFFAIRS (1984). Prior to the federal government's involvement in the assimilation of the Indians, most assimilation activities were from the private sector. "Many of the *civilization* efforts were in the hands of missionary organizations in the first half of the nineteenth century." *Id.* at 33.

[12] *Id.* at 35, Table 2.1.

[13] *Id.* at 35. The notion of assimilation was forwarded earlier in the 19th century from an unlikely source, President Andrew Jackson, a proponent of Indian removal. In justifying the removal of Indians from the southeast he stated that "perhaps [it will] cause them gradually, under the protection of the Government and through the influence of good counsels, to cast off their savage habits and become an interesting, civilized, and Christian community." WINTHROP D. JORDAN & LEON F. LITWACK, THE UNITED STATES 223 (6th ed. 1987).

[14] The need to civilize the Indians was an old theme carried over from the original European settlers. "Integrating tribes into the national legal framework through the successive implementation of treaties, trade, and political reorganization was already an established pattern by 1700." Russel L. Barsh, *'Indian Law,' Indians' Law and Legalism in American Indian Policy: An Essay on Historical Origins, in* AMERICAN INDIANS: SOCIAL JUSTICE AND PUBLIC POLICY 9 (Donald E. Green & Thomas V. Tonnesen eds., 1991)

[15] *See generally* AMERICANIZING THE AMERICAN INDIAN (Francis P. Prucha ed.,1973).

came under attack."[16] Much of what was unique about the Indians, their communal lifestyle, their nomadic tendencies, their spiritual attachment to nature, their culture, their languages, and their religions were all considered to be uncivilized. "Indian feasts, languages, marriage practices, dances, and any practices by medicine or religious persons were all banned by the Bureau of Indian Affairs."[17] The notion of civilizing or assimilating the Indian as the aim of government policy was apparent in an 1872 Annual Report of the Commissioner of Indian Affairs. It classified the some 300,000 Native-Americans living in the continental United States based upon their degree of civilization. The Indian population was divided into three groups consisting of the *civilized, semi-civilized,* and the *wholly barbarous.*[18] Missionaries sought to convert them to Christianity,[19] the government wanted to educate them as white school children were educated, and the Bureau of Indian Affairs wanted to convert them to a sedentary lifestyle, preferably one of farming.[20] The historical fact shows that "the assimilationist polices of the federal government were disastrous for Indian peoples."[21] The allotment and irrigation programs resulted in the loss of Indian lands without producing progress towards assimilation. "Native Americans never became successful farmers."[22] Two-thirds of the irrigated lands created for their benefit passed to non-Indian owners.

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[16] U.S. Commission on Human Rights, *A Historical Context for Evaluation, in* NATIVE AMERICANS AND PUBLIC POLICY 23 (Fremont J. Lyden & Lyman H. Legters eds., 1992).

[17] *Id.*

[18] TAYLOR, *supra* note 11, at 36, Table 2.2.

[19] As early as the mid 1800's, "President Grant turned to religious bodies for nominations of Indian agents and superintendents." Donald J. Berthrong, *Nineteenth-Century United States Government Agencies, in* 4 HANDBOOK OF NORTH AMERICAN INDIANS: HISTORY OF INDIAN-WHITE RELATIONS 259 (Wilcomb Washburn ed.,1988).

[20] Commissioner Hiram Price, in 1882, enunciated the benevolence of the Bureau's mission to "civilize" the Indians. "To domesticate and civilize wild Indians is a noble work, the accomplishment of which should be a crown of glory to any nation." ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (Oct. 24, 1881), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 1, at 155. It is unlikely that many Native-Americans view the assimilation policies of the United States as a "crown of glory." *Id.*

[21] James A. Casey, *Sovereignty By Sufferance: The Illusion of Indian Tribal Sovereignty,* 79 CORNELL L. REV. 404, 412 (1994).

[22] *Id.* at 413, n. 57 (citing Deborah J. Borrero, Note, *They Never Kept But One Promise,* County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 112 S. Ct. 683 (1992), 67 WASH L. REV. 937, 943 (1992)).

B. Allotment as a Mechanism for Assimilation

The direct relationship between Indian assimilation and allotment was a firm belief of the Bureau of Indian Affairs from the 1890's to 1933.[23] "[T]he commissioners were convinced that owning land would *civilize* [the Indians] and improve their lot in life. This belief in the importance of making the Indian a private land owner was the creed by which BIA employees lived for nearly fifty years."[24] The importance of treating Indians as individuals and to de-tribalize their values in order to Americanize them was restated by Commissioner Thomas Morgan in 1889. "The tribal relations should be broken up, socialism destroyed, and the family and the autonomy of the individual substituted. The allotment of lands in severalty . . . [is the] means to this end."[25]

Equally important was the Bureau's rigid belief that the Indians' consent was not a necessary component to the implementation of the allotment regime.[26] As early as 1876, Commissioner John Smith noted that "provision should be made not only permitting, but *requiring*, the head of each Indian family, to accept the allotment of a reasonable amount of land . . . ."[27] A sad example can be seen in the break up of the Sioux reservations in North and South Dakota. A military officer reported that "90 per cent [of the Indians] opposed the allotment because they wanted to hold their land as a stock range . . . . [Furthermore,] it was worthless for agriculture."[28] Nonetheless, allotment became a reality beginning in 1903. Although Indian consent was not a Bureau priority, the Indian's lack of consent or indifference doomed allotment as a device of assimilation. Not only was Indian consent disregarded, the Supreme Court empowered the federal government with treaty breaking authority. In *Lone Wolf v. Hitchcock*,[29] it held that the

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[23] The importance of individual land ownership as a requirement for assimilation had been argued prior to the enactment of the Dawes Act in 1887. In 1876, Commissioner John Smith voiced the following opinion: "It is doubtful whether any degree of civilization is possible without individual ownership of land." DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 1, at 149.

[24] James E. Officer, *The Indian Service and Its Evolution*, *in* THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880'S 63 (Sandra L. Cadwalader & Vine Deloria, Jr. eds., 1984).

[25] ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (Oct. 1, 1889), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 1, at 177.

[26] *See generally* Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989) (discussing whether the Indians have consented to be governed under the laws of the United States).

[27] DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 1, at 149 (emphasis added).

[28] ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 313 (1970).

[29] 187 U.S. 553 (1903).

government's plenary power[30] over tribal lands could not be restricted by its own treaties. The ancient doctrine of *pacta sunt servanda*,[31] that countries must honor their treaty obligations, was disregarded.

The government's failed attempt of allotting the Hopi Reservation in 1910 provides another example. "The program failed everywhere except Moenkopi because of Hopi indifference and resistance and because of the special allotting agents' incompetence. The government abandoned allotment [of the Hopi Reservation.]"[32] It was not until the administration of John Collier beginning in 1933 that the destruction of the communal structure of the reservation system was [completely] abandoned.[33] A side-effect of the allotment and irrigation programs was the rapid expansion of the Bureau's staff. The bureaucratic complications created in the administration of these programs is legendary. By 1912, "the Bureau of Indian Affairs had become one of the most complicated arms of the federal bureaucracy, a status it has retained ever since."[34]

C. The Irrigation Program as a Policy of Assimilation

Assimilation has been the cornerstone of federal policy toward the Indians beginning in the mid-1800's:

> The drive to assimilate Indians into the mainstream of American life by changing their customs, dress, occupations, language, religion, and philosophy has always been an element in federal- Indian relations. In the latter part of the nineteenth century and the early part of the twentieth century, this assimilationist policy became dominant.[35]

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[30] *See, e.g.*, United States v. Kagama, 118 U.S. 375 (1886) (upholding plenary power of United States over Indians and their lands). For an interesting re-assertion of the right of native title in another country *see* Mabo v. Queensland, 175 C.L.R. 1 (Austl. 1992) (repudiating the century old precedent by holding that Australian common law recognizes a right of native title).

[31] *See generally* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 613 (3d ed. 1979).

[32] RUSHFORTH & UPHAM, *supra* note 8, at 150-151.

[33] The Collier administration's revolutionary work was encapsulated in the Indian Reorganization Act of 1934. "[I]t brought the allotment program to an end, extended indefinitely the period of trusteeship over Indian land, [and] established the basis for democratic tribal governments." Officer, *supra* note 24, at 72.

[34] *Id.* at 66. It should be noted that the administration of policies and programs towards the Indians had always been a complicated affair. "At the end of the nineteenth century, there were *61 Indian agencies* maintained by the federal government to distribute food and provide services for Indian tribes." Berthrong, *supra* note 19, at 263 (emphasis added).

[35] U.S. Commission on Human Rights, *supra* note 16, at 22.

The Bureau of Indian Affairs binary policy of connecting farming and assimilation[36] was inherently flawed. The conversion of Indians into the agricultural lifestyle had been the theory behind the allotment of Indian lands, most notably by the Dawes Act of 1887.[37] "Allotment was advocated as a means of further civilizing Indians by converting them from a communal land system to a system of individual ownership. It was argued that ownership would make *farmers out of the savages.*"[38] The logic behind the allotment of Indian lands was extended to justify the establishment of an irrigation program for those lands. It compounded this flawed analysis with the oversimplified belief that irrigation projects would be the single impetus needed to transform the Indians into farmers.[39] "Irrigation on Indian lands received increasing attention after 1900. . . . [T]here was a necessity of providing water on the allotments . . . if the Indians were to become self-sufficient through farming."[40] By 1911, the annual appropriation for irrigation projects had risen to one and a half million dollars and "230,000 acres of reservation land were *under ditch.*"[41]

The inherent problem with the allotment and irrigation policies was that they were item specific and not person focused.[42] They hoped to transfer the Indian tribes from a communal, nomadic lifestyle to a sedentary, agricultural one by simply providing them with the means of production. This overly simplistic view was flawed in at least two respects. First, there is much more to a successful farming enterprise than land and water. Land and water

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[36] "The allotment plan, in its attempt to make Indians into freeholding farmers, particularly attempted to assimilate the Indian into white civilization." Michael G. Lacy, *The United States and American Indians: Political Relations, in* AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 87 (Vine Deloria, Jr. ed., 1985).

[37] The legislative history of the Dawes Act is remarkably scant. As on most items involving Indian policy, Congress deferred to the bureaucratic experts. "Congress trusted the ability of specialists in Indian policy to devise a satisfactory plan." LORING B. PRIEST, UNCLE SAM'S STEPCHILDREN: THE REFORMATION OF THE UNITED STATES INDIAN POLICY, 1865-1887 187 (1969).

[38] U.S. Commission on Human Rights, *supra* note 16, at 24 (emphasis added).

[39] Farming was historically an integral part of the lives of some of the Indian tribes. The Pima tribe, for example, were successful irrigators and farmers long before the whites inhabited the continent. *See* Ed Severson, *A Walk Through Time: Old Fort Lowell Neighborhood Spans a Century*, ARIZONA DAILY STAR, Feb. 8, 1997, at D1.

[40] Lawrence C. Kelly, *United States Government Indian Policies, 1900-1980,in* 4 HANDBOOK OF NORTH AMERICAN INDIANS: HISTORY OF INDIAN-WHITE RELATIONS 69 (Wilcomb Washburn ed., 1988). At the turn of the century "the Indian Bureau became seriously involved in programs of irrigation, an activity closely related to land allotment." Officer, *supra* note 24, at 63.

[41] Officer, *supra* note 24, at 65.

[42] "The Indian himself should be the focus of all public policy affecting him." THE INDIAN: AMERICA'S UNFINISHED BUSINESS, *supra* note 10, at 3.

management, technical expertise and equipment are among the other essentials. The Indian was "not familiar with private ownership or farming."[43] The Bureau failed to make "provision for training in agriculture, or for granting credit for livestock, feed, and implements."[44] Second, motivation, attitude, and values are the person centered factors that the Bureau failed to focus upon. It was this lack of focus that doomed the allotment and irrigation programs as devices of assimilation.

> No program imposed from the outside can serve as a substitute for one willed by Indians themselves. Nor should their ostensible consent to a plan be deemed sufficient. Such *consent* may be wholly passive, indicating only a surrender to what seems unavoidable .... What is of paramount concern is that the mores of the Indian should be recognized in helping plan his future. Besides tribal values vital in framing policy, ... officials must make it a point to help the Indian participate on a basis of equality in their political and economic life.[45]

The implementation of the Dawes Act strayed even further from its philosophical underpinnings. The selection of lands for allotment was determined not so much as to the needs of the individual Indians but on the desirability of the land itself. Some of those who initially supported allotment, including the Indian Rights Association,[46] "innocently assumed that tribes would be selected on the basis of their advancement, but it was soon apparent that the desirability of their land was an important criterion."[47] For example, the first allotment involved a Sioux reservation in South Dakota. This "allotment" produced a "660,000-acre *surplus* for white settlement."[48]

The Bureau's flawed approach to allotment and irrigation projects was duly noted in the 1928 Meriam Report.[49]

> The position taken, therefore, is that the work with and for the Indians must give consideration to the desires of the individual Indians. He who wishes to merge into the social and economic life of the prevailing civilization of this country should be given all practicable aid and advice in making the necessary

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[43] *Id.* at 20.

[44] *Id.*

[45] *Id.* at 3-5. The authors also note another shortcoming of Indian policy has been its inconsistency. It has often swung between the poles of eliminating Indian culture to embracing it. "Why has the Bureau of Indian Affairs, charged with the responsibility, not followed a uniform course? Why has it swung form pole to pole?" *Id.* at 8.

[46] *See infra* note 92-93 and accompanying text.

[47] DEBO, *supra* note 28, at 304.

[48] *Id.*

[49] LEWIS MERIAM, THE PROBLEM OF INDIAN ADMINISTRATION (1928), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 1, at 219-21 (popularly known as the Meriam Report).

> adjustments. He who wants to remain an Indian and live according to his old culture should be aided in doing so.[50]

The Bureau's benchmark for success had been the number of acres allotted or the number of acres irrigated. The Meriam Report uncloaked the illusion that the irrigation and allotment programs had assimilated the Indians or had improved their economic and social conditions. Irrigation and allotment as instruments of assimilation had been debunked. A new measuring standard had been put forward. Allotment and irrigation should be pursued only if there was a reasonable likelihood of success. Success was to be judged by the assimilation of the Indians and their success in the farming enterprise.[51]

D. Indian Water Rights

The issue of Indian water rights has been one of crucial importance in western economic development.[52] Indian water rights are important for a number of reasons. First, the ability of irrigation systems to function are necessarily dependent upon a viable source of water. Second, water rights are valuable property rights. Given the arid climate, rights to water are often more valuable than actual land ownership. Third, Indian water rights are often in direct conflict with non-Indian water rights. Fourth, the issue of Federal and state jurisdiction over water rights claims has been a point of controversy and litigation.

1. Winters v. United States

The Winters Doctrine has been the law on the issue of Indian water rights since 1907. The Supreme Court decision in *Winters v. United States*[53] established an implied federal right to water for Indian reservations that pre-empts most claims under the western states' Prior Appropriations

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[50] *Id.* at 221.

[51] The Meriam Report concludes that:

> In every activity of the Indian Service the primary question should be, how is the Indian to be trained so that he will do this for himself. Unless this question can be clearly and definitely answered by an affirmative showing of distinct educational purpose and method the chances are that the activity is impeding rather than helping the advancement of the Indian. . . .

Id.

[52] *See generally* LLOYD BURTON, AMERICAN INDIAN WATER RIGHTS & THE LIMITS OF LAW (1993).

[53] 207 U.S. 564 (1907). *See generally* Harold A. Ranquist, *The Winters Doctrine and How it Grew: Federal Reservation of Rights to the Use of Water*, 1975 B.Y.U. L. REV. 639, 698 (1975); Comment, *Adjudication of Indian and Federal Water Rights in the Federal Courts*, 46 U. COLO. L. REV. 555 (1975) [hereinafter *Adjudication*].

Doctrine.[54] The Winters Doctrine holds that the Indians reserved water rights when they gave up lands by treaty or otherwise. The crucial issue is whether private upstream landowners can divert water to cultivate their lands to the detriment of the Indians right to irrigate their lands. Justice McKenna held that the Indians' claims were paramount to that of the non-Indians who made claim under Montana's prior appropriation doctrine. The Indians' transfer of large tracts of land to the federal government is what made private land ownership possible. The land retained by the Indians, in this case the Fort Belknap Indian Reservation, has a perpetual right to the waters of the Milk River for irrigation purposes. The fact that the Indians did not fully utilize their water rights is immaterial. The rights cannot be abrogated by the prior appropriation or use by upstream property owners. The public policy of Indian assimilation, along with the law of property rights and treaty law, played a role in McKenna's decision.

> The reservation was a part of a much larger tract which the Indians had the right to occupy and use, and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such, the original tract was too extensive; but a smaller tract would be inadequate without a *change of conditions*. The lands were arid, and without irrigation, were practically [useless].[55]

2. *Arizona v. California*

The Supreme Court confirmed the Winters Doctrine some fifty years after its enactment in the 1962 case of *Arizona v. California*.[56] This complicated case focused upon the competing water claims of a number of western states, the federal government, and a number of Indian reservations. At stake was the limited water supply produced by the Colorado River in conjunction with the Boulder Canyon Project.[57] The states' claims were based upon the law of prior appropriation and the doctrine of equitable appropriation.[58] Justice

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[54] There are two predominate water rights doctrines in the United States. The Prior Appropriation Doctrine is the law of a majority of the states west of the Mississippi River. The Riparian Rights Doctrine is the law in the states east of the Mississippi River and a minority of the states to the west. *See infra* note 65.

[55] *Winters*, 207 U.S. at 576 (emphasis added).

[56] 373 U.S. 546 (1963).

[57] The Boulder Canyon Project Act delegated the right to appropriate the water from the project to the Secretary of the Interior. Boulder Canyon Project Act, ch. 42, § 21, 45 Stat. 1066 (1928) (codified as amended in scattered sections of 43 U.S.C.).

[58] "The doctrine of equitable apportionment is a method of resolving water disputes

Black held that those two doctrines only applied to competing claims among the states. The states' claims were tied to the passage of the Boulder Canyon Project Act in 1928. Black held that these doctrines did not pertain to the claims of the Indians because the reservations had been formed prior to 1928.[59]

Justice Black initially looked to the history of the Colorado River Indian Reservation. He concluded that part and parcel to the creation of the Reservation is an implied right to irrigate the lands within. "Irrigating canals are essential to the prosperity of these Indians. Without water there can be no production, no life."[60] The right to irrigate Indian lands is vested upon the formation of the reservation. Whether used or not, Indian water rights are "present perfected rights" and paramount to latter created state and private claims. Thus, the Winters Doctrine grants the Indians an implied reservation of water rights dating back to the creation of their land reservations.

Given the Indians superior claim, the next issue confronted by the court was the scope of those rights. The State of Arizona argued that the Indians' superior claim should be limited to a volume of water "measured by the Indians' *reasonably foreseeable needs*."[61] Factors to be looked at in making this determination include the number of acres actually being cultivated and the number of Indians on the reservation. The court rejected the state's reasonableness limitation. Instead, it held that the Indians had the right to as much water as they needed to irrigate the entire usable acreage of the Reservation. "The water was intended to satisfy the future as well as the present needs of the Indian Reservation and ruled that enough water was reserved to irrigate *all practicably irrigable acreage* on the reservations."[62] Indian water rights reserved by the reservation system are thus unconditional and cannot be lost through nonuse. However, they can be leased and purchased. The loss of lands under the Dawes Act and due to the irrigation program also meant the loss or sharing of these valuable Indian water rights.

The division of western water development into Indian and non-Indian water resources and projects overlooks their inherent interrelationships. "Indians and non-Indians [were] competitors not only for water but also for water *projects* and the federal funding used to finance them."[63] The

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between States .... An Indian Reservation is not a State .... Indian claims here are governed by the statutes and Executive Orders creating the reservations." *Adjudication, supra* note 53, at 597.

[59] *Id.*

[60] *Id.* at 599 (quoting CONG. GLOBE, 38th Cong., 2d Sess. 1321 (1865)).

[61] *Id.* at 600.

[62] *Id.* (emphasis added).

[63] DANIEL MCCOOL, COMMAND OF THE WATERS: IRON TRIANGLES, FEDERAL WATER DEVELOPMENT, AND INDIAN WATER 4 (1987).

adversarial representatives for the public dole included the Bureau of Indian Affairs on behalf of Indian irrigation projects and the Bureau of Reclamation on behalf of the non-Indian majority. These two groups of interests were the primary forces behind western water development. The reality was, however, that this adversarial relationship was mostly symbolic. The fact is that much of the land irrigated under the guise of civilizing the Indians benefited non-Indians. In this sense, the leasing and selling of Indian lands, especially the irrigated lands, provided whites with an avenue around the Winters Doctrine.

3. Water Rights, Allotment, and Irrigation

There has been a widening divergence between Indian rights as protected under the Winters Doctrine and the erosion of those rights in practice. Legal rights and the legal theory supportive of those rights provide a means of protection if aggressively defended and protected. Uncontested appropriations of Indian water rights have generally resulted in a permanent diminishment of those rights. "Despite the *Winters* decision, Indian water rights have been diminished by action of states, individuals, companies, and the federal government . . . . As more and more reclamation and power projects have been instituted to increase water flow to white agricultural and commercial users, the Indian has seen his rights evaporate."[64]

Two areas that have posed threats to the loss of Indian water rights is the appropriations doctrine and the loss of rights appurtenant to allotted lands. The appropriations doctrine[65] holds that those who put water to a beneficial use or appropriate it, whether or not the water resource is adjacent to their property, obtain rights to further use of that water resource. Thus, the time of appropriation and not the location of the property becomes the measuring device for determining rights among users of the water. The *Winters* case set the date for the Indians' implied water rights as the time of the creation of their reservation by the federal government. Generally, Indian water rights will predate those of subsequent white settlers who attempt to make claims under the prior appropriations doctrine. The problem for Indian rights is that the western states appropriations doctrine, unlike the riparian theory of water rights, is not perpetual. If the water is not actually appropriated and put to beneficial use, then the priority of rights will be lost to a more recent

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[64] WILCOMB E. WASHBURN, RED MAN'S LAND/WHITE MAN'S LAW 197 (2d ed. 1995).

[65] The two general theories of water rights are the prior appropriations doctrine (western states) and the riparian theory (eastern states). The former grants rights based on the order in which parties have made use of the water. The riparian theory grants adjacent land owners pro rata rights to use the water resource. *See* A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 1 (1988).

appropriator. The history of Indian water rights has been one of under-utilization. A number of points are raised in an analysis of Indian water rights and the prior appropriations doctrine. First, there may have been some unintended benefits from the Bureau's irrigation program. They may have served to certify the reservations' implied water rights by more fully putting them to use. Second, Indian water rights have generally been recognized as an exception to the beneficial use requirement. They are implied rights that are inferior only to appropriations made prior to the creation of their reservations. The rationale for this exception as recognized under the Winters Doctrine is two-fold. First, that by creating the reservations, Congress intended to reserve all water rights needed to nourish all irrigable reservation lands at the time of its creation and into the future.[66] Second, the Indians have argued that they should not be penalized for their non-use of water rights. They have been restricted by the federal and state governments, along with economic restraints, from a fuller utilization of their water rights. "The tribes contend, however, that the reason for their non-use of the water was the failure of the United States to fulfill its responsibility as trustee in developing and protecting [Indian] water resources."[67]

The second issue posed is whether Indian lands, sold or leased under the allotment program, also resulted in a transfer of water rights. Did the irrigation projects not only result in the sell-off of Indian lands, but also did the water rights *appropriated* by the irrigation projects transfer to the non-Indians? The Supreme Court held in *United States v. Powers*[68] that the Winters rights did pass with the allotted lands. Those who purchased irrigated, allotted lands received a pro rata share of the water rights attributable to their allotments. Unlike Indians, however, the non-Indian holder of Indian water rights must continue to use the water or lose it under the appropriations doctrine.[69] The next logical issue is can Indian water rights be sold or leased independent from the sale of their lands? In 1921, the Ninth Circuit held that Indian water rights may be leased.[70] However, the sale of Indian water rights must be approved by the federal government under its trust

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[66] Arizona v. California, 373 U.S. 546, 600 (1963).

[67] WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 285 (2d ed. 1988).

[68] 305 U.S. 527 (1939).

[69] *See, e.g.*, Colville Confederated Tribes v. Walton, 647 F.2d 42, 51 (9th Cir. 1981), *cited in* CANBY, *supra* note 67, at 287.

[70] Skeem v. United States, 273 F. 93, 96 (9th Cir. 1921). *See* CANBY, *supra* note 67, at 287-88.

responsibility.[71] It is not likely that a permanent sale of Indian water rights would be approved under the trust relationship.

III. THE PRE-1920 IRRIGATION PROGRAMS: PRELUDE TO DISASTER

A. The Evolution of the Irrigation Program

Government efforts to irrigate Indian land began with the reclamation movement of the 1860's. Federal funds were appropriated in 1867 for the construction of a canal to divert water from the Colorado River to an Arizona reservation.[72] Throughout the 1870's and the 1880's congressional allocations for irrigation were continual but relatively nominal in size. The appropriations averaged less than thirty thousand dollars annually. The project sizes funded under these allocations consisted of the excavations of wells and the construction of minor dam diversions. The amount of acreage affected was insubstantial.[73]

The interest in funding irrigation projects for Indian lands increased during the 1890's. Commissioner of Indian Affairs, Daniel Browning, stated in his 1891 Annual Report that "if farming is to be more successful on the Reservation, a system of irrigation is first required. Until it is provided, time, labor, and money expended to make the Indian a farmer [will be wasted.]"[74] The inherent interrelationship between irrigation and the transformation of the nomadic Indian into farming led to the appointment of engineers in 1900 to commence projects on the Pueblos and Wind River Reservations.[75] The

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[71] One exception to the preemption of the federal government as trustee of Indian water rights is certain regulation of non-Indians. "[S]tates have been held to possess authority to regulate the use of excess Indian water by non-Indians on fee land where the water flowed past the edge of the reservation." Mary Beth West, *Natural Resources Development on Indian Reservations: Overview of Tribal, State, and Federal Jurisdiction* 17 AM. INDIAN L. REV. 71, 97 (1992). *See generally* Montana v. United States, 450 U.S. 544 (1981); United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984).

[72] ROY E. HUFFMAN, IRRIGATION DEVELOPMENT AND PUBLIC WATER POLICY 27 (1953).

[73] CHARLES E. BURKE, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 14 (1924). *See generally* ALFRED R. GOLZE, RECLAMATION IN THE UNITED STATES (1952).

[74] DANIEL BROWNING, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 51 (1891).

[75] WILLIAM A. JONES, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 58 (1900). The diversity of Indian tribes should not be overlooked. Some Indian groups had historically been farmers. One commentator noted that "an agrarian lifestyle was fairly compatible with the culture of the nomadic hunting . . . tribes of the West . . . . [Furthermore,] many Indian tribes had a rich tradition of agriculture long before the first white men came to the New World." John Fredericks, III, *Indian Lands: Financing Indian Agriculture: Mortgaged Indian Lands and The Federal Trust Responsibility*, 14 AM. INDIAN L. REV. 105 (1989).

federal government officially entered into the irrigation business with the passage of the Reclamation Act in 1902.[76] By 1908, the need for yearly appropriations for a separate irrigation program to be administered by the Bureau of Indian Affairs was widely accepted. In 1909, the Irrigation Service was created as a separate branch of the Bureau.

The Irrigation Service's initial mandate was to plan cost effective projects to irrigate Indian lands. It was the hope of the Service and the Bureau that the irrigation projects would make the Indians self-supportive.[77] The reality of the projects never came close to matching the Bureau's lofty expectations. By 1916, Commissioner Sells began to realize that most of the projects were not beneficial to the Indians.[78] Despite, these early indications of failure, the aim of the irrigation program to "domesticate" Indians into farmers remained a fundamental tenet of Bureau policy leading into the 1920's.[79]

B. The Reclamation Movement as Analogy

An analogous movement that can help explain the Bureau's affinity for the irrigation program is the reclamation movement.[80] The origins of the movement reached to the mid-1800's and culminated in the passage of the Reclamation Act of 1902.[81] The ideology of the reclamation movement is closely akin to the philosophy used to support the Indian irrigation program. "Irrigation would produce an ideal democracy, perhaps even serve as the foundation for a new ethical code and a higher *civilization*."[82] Reclamation was seen as a way of bringing civilization to the West and thus, irrigation was seen as a way to civilize the Indian. Another consideration which could have motivated the Irrigation Service was the need to protect Indian water rights

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[76] Huffman, *supra* note 72, at 27.

[77] CATO SELLS, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 49 (1915), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 1, at 213-15.

[78] *Id* at 51.

[79] Despite the failure of the irrigation and allotment programs to convert the Indians into farmers, the issue of Indian water rights remains an important one. *See, e.g.*, Steven J. Shupe, *Indian Tribes in the Water Marketing Arena*, 15 AM. INDIAN L. REV. 185 (1990). "Although controversies over defining land-related rights remain important to tribes, in the latter part of the 20th century the primary resource focus has shifted. Today, *water* issues are of fundamental importance in Indian Country." *Id.*

[80] *See* DONALD J. PISANI, TO RECLAIM A DIVIDED WEST: WATER, LAW, AND PUBLIC POLICY, 1848-1902 125 (1992) (exemplifying the notoriety of the reclamation movement through a political cartoon with the caption reading: "The Western Deserts As They Are and As They Can Be Transformed" and showing Uncle Sam is using a sprinkling can with a logo reading: "Government Aid to Irrigation.").

[81] Reclamation Act of 1902, 32 Stat. 388 (1902) (codified as amended at 43 U.S.C. § 391 (1996)).

[82] Pisani, *supra* note 80, at 287 (emphasis added).

from the onslaught of the reclamation movement. "[A]fter 1910 there was a very real necessity to utilize water rights if the Indians were not to lose them to whites who, since the passage of the Reclamation Act of 1902, had begun to develop large-scale irrigation projects that drew heavily on waters previously used only by Indians."[83]

An underlying theme behind the appropriations for Indian irrigation could have been borrowed from the reclamation movement, that is, the development of the West. The financial justification for the Reclamation Act was that it could be a vehicle to diversify the western economy. "Since many western cities . . . predated large-scale farming, and since many of the early residents were miners and ranchers, rather than farmers, the West's development seemed *out of order*. Only agriculture could provide the foundation for a stable, diversified economy."[84] It is not inconceivable that the same pro-western development philosophy underscored the Indian irrigation program. A more insidious view would argue that the Indian irrigation projects were veiled attempts to forward the western Congressmen's reclamation agenda. The historical facts show that the entry into the union of the western states created a strong political voting block within Congress. This newly acquired power was used to forward a pro-western development agenda. Many of the same Congressmen who supported reclamation also supported the Indian irrigation projects. "By the 1870's, irrigation became a way to wealth."[85] Historically, the allotment and irrigation programs ultimately benefited non-Indian westerners. The under-utilization of irrigated lands by the Indians provided the justification for the transfer of lands to non-Indians. The transfer of their lands was rationalized by the need to fully utilize western water resources. "It is easier to *justify* taking Indian water if the Indians are not using it."[86]

IV. THE 1920'S: BURKE'S FOLLY

Secretary of the Interior Hubert Work was a strong supporter of the irrigation projects.[87] He believed that the failure of the projects to assimilate

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[83] Kelly, *supra* note 40, at 69.

[84] Pisani, *supr* note 80, at 77.

[85] *Id.* at 69. "The census of 1890 revealed . . . that the price of irrigated farms increased by 283 percent during the 1880's." *Id.* at 75-76.

[86] THE INDIAN: AMERICA'S UNFINISHED BUSINESS, *supra* note 10, at 91.

[87] Chronology of Important Events in Indian Allotment and Irrigation Policies:

Act /Event and Year of Occurrence	*Importance or Meaning*
Dawes Act or General Allotment (1887)	Authorized the President to subdivide tribal lands with a 25 year trusteeship and to dispose of surplus lands.

the Indians was correctable. He directed the Irrigation Service to reform the irrigation program in order to make the projects more efficient. Given this direction, Commissioner Charles Burke pursued the irrigation program with renewed vigor. Despite growing disenchantment voiced by project superintendents, along with dismal reports presented in Congressional hearings, Burke insisted that the Indian irrigation program was the best course of action.[88] He argued that the irrigation program served two vital purposes. First, it reclaimed large quantities of arid, non-fertile land. Second, it helped preserve and protect Indian water rights. Throughout Burke's administration appropriations for the irrigation program remained high, despite the record of failure of the Indian as farmer within the reclaimed areas.[89]

Support for the irrigation program outside the Bureau began to deteriorate. Opposition to the continuance of the irrigation program came from two main sources, within Congress and the Indian Rights Association. The first source came within Congress. Senator James Curtis strenuously objected to the 1920 appropriations bill. He argued that the program not only failed to bring about

1891 Amendment to the Dawes Act	Amended Act to allow for the leasing of Indian lands.
Congressional Appropriation (1893)	First allocation of funds for Indian water development (Navajo Reservation)
Reclamation Act of 1902	Attempt to centralize control over Western water development.
Lone Wolf v. Hitchcock (1903)	Supreme Court held that Congress had the power to disregard treaties that required Indian approval prior to the allotment of lands.
The Burke Act of 1906	Authorized the Secretary of the Interior to terminate trust period and issue patent in fees.
The Omnibus Act of 1910	Increased funding to the Bureau of Indian Affairs leading to a rapid increase in Bureau staff.
Meriam Report (1928)	Documented the failure of the Bureau's assimilation programs to improve the economic and social conditions of the Indians.
Wheeler-Howard Act or Indian	Ended the allotment program and extended the Reorganization Act (1934) periods of trust over Indian lands.

THE AMERICAN INDIAN, 1492-1976 (Henry C. Dennis ed., 2d ed. 1977); *See generally* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 1.

[88] CHARLES BURKE, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, 1921-1928, 14 (1922), 26 (1924), 56 (1927).

[89] "Millions of dollars, many of them from Indian tribal funds and others from reimbursable appropriations, were poured into the irrigation projects" despite disappointing results. Kelly, *supra* note 40, at 69.

Indian self-sufficiency, it was inefficient in providing irrigated land. Over thirty five million dollars in appropriations had only produced 25,000 acres of irrigable land.[90] Despite the efforts of Senator Curtis and others, appropriations remained high throughout the 1920's.

Despite indications of their failure as means of assimilation, the allotment and irrigation programs were energetically pursued in the 1920's and into the 1930's by Commissioners Burke and Rhoads. One of the issues of contention with Congress was the continuation of irrigation appropriations in the face of a low rate of reimbursement by the Indians.

> Indian irrigation proved another area of frustration for Burke. When, appropriating money for reservation projects, Congress had insisted that the millions of dollars of construction and maintenance costs be reimbursed . . . . [Burke] found that only 3.5 percent of the reimbursable construction costs had been recovered . . . [and] that less than 52 percent of the reclaimed lands were under irrigation, and that only 17 percent of the irrigated land was being farmed by Indians.[91]

Finally, in 1932, Commissioner Rhoads persuaded Congress to forgive the reimbursable costs on the Indian irrigation projects.[92]

A. Indian as Farmer and Forced Repayment

A second front of opposition to the continuation of the irrigation program originated in the activities of some private organizations. Foremost in opposition to the continuation of the program was the Indian Rights Association.[93] The Association was not opposed to the irrigation of Indian lands, but was incensed over the forced reimbursement from tribal funds to the government for its inefficient implementation of the program.[94] An act of

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[90] *1920 Indian Appropriation Bill: Hearings on H.R. 11368 Before the House Comm. on Indian Affairs*, 66th Cong., 1st Sess. 67 (1919).

[91] Officer, *supra* note 24, at 69.

[92] *Id* at 71 (popularly known as the Leavitt Act).

[93] The Indian Rights Association was founded in 1882 to protect the interests of Indians in their relationship to the dominant white society. *See generally* Vine Deloria, Jr., *The Indian Rights Association: An Appraisal*, *in* THE AGGRESSIONS OF CIVILIZATION, *supra* note 24, at 3-18. *See also* THEODORE W. TAYLOR, AMERICAN INDIAN POLICY 131 (1983) (summarizing a number of Indian interest groups including: Association on Indian Affairs (AIA), National Congress of American Indians (NCAI), and the Friends Committee on National Legislation (FCNL)).

[94] Professor Deloria points out that the Indian Rights Association initially supported the enactment of the Dawes Act.

> The Association advocated allotment as a means of vesting Indians with political rights and of providing them an economic livelihood, rather than as a policy to eliminate all traces of Indian culture . . . . The Indian Rights Association has since had many

Congress on August 1, 1914 declared that government funds expended on the irrigation program were to be repaid by the Indians.[95] The act required reimbursement for not only future expenditures, but also retroactively for monies spent prior to 1914. The inequity of this retroactive mandate was that the cost of the program greatly outweighed any benefits to the Indians. The substantive unfairness of shifting the cost of the program to those least capable of meeting such a financial burden is evident. This was coupled with a procedural unfairness argument advocated by the Indian Rights Association, namely that the Indians had never consented to the program.[96] Thirdly, placement of such a financial burden upon the Indians undercut the irrigation program's stated goal of making the Indians self-sufficient farmers. Matthew Sniffen of the Indian Rights Association argued that "the debt incurred by the Indians took away any incentive to establish a farm because the cost of irrigation often outweighed the profits."[97]

The case of the Pima Indians is one of heightened injustice. For centuries, the Pima's had been successful irrigators and farmers. It was only after whites had diverted the waters of the Gila River had their farming activities been severely restricted. The Pima Reservation irrigation project was a remedial device to restore some of the water supply that had been taken by the whites' upstream diversion. Despite, the fact that the Pima's had constructed their own irrigation system which had been destroyed by the upstream diversion, the Bureau still required that they reimburse the federal government for the cost of the irrigation project.[98]

> occasions to regret its support of the allotment policy . . . . [T]here is as much reason to applaud the organization for its efforts to assist tribes resisting allotment, once it became federal policy, as there is to criticize it for helping the law become enacted in the first place.

Deloria, *supra* note 93, at 7, 9. This is not the first time that Indian legislation sought to force repayment of monies spent on behalf of Indian policy. For example, the Dawes Act required that the costs of administrating the allotment of Indian lands be recouped. "That for purposes of making surveys . . . to be repaid proportionately out of the proceeds of the sales of such land." Section 9 of the Dawes Act, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supr* note 1, at 174.

[95] Indian Department Appropriations Act of 1914, ch. 222, § 1, 38 Stat. 583 (1914) (codified as amended at 25 U.S.C. § 385).

[96] *See generally* Vine Deloria, Jr., *The Indian Rights Association: An Appraisal, in* THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880'S 4-17 (Sandra L. Cadwalader & Vine Deloria, Jr. eds., 1984).

[97] Letter from Matthew K. Sniffen to S.N. Brosius (July 15, 1925), *in* PAPERS OF THE INDIAN RIGHTS ASSOCIATION, *microformed on* MATTHEW K. SNIFFEN, FIELD TRIP Reel 43 at 567 (Microfilming Corp. of America). Sniffen also noted that many of the Indians were not suited to farming. "They will not work regularly." *Id.* at 963.

[98] *Survey of Conditions of Indians in the United States: Hearings Before a Subcomm. of the Senate Comm. on Indian Affairs*, 71st Cong., 2d Sess. 2335 (1930) [hereinafter Preston-Engle

Another private group to campaign against the irrigation program was the American Indian Defense Association.[99] Under the leadership of John Collier, the Association criticized the Bureau of Indian Affairs for grossly mismanaging the program.

> Examination of the history of these projects shows that the Indian office through a term of years down to 1929 enjoyed a veritable debauch of expenditures, chargeable against the Indian, with equal disregard of engineering considerations, climatological considerations, and economic considerations. The continuance of this reclamation debauch was, as the record proves, made possible through the systematic misinforming of Congress by the Indian office [Bureau of Indian Affairs].[100]

A study performed by the Indian Defense Association in 1929 showed that the Burke administration had repeatedly misinformed Congress regarding the status of the irrigation program. A prototypical case presented was that of the Blackfeet Irrigation Project in Montana. The Blackfeet Indians resided in the foothills where numerous streams and lakes could have been harnessed for irrigation purposes. The Irrigation Service decided, instead, to locate the Blackfeet Project in a valley approximately forty miles away. The Service expended over one million dollars for the project resulting in only forty-five acres being utilized for farming by the Indians. The maintenance cost were calculated to be over one thousand dollars annually per acre to continue the irrigation.[101] The Bureau's report to Congress described the status of the Blackfeet Project as "some land is being farmed by the Indians and more will be."[102]

In addition to false reporting to Congress, the American Indian Defense Association accused the Bureau of intentionally miscalculating the number of acres being irrigated. Inflated numbers of acres being irrigated and farmed were used to procure additional appropriations. For example, uncultivated fields of wild hay and brush were often included in the Bureau's acreage count.[103] The ability of the Bureau to miscalculate the number of acres being

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Report].

[99] One polar extreme of Indian policy is the forced assimilationist programs represented by the Dawes Act and the irrigation projects. The enactment of the Indian Reorganization Act represents a shift toward the other extreme of "cultural pluralism." Cultural pluralism places "emphasis upon the preservation and intensification of the Indian heritage." Kelly, *supra* note 40, at 66.

[100] Preston-Engle Report, *supra* note 98, at 2725 (Letter of John Collier to the Senate Investigating Committee, January 20, 1930). *See generally* KENNETH R. PHILIP, JOHN COLLIER'S CRUSADE FOR INDIAN REFORM, 1920-1954 (1977).

[101] Preston-Engle Report, *supra* note 98, at 2220-30.

[102] *Id.* at 2735.

[103] *Id.*

affected was enhanced by the fact that most of the irrigation projects had not been completed. Thus, the figures were inflated estimates of the acres to be irrigated upon completion of the projects. Furthermore, employees of the Irrigation Service were encouraged to falsify their annual reports regarding the progress of the irrigation projects. "There was a feeling or realization on the part of many employees, unwittingly encouraged by the Indian Office, that tenure of employment, salaries and promotion all depended on the fact as to whether successive reports showed an improvement in the conditions described."[104]

The Preston-Engle Report of 1930 concluded that the irrigation program had failed to make the Indian a farmer. The fundamental flaw in the Bureau's assimilation policy was that simply providing the Indians with a water supply would be enough to motivate them into the farming lifestyle. In reality, much more was needed in order to transform the Indians into farmers. The Indians were, generally, strangers to farming activities and lacked the necessary expertise and equipment to establish successful farming operations. The Preston-Engle Report showed that the Indians lacked the necessary capital, equipment, and training to undertake successful farming. It concluded that the Bureau had drastically miscalculated when it assumed that a water supply would automatically result in productive farming. Furthermore, the repayment requirement worked against the goal to make the Indian a productive farmer by encumbering the Indians already inadequate financial reserves.[105]

1. The Preston-Engle Report

The Preston-Engle Report recommended that more supervisors, engineers, and planners be hired. Their focus should be directed not at the irrigation projects *per se*, but at assisting the Indian farmer in agricultural techniques and methods. Second, financing should be made available to help the Indians procure much needed equipment. Unfortunately, the recommendations fell upon deaf ears. The Bureau had long differentiated between the white project farmer and the Indian farmer. "[T]he Bureau has adopted a plan carefully selecting its [white] project settlers requiring of them in addition to ample capital, actual experience and such other qualifications as are known to be essential for a fair chance of success."[106] The Bureau neglected to undertake such precautions with reference to the Indian farmer.

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[104] *Id* at 2315.

[105] The Indians "found themselves saddled with discouraging obligations to repay the reimbursable debts on which Congress decreed in 1921 payment must soon begin." Kelly, *supra* note 40, at 69.

[106] PHILIP, *supra* note 100, at 2235.

The irrigation program was an ill-conceived plan for Indian assimilation. The Bureau of Indian Affairs generally failed to take into account the desires and needs of the individual Indian tribes in constructing the irrigation projects. The Shoshone Reservation Projects was a case in point. The Shoshone Indians were already irrigating their lands and did not desire a more elaborate system. Despite their objections, the Bureau authorized the destruction of the Indian irrigation system in order to construct a more expensive and sophisticated one. The size of the project overwhelmed the Indians, both in capital debt and in their ability to use the system. "It seems clear that the Indian Bureau descended upon the Shoshone Indians as a sort of plague, loaded them with individual debts, and still continues an extravagant operation . . . [producing high] maintenance expenditures."[107]

2. The allotment program as the antithesis to Indian farming

In addition to ignoring the different aspects of a successful farming enterprise, the allotment program of the 1920's discouraged Indian farming. Ancillary to the irrigation program, was the allotment of land to individual Indian farmers. Instead of encouraging Indian farming, it made successful farming more difficult. The allotment program parceled out eighty acre tracts of land per person. A family of six could have upwards of three to four hundred acres allotted to the family unit. The average Indian family generally cultivated between forty and fifty acres leaving the remaining portion of their allotment unused. Thus, under this allotment system as little as one acre of irrigated land out of four or five were actually cultivated. The inefficiencies in the development of irrigated land were compounded by an inefficient use of that land under the allotment program. The efficiency in the allotting of land to the Indians was coupled with the inefficiency of the utilization of the allotted land by the Indians.

> A century ago, Congress decreed in the General Allotment Act that all Indians would become farmers and subsequent agreements and statutes allotting tribal lands were enforced with frightening efficiency. Even on reservations crowded with trees or in barren desert areas, allotment was carried out in defiance of common sense because Congress had so decreed.[108]

Another factor in the failure of allotment to convert Indians into farmers was the government's encouragement of Indian leasing. "Leasing of allotted trust land to non-Indians became common, defeating the intention of the Act to

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[107] *Interior Department Appropriation Bill of 1933: Hearings on H.R. 8397 Before the House Comm. on Appropriations*, 72d Cong., 1st Sess. 5450 (1932).

[108] VINE DELORIA, JR., AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 4 (1985).

turn Indians into small farmers."[109] Much of the allotted lands were not conducive to large field agriculture.[110] The tracts that were amenable to large scale farming were ultimately farmed by non-Indians. "[S]ystematic attention to large fields of cash crops was antithetical to most Indian ways of life."[111]

3. The Dawes Act and the Selling of Indian Lands

The allotment of lands to the Indians on a per person and not a per family basis resulted in nonuse of large amounts of irrigated acreage. The Indians' inexperience in farming and their lack of adequate equipment were additional factors in their inability to use the allotted acreage. Their inability to cultivate the lands allotted to them, coupled with their poor financial status, presented a constant temptation for them to sell their land. This temptation, more times than not, lead them to sell their lands. The Dawes Act provided that after twenty-five years, the Indians were allowed to sell or lease their allotted properties. The Burke Act of 1906 modified the twenty-five year waiting period.[112] It allowed the Indians to petition the government for a patent in fee prior to the expiration of the trust period.[113] The patent in fee certified the Indian's fee ownership and signified that the government no longer retained any right of control over the property. The Indians with patent in fees were able to sell or lease their lands at their sole discretion.[114] And sell they did. From 1911 to 1926 over three million acres of reservation lands were sold by the Indians.[115]

Commissioner Sells made it his mission to issue as many fee patents as possible and to continue the irrigation program.[116] In 1917 "he announced that

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[109] CANBY, *supra* note 67, at 21-22 (emphasis added). "Most of the allottees refused to farm their irrigated allotments with the result that they were leased to whites." Kelly, *supra* note 40, at 69.

[110] "Much of the land was located in regions where intensive agricultural techniques were inappropriate." Berthrong, *supra* note 19, at 263.

[111] *Id.*

[112] "The Secretary of the Interior may, in his discretion . . . whenever he shall be satisfied that an Indian allottee is competent . . . cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale . . . shall be removed." Section 6 of the Burke Act, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 1, at 207.

[113] Patent in fee or land patent is a "muniment of title issued by a government or state for the conveyance of some portion of the public domain." BLACK'S LAW DICTIONARY 1013 (5th ed. 1979).

[114] "Twenty-seven million acres or two thirds of the land allotted to Individual Indians was lost by sale between 1887 and 1934." WASHBURN, *supra* note 64, at 145.

[115] Preston-Engle Report, *supra* note 98, at 2236.

[116] "[Commissioner Sells] immediately sought the necessary funds from Congress to extend the existing reimbursable loan program--created primarily for financing irrigation projects." Officer, *supra* note 24, at 66-67.

all Indians in certain categories would be issued unrestricted (fee) patents. [This] *forced fee patent* policy was a major contributor to the substantial reduction in the Indian estate between 1887 and 1933."[117] Equally damaging to the retention of Indian lands was an 1891 Amendment to the Dawes Act that provided for the leasing of Indian properties.[118] Commissioner Sells was one of the first to make the connection between the irrigation of Indian lands and the need to fully utilize irrigated lands. The leasing of irrigated lands to non-Indians began to be seen as the only way to make use of the newly irrigated lands. This was due to the under-utilization of lands allotted to the Indians. Full utilization became a symbol to justify the large amounts of monies being expended upon the irrigation projects.

B. The Failure of the Irrigation Program to Advance the Cause of Assimilation

Secretary Work authorized a survey to measure the success of the Bureau's assimilation policies. The survey was undertaken by the Brookings Institution in 1928. The findings of the survey became known as the Meriam Report. The Report concluded that despite its failure, the policy of assimilation should remain the goal of the Bureau.[119] A separate survey of the irrigation program was authorized by the Work administration in 1927. The surveyors were authorized to study ways to improve the farming conditions on Indian lands. The results of the survey, popularly known as the Preston-Engle Report were submitted to Secretary Work in 1928.[120] The report stands as a harsh indictment of the irrigation program and the Irrigation Service. In over five hundred pages of documentation it exhaustively details the history of inefficient mismanagement by the Bureau and its Irrigation Service. The projects were a partial success in transforming arid land into valuable farmland. They were a complete failure in assimilating Indians as farmers into the American mainstream. The Preston-Engle Report showed that the assimilation policy founded upon the irrigation program had not enhanced the quality of Indian life. Instead, the forced repayment edict transformed the irrigation program into another example of the performance of injustice under federal Indian policy.

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[117] *Id.* at 68.

[118] "[Allotments] may be leased upon such terms, regulations and conditions as shall be prescribed by [the] Secretary [of the Interior] . . . ." Section 3 of Amendment to Dawes Act (Feb. 28, 1891), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 1, at 185.

[119] *See generally* Randolph C. Downes, *A Crusade for Indian Reform, 1922-1934*, MISS. VALLEY HIST. REV. 331 (1945).

[120] Preston-Engle Report, *supra* note 98, at 2210, 2261.

1. The irrigation program as inherently flawed

The Preston-Engle Report highlighted some of the major flaws in the irrigation program as a policy to convert the Indians into farmers. First, the projects were poorly chosen and mismanaged. The result was the production of an inadequate water supply. Second, the forced repayment from tribal funds financially handicapped the Indians who attempted to farm the land. The government passed many of its administrative expenses, along with the cost of irrigation and non-irrigation projects, to the Indians. John Collier's crusade against the Bureau in the 1920's uncovered the rarely publicized fact that "Congress had been levying debts against Indian tribal funds, without Indian consent, through the use of reimbursable debts."[121] Third, the irrigated lands that were being farmed were mostly under the control of whites. The Report showed that by 1927, only 230,591 of the 362,000 acres of land under irrigation on reservations remained under Indian ownership. Additionally, two-thirds of the remaining acreage had been leased to white farmers. Of the total acreage serviced by the Indian irrigation projects, only 16.9 percent were being farmed by Indians.[122] At individual projects the land used by whites and Indians were even more disproportionate.[123]

2. Irrigation costs as incentive to sell

The forced repayment for the costs of maintaining the irrigation projects provided added incentive to the Indians to sell their allotted lands. Many of them sold their lands in order to avoid the irrigation charges. The federal government failed to discourage the sale of Indian lands to white farmers. In fact, the selling of Indian lands was viewed positively since the government was able to collect transfer taxes. The lands retained by the Indians were often encumbered by irrigation liens. Upon the death of the owner, the lands were often sold to whites in order to collect on the irrigation liens. In the 1920's the government sold approximately two million acres through this process. In the pronounced goal of making the Indians into farmers, the

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[121] Kelly, *supra* note 40, at 71.

[122] Preston-Engle Report, *supra* note 98, at 2335.

[123] *Ratio of White/Indian Farming*

Reservation	*Total Acreage*	*White Farmers*		*Indian Farmers*	
Wapto-Yakima	77,938	72,000	(92%)	4,600	(6%)
Flathead	33,500	34,000	(98.5%)	452	(1.5%)
Blackfeet	7,000	6,950	(99%)	44	(less than 1%)

Id at 2224.

allotment and irrigation programs succeeded in depleting Indian land holdings by more than five million acres from 1910 to 1926.[124]

3. Allotment as the avenue to ruin

Most of the Indians who were "beneficiaries" of the allotment and irrigation programs were ill-equipped to be farmers. Their poverty provided added incentive to sell or lease their newly acquired lands. Instead of being a motivating influence, allotment discouraged many Indians from working. The newly obtained land was not supported by the training needed for proper farming and land management. The encumbering of the land by the cost of irrigation provided further disincentive. The ability to obtain quick money was a temptation that many Indians were unable to resist. The Preston-Engle Report described the nature of this phenomena in commenting on the Yakima Irrigation Project: "If the purpose of building the Yakima Project was to enable the Indian to live in indolence and improvidence and to enable Caucasians to reap the proceeds from irrigation development under the guise of being a benefit to the Indian, it is a wonderful success."[125]

Indian land holdings have diminished dramatically over the years. A number of factors played large roles in the loss of Indian lands. Foremost, the allotment policy allowed for the individualization of tribal lands resulting in a sell off by individual Indians. Second, the allotment of 80 acres per Indian created a "surplus" that the Secretary of the Interior was able to sell directly to non-Indians.[126] "Sixty million acres [which constituted over forty percent of Indian land holdings prior to the enactment of the Dawes Act,] were lost through the sale of lands designated *surplus* by the government after the allotments had been made to the Indians."[127] Third, the heavy costs of the irrigation projects saddled Indians with unmanageable debt. The sale of land was often their only recourse to replenish tribal funds encumbered by irrigation costs. Fourth, Indian lands were often taken for public projects. One commentator argues that Indian lands were often targeted for taking in association with public improvement projects: "*The Greater Good* always hobbles the Indian."[128] These various factors of erosion have resulted in the

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[124] *Id.* at 2237.

[125] *Id.* at 2.

[126] The Dawes Act states "that all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers . . . ." Section 5 of the Dawes Act, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 1, at 173.

[127] WASHBURN, *supra* note 64, at 145.

[128] OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA 69 (Edgar S. Cahn ed., 1969).

loss of sixty per cent of the Indian lands held in 1887. "Between the years 1887 and 1966 the Indian land base decreased from 138 million acres to 55 million acres."[129]

4. The impact of the Preston-Engle Report: File under "I" for Indian

The Preston-Engle Report stands as a testament to the failure of the federal irrigation and assimilation policies and programs. It exposed the Bureau of Indian Affairs as negligent, misguided, and at times malicious in its dealings with the Indians. The Report made four distinct recommendations in reference to the irrigation and allotment programs. First, it recommended a reorganization of the Irrigation Service. Second, a reduction in funds for irrigation projects. This included the liquidation of the less efficient projects and a transfer of "white" irrigation projects to the Bureau of Reclamation. Third, it suggested increased funding for training and assistance to Indian farmers. Fourth, it proposed a moratorium on the sale and leasing of Indian lands.

The report was submitted to Interior Secretary Work on June 8, 1928. The only other reference to the Report was made in the annual report of Commissioner Burke.[130] Ultimately, the recommendations of the Preston-Engle Report were ignored. The Bureau of Indian Affairs failed to implement any of its recommendations or to acknowledge the shortcomings of its policies as highlighted by the Report. One of the reasons for the failure to implement the Report's recommendation was largely historical. The Teapot Dome scandal had placed the Interior Department on the defensive. The accusations of the Preston-Engle Report that employees of the Bureau of Indian Affairs had been encouraged to falsify reports on the progress of the irrigation projects was another ground for scandal. These accusations of fraud and mismanagement within the Irrigation Service would remain largely non-public information until after Work and Burke had left office.

V. THE EARLY 1930'S: A NEW ADMINISTRATION'S RE-IMPLEMENTATION OF FAILED POLICY

In 1929, President Hoover appointed a new Secretary of the Interior. The following year the Preston-Engle Report resurfaced at a House subcommittee hearing investigating the living conditions on the reservations. Except for Secretary of the Interior Ray Wilbur's attempt to transfer the Irrigation Service to the Reclamation service, the Preston-Engle recommendations once

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[129] *Id.*

[130] Burke, *supra* note 88, at 56.

again were largely ignored. The Irrigation Service remained within the domain of the Bureau of Indian Affairs and Commissioner Rhoads continued to authorize new irrigation projects despite congressional criticism.[131] Senator William King alluded to the Preston-Engle Report in the 1932 budget hearings. "Examinations of the present bill and the budget estimates show that the Indian office has purposely ignored the detailed findings and recommendations to the effect that many projects should be abandoned."[132]

A. Criticism Mounts Against the Bureau of Indian Affairs

Entering the decade of the 1920's, it was apparent that "assimilation of the Indians . . . was not working. At the same time, dissatisfaction with the Bureau of Indian Affairs and its management of Indian programs increased."[133] It was apparent earlier in the implementation of the allotment and irrigation programs that the Bureau's policies were flawed.[134] "Because many Indians were not interested in or skilled in agriculture . . . many allotments were sold cheaply. In the early years of the twentieth century, there was a growing awareness that the government's Indian policy was flawed."[135] The American Indian Defense Association began to become more active in its criticism of the Bureau's irrigation policy. In a 1931 issue of *Indian Life* it attacked the Bureau for failing to heed the recommendations of the Preston-Engle Report.

> The Preston-Engle Report, and Secretary Wilbur's policy, have been flaunted, frustrated, and reversed by Commissioners Rhoads and Scattergood in combination with Representative Gramton. . . . If the full force of the facts could be registered in the consciousness of citizens, either the new Commissioners would be compelled to accept reforms in this part of their activity or they would be compelled to resign from office.[136]

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[131] *See* S. LYMAN TYLER, INDIAN AFFAIRS: A STUDY OF THE CHANGES IN POLICY OF THE UNITED STATES TOWARD INDIANS 51 (1964) (discussing Commissioner Rhoads successful blockage of the transfer of the Irrigation Service from the Bureau of Indian Affairs).

[132] *Indian Appropriations Bill of 1933*, *supra* note 107.

[133] FORCE & FORCE, *supra* note 3, at 99-100.

[134] *See* Ronald E. Johnny, *Can Indian Tribes Afford to Let the Bureau of Indian Affairs Continue to Negotiate Permits & Leases of Their Resources*, 16 AM. INDIAN L. REV. 203 (1991) (discussing a contemporary example of the Bureau's mismanagement of its trust responsibilities).

[135] FORCE & FORCE, *supra* note 3, at 99.

[136] "The Refusal to Reform Indian Irrigation Dooms Many Tribes," 17 AM. INDIAN LIFE 13 (Jan. 1931).

Despite the mounting criticism, Commissioner Rhoads continued to argue the merits of the irrigation program.[137] He argued that the projects were generally successful and of benefit to the Indians. He announced that fifty-six percent of the acreage being supplied by the 1931 irrigation projects were being farmed by Indians.[138] He failed to note, however, that approximately half of the Indian farmland was actually leased to white farmers.

B. The Congressional Response

Congress generally ignored the recommendations of the Preston-Engle Report.[139] The feeling was that although the irrigation projects failed to convert the Indians into farming, the projects were successful in creating fertile farmland. The successful white farmers represented a voting block that Congress did not want to alienate. It was politically prudent for western politicians to continue to appropriate funds for the continuation of the irrigation program. Thus, the philosophical impetus for the irrigation program, the assimilation of Native-Americans, had become severed from the program as instituted. Like many federal programs the irrigation program had gained a self-sustaining political and institutional life of its own. From a political mind-set, the minimum net benefits it achieved were not the measurement by which its continuation was measured. Instead, its sustenance was measured by the perceived political harm that would be caused by its termination. The fact that the Indians were not benefiting from their own program had become immaterial.

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[137] This was despite the evidence that the Indian irrigation projects were mostly benefiting non-Indians. A criticism that continues into contemporary times. *See, e.g.*, Scholder v. United States, 428 F.2d 1123 (9th Cir. 1970).

[138] RHOADS, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 78 (1932).

[139] Commissioners of Indian Affairs (1905-1945)

Commissioners	*Tenure*
Francis E. Leupp	1905-1909
Robert G. Valentine	1909-1913
Cato Sells	1913-1921
Charles H. Burke	1921-1929
Charles J. Rhoads	1929-1933
John Collier	1933-1945

Philleo Nash, *Twentieth Century United States Government Agencies, in* 4 HANDBOOK OF NORTH AMERICAN INDIANS: HISTORY OF INDIAN-WHITE RELATIONS 266 (Wilcomb Washburn ed., 1988).

1. A case study: The Flathead Irrigation Project

The Flathead Irrigation Project provides a prototypical example of a government program gone amiss. It is clear from a study of the project that the motivating force behind it was not the assimilation aims of the irrigation program, but the economic benefits to white settlers. The Preston-Engle Report had designated the Flathead Project as unworthy of continuation. It was described as one of the most wasteful and the least cost-effective of the irrigation projects. In 1920 only one-third of the land being irrigated by the project was being used. Despite the gross under-utilization of the irrigated land, the Bureau of Indian Affairs requested additional funds of over three hundred thousand dollars. A coalition of western senators were able to usher the appropriations bill through Congress. Senator Robert Walsh of Montana stated the case on behalf of white settlers living near the Flathead Reservation.

> [W]hite settlers paid their money for land under the . . . assumption that it was to be irrigated land and the Government of the United States took their money and has their money, that they are as much entitled to consideration as the Indian, and there is no real reason for hesitating at the completion of the [Flathead] project because the Indians are not using it.[140]

The underlying meaning of this reasoning is that a contract with whites was not to be easily broken. Public policy rationales were also used to procure the funding for the continuation of the Flathead Project. The growth of the area and the nearby town was dependent upon the completion of the project. Joseph Herbert, president of the Flathead Irrigation Association, testified before Congress on the need for the continuation of the "Indian" irrigation project. "We expect [in] some time to see Flathead country become a prosperous country. I know that every acre of land under water will yield a good living for the man on it. Irrigation will add wealth to our country, and make the farmer independent."[141] It is very likely that Mr. Herbert was thinking of the white farmer when making this statement. The project was continued to advance the cause of white civilization. It may have been the hope of Congress that tangentially the Indians would also benefit. It was their hope that white farming would lead to white schools, white churches, white towns, and eventually a white life for the local Indians.

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[140] *Indian Appropriations Bill of 1920: Hearings Before the House Comm. on Appropriations*, 66th Cong., 1st Sess. 538 (1920).

[141] *Id.* at 529.

2. Congressional faux pas

The irrigation program was a creature of Congressional inertia and bureaucratic intransigence. Congress dislikes being accused of misappropriation or mismanagement of the taxpayers' monies. Project termination and downsizing are anathema to the bureaucrats self-interests. The abandonment of irrigation projects that had cost the government over thirty-five million 1920's dollars was politically unpalatable. It was more convenient to continue the projects in the hope that their cost effectiveness and utilization rates would improve. The failure of the Indian farmer focused attention on this illusion. The white farmer was looked to in order to justify the continued expenditures on the irrigation projects.[142] Senator Curtis articulated this view before the Senate Appropriations Committee. "Why waste the projects, it is better to let the whites take over Indian land than to let irrigated land . . . go to nothing."[143]

The political appropriators had become disenfranchised from the mandate of their Congressional predecessors. The impact of the irrigation projects to civilize the Indians, convert them to farming, and to improve their economic condition was no longer important to the continuation of funding. An "irrigation clique"[144] had evolved that saw the continuation of the irrigation projects as a matter of self-preservation. The clique was made of a triad that included congressional committees, administrative agencies, and special interest groups. The very essence of "pork barrel" politics[145] was the driving force that allowed this triad to obtain additional appropriations in the face of negative results. Between the western representatives that packed the committees dealing with water resource development, to the Bureau of Indian Affairs and special interest groups whose livelihood depended upon the continuation of the projects, the allocation of funds had become severed from objectivity.

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[142] An example of this attitude can be found in a Congressional hearing on the conditions of the Indians.

> [T]he Indians on the Modoc Point project are not progressing, as far as irrigation is concerned; in fact they are going backward . . . . If it were not for the few white owners and renters I would be tempted to recommend that the project be closed for a season or two, which I would believe would change their present attitude.

Preston-Engle Report, *supra* note 98, at 2731.

[143] *Id.* at 67.

[144] MCCOOL, *supra* note 63, at 9.

[145] "*Pork barrel* meaning that allocations of government benefits are based on political gain rather than objective criteria." *Id.* at 6-7 (emphasis added).

3. The BIA's attitude toward the Indians

The impetus for the establishment and the continuation of the irrigation program stemmed partially from the negative attitude that some personnel within the Bureau possessed toward the Indians. It was an attitude that held that the Indians were, by and large, irresponsible. Financial support of the Indians was considered to be wasteful. The reclamation and irrigation policies stemmed from this negative mind-set. Since the Indians could not be trusted to spend money wisely, then the Bureau would spend it for them. A chief engineer in the Bureau summed up this attitude in a 1909 report:

> Justification for expending so large a sum in reclaiming their lands could only be on the grounds that it was much better for the Indians and the country at large that their money should be spent on reclaiming the deserts of the West . . . rather than it should be subsequently doled out to them in cash payments.[146]

This less than benevolent attitude toward the Indians, coupled with Congressional disinterest, resulted in the irrigation program's continuation despite its inherent shortcomings. Western representatives remained supportive of its continuation due to their concern for satisfying the demands of the white homesteaders.

Interest groups often materialize around government pork barrel programs. The irrigation program was no different. Construction of irrigation projects produced lucrative contracts that were strongly sought by private contractors. The contracts did not encourage efficiency or frugality. The Preston-Engle Report noted such inefficiency at the Crow Irrigation Project.

> It seems that whoever is responsible for the construction and maintenance of this project must have considered that the Crow tribal fund is inexhaustible as money has been spent with a lavish hand, and seemingly with no thought as to whether the investment in irrigation works can even be repaid by the land included within the project.[147]

Maintenance costs were often inflated due to the employment of an excessive number of workers. Expenses were greatest on reservation projects that were associated with large tribal funds.[148] The system of forced repayment had exorcized the competitive balance between the contractor and the employer. There was no incentive to be cost efficient in the construction and maintenance of the projects. All costs were to be passed on to the Indian "beneficiaries."

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[146] Preston-Engle Report, *supra* note 98, at 2729.

[147] *Id.* at 2733.

[148] *Interior Department Appropriation Bill of 1932: Hearings on H.R. 14675 Before the Subcomm. on Appropriations of the House Comm. on Appropriations*, 71st Cong., 3d Sess. 3546-7 (1931).

4. The banner of Western development

The irrigation projects can be identified with the development of the West. As such, it was a symbol of the new West and could not be lightly disregarded. By the close of the nineteenth century much of the free land West of the Mississippi had been settled. The federal government changed its western policy from settlement to conservation and reclamation.[149] The unknown West had been conquered by manifest destiny. The new frontier became the arid lands overlooked in the westward migration to more fertile lands. The irrigation projects and the prospect of free water provided the incentive for land speculators, homesteaders, and ranchers to descend on the once barren Indian lands. The impetus for the allotment and irrigation legislation was theoretically to safeguard the interests of the Indians. These policy goals were soon overtaken by the drive for progressive, efficient, and full development of reservation lands. This component of western development became linked to the well-being of the white settlers. Homer P. Snyder, Chair of the House Committee on Indian Affairs stated in 1932 that leasing to white settlers was the answer to the Indians nonuse of irrigated lands surrounding the Crow Irrigation Project. "The leasing system was put in force recently and [it] succeeded in leasing to white people who are going to use the land for beef-sugar culture . . . so that [the acreage] will be well utilized."[150]

The new policy associated with the irrigation program was the full utilization of the lands. No longer was the conversion of Indians into farmers or the assimilation of the Indians into American society the motivating force behind the continuation of the irrigation program. Despite the reality of white farming in conjunction with the irrigation projects, the illusion that it was for the benefit of the Indians continued to be used. One commentator noted that the importance of legal formality held a firm place in American culture. "From the start, Indian policy was preoccupied with appearances. The conduct of the United States towards the natives was inspired by the most chaste affection for legal formalities . . . . It is impossible to destroy men with more respect for the laws of humanity."[151] Despite the deleterious impact that the irrigation and allotment polices were having on the Indians, their continuation remained cloaked in benevolence towards the Indians' well-being. Congressman Burton L. French of Idaho in 1920 stated that

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[149] *See, e.g.*, Reclamation Act of 1902, *supra* note 81.

[150] *Indian Appropriations Bill of 1920*, *supra* note 140, at 68.

[151] Barsh, *supra* note 14, at 29.

"there is a duty that we owe to the Indians."[152] He argued that this duty could be satisfied by the continuation of the irrigation projects.[153] "It means more to them; it means the improvement in the value of their lands, and it means the harmonious working out [of] a project that is already begun."[154] The reality of the economic condition of the Indians and the failure of the irrigation projects to improve that condition was ignored. Instead, the quest to complete the irrigation projects and the policy of full utilization transferred the irrigation program from the banner of Indian assimilation to the banner of western development

5. *The Wheeler-Howard Act: Collier's death knell to individualist assimilation policies*

The need to individualize Indian land holdings and to re-make the Indian lifestyle into one of farming were epitomized by the Dawes Act and the irrigation projects. Both had failed to fulfill their individualistic assimilationist agendas. The Wheeler-Howard Act, more popularly known as the Indian Reorganization Act,[155] officially recognized the failure of these individualized assimilationist programs.[156] The allotment of Indian lands and the break up of the reservations would no longer be the cornerstone of Indian policy. The reform movement culminating with the enactment of the Indian Reorganization Act was spearheaded by John Collier who rose to the position of Commissioner of Indian Affairs in 1933.[157] The Act attempts to reverse the failed policies of individualized assimilation. First, it officially ended the allotment of Indian lands.[158] Second, the trust periods over Indian lands were

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[152] *Indian Appropriations Bill of 1920*, *supra* note 140, at 496.

[153] The American government's duty to protect Indian interests is known as the "Indian Trust Doctrine." "It has long been established that the United States owes general trust responsibilities in its dealings with Indian people." Fredericks, *supra* note 75, at 107. *See generally* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (establishing Justice Marshall's landmark trust relationship decision); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[154] *Indian Appropriations Bill of 1920*, *supra* note 140, at 496.

[155] The Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-79 (1988)).

[156] *See supra* note 99.

[157] *See generally* PHILIP, *supra* note 100. Prior to his appointment to the position of Commissioner of Indian Affairs in 1922, John Collier was executive secretary of the American Indian Defense Association. This private association of "wealthy, liberally oriented individuals" pushed a reform agenda that included the "recognition of the Indian right to basic civil liberties; conservation of the remaining Indian reservations through communal and corporate enterprise; the preservation of Indian cultures and societies; and the extension of federal assistance to Indian communities." Kelly, *supra* note 40, at 70-71.

[158] "Be it enacted . . . that hereafter no land of any Indian reservation . . . shall be allotted in severalty to any Indian." Indian Reorganization Act of 1934, ch.576, 48 Stat. 984 (1934).

extended to prevent further loss.[159] Third, the Secretary of the Interior was "authorized to restore to tribal ownership the remaining surplus lands."[160] Fourth, "the Secretary is authorized to acquire any interest in lands [including] *water rights* . . . for [the] purpose of providing land for Indians."[161] Fifth, it encourages the formalization and organization of tribal governments.[162] Finally, the Act provides for a revolving fund to be used for "promoting the economic development of such tribes and their members."[163] Most importantly, the Act recognized the importance of obtaining the consent of the Indians when implementing new polices and programs. Section 18 states that "this Act shall not apply to any reservation wherein a majority of the adult Indians . . . shall vote against its application."[164] Commissioner Collier summarized the results of the failed policies as represented by the allotment and irrigation programs. "Through 50 years of "individualization," coupled with an ever-increasing amount of arbitrary supervision over the affairs of individuals and tribes . . . the Indians have been robbed of initiative, their spirit has been broken . . . ."[165]

VI. CONCLUSION

The epithet for government assimilation policy as embodied in the allotment and irrigation programs was given by the "Committee on Indian Affairs to the Commission on Organization of the Government [when it] recognized that assimilation has failed if shedding the old culture takes the joy out of life, produces a feeling of inferiority, and destroys the drive and

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[159] The trust status of Indian lands remains an issue in the present. *See* 25 U.S.C. § 462 (1982) (extending the trust period indefinitely). A contemporary problem involving the trust relationship and the loss of Indian lands involves the mortgaging of Indian property. In 1956 Congress amended Title 25 to allow the mortgaging of individually held Indian lands "with the approval of the Secretary of the Interior." 25 U.S.C. § 483(a) (Supp. 1986). The potential for loss of Indian lands due to foreclosure is great. "Indian farmers are in danger of losing their land to creditors through foreclosure, and Indian tribes are facing *yet another erosion of their land base.*" Fredericks, *supra* note 75, at 107 (emphasis added).

[160] Indian Reorganization Act of 1934, *supra* note 155.

[161] *Id.* (emphasis added).

[162] "[T]he most important part of the Act asserted the right of Indians to govern themselves and enabled tribes to organize as corporations for the management of tribal business enterprises." FORCE & FORCE, *supra* note 3, at 101.

[163] *Id.* Section 10 of the Act provided for an initial appropriation of ten million dollars. *Id.* "During the mid-1930's . . . tribes were eligible to receive credit for agricultural and business projects through a revolving loan fund." *Id.* at 102.

[164] *Id.* at 224.

[165] JOHN COLLIER, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1934), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 1, at 227.

purpose of the Indian."[166] The allotment and irrigation policies were ill-conceived and mismanaged. Their goal of making the Indians independent farmers was doomed from the beginning. The failure of Congress and the Bureau of Indian Affairs to customize programs to take account of the uniqueness of the Indian cultures helped create an insensitive and inefficient bureaucracy. A bureaucracy that failed horribly in preparing its wards for the responsibilities of land ownership or to train them in the skills needed to succeed in farming.

The early 1900's irrigation program did not achieve its twin goals of making Indians into independent farmers and to assimilate them into the mainstream of American society. Instead the forced repayment policy depleted tribal funds causing more dependence on government subsidies. The irrigation program soon gained a life of its own that would not be easily extinguished. The irony of the program was that the greater its success in irrigating arid lands, the less beneficial it was to the Indians. Instead of making the Indians successful farmers in the white man's tradition, the irrigation program of the 1920's became a vehicle for western development. A development that was primarily to the benefit of the white settlers who purchased or leased the newly irrigated lands. One commentator states that "it is impossible to redress fully the wrongs of the past . . . . The best justice that we contemporaries can do in such cases is to avoid repeating them."[167]

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[166] This Report was presented in 1948. *See* THE INDIAN: AMERICA'S UNFINISHED BUSINESS, *supra* note 10, at 10-11.

[167] Barsh, *supra* note 14, at 30.

Essay: When Less Is More—Can Reducing Penalties Reduce Household Violence?

Virginia E. Hench*

The weapons of choice are fists, hands, feet, telephones, knives, and thrown objects.[1]

I. INTRODUCTION

In Hawai'i today, we are in relatively little danger of violent crime on the streets, but for the one Hawai'i woman in five who has been violently assaulted in her home, our low street crime rate is cold comfort.[2] Every twenty-eight days, a woman in Hawai'i is murdered by her present or former husband or partner; three out of four are murdered *after* they leave their abuser. Attacks on household members are more common than attacks on strangers, and the injuries inflicted are far more serious than injuries sustained in attacks by strangers.[3] Shocking as they are, the statistics do not tell the whole story, since much household violence goes unreported.[4] The FBI estimates conservatively that only one in ten incidents of household violence is reported; some experts believe that reported abuse is as low a percentage as one in one hundred attacks.[5]

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[1] Marilyn Kim, *No Way Out*, HONOLULU MAGAZINE, Sept. 1995, at 48, 56; League of Women Voters and Hawaii State Commission on the Status of Women, REPORT: DOMESTIC VIOLENCE FAMILY COURT MONITORING PROJECT (Sept. 1996) [hereinafter REPORT] (on file with the author).

[2] Kim, *supra* note 1, at 48, 56. *See* REPORT, *supra* note 1, at Summary (unpaginated). In Hawai'i, from 1985 through 1994, nearly 30% of all homicides in the state arose out of domestic violence, compared with 15% nationally in 1994. *Id.*

[3] Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1134 n.10 (1994). *See also* Carolyn M. Sampselle et al., *Violence Against Women: The Scope and Significance of the Problem, in* VIOLENCE AGAINST WOMEN: NURSING RESEARCH, EDUCATION, AND PRACTICE ISSUES 3, 8 (Carolyn M. Sampselle ed., 1992) (family violence affects all economic classes).

[4] Welch, *supra* note 3, at 1135. REPORT, *supra* note 1, at Summary (unpaginated) (only a small fraction of abuse is reported to police; by the time an arrest is made, abuse is likely to have been going on for years).

[5] *Calling Police Protects Abused Wives, Report Says*, N.Y. TIMES, Aug. 18, 1986, at A9.

Household violence is the number one health risk for women today.[6] It is also a risk to our society at large. As Attorney General Janet Reno has pointed out, "If we don't stop violence in the home, we are never going to stop it on the streets of America."[7] Household violence is the primary source of crime for virtually every major social problem Hawai'i faces today, from child abuse, juvenile delinquency, gang activity, alcoholism and drug abuse, to rape, robbery, home invasion, and murder.[8] These problems touch all of us in some way, and they are growing.

It is a fact that children who grow up in violent homes, even if they are not abused themselves, commit three times the serious crimes than those who did not grow up in such violent homes.[9] The children of these violent homes are six times more likely to attempt suicide, 24 percent more likely to commit sexual assaults, 74 percent more likely to commit other crimes against the person, and 50 percent more likely to abuse drugs and alcohol.[10] A Hazleton Foundation study documented that 63 percent of young men between the ages of 11 and 20 now doing time for homicide have killed their mothers' batterer.[11]

For girls, violent homes are likely to lead to becoming teenage prostitutes, runaways, and having babies at far too young an age.[12] Not only do the babies of these girls from violent homes tend to recreate the cycle of their mothers'

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[6] Former Surgeon General C. Everett Koop identified family violence as the leading health risk to women today, causing more injuries than automobile accidents, muggings and rapes combined. Joan Zorzo, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 46 (1992). Between 1.8 and 6 million women a year are assaulted or killed by men with whom they have been intimately involved. Jan Hoffman, *When Men Hit Women*, N.Y. TIMES MAG., Feb. 16, 1992, §6 at 25; Martha Shirk, *Domestic Violence is a Leading Hazard for Women*, ST. LOUIS POST-DISPATCH, May 6, 1992, at 10A. *See also* Angelo Bruscas, *Athletes Cross the Line: Simpson Not Only One With Record of Domestic Violence*, SEATTLE POST-INTELLIGENCER, June 23, 1994, at A1 (family violence is the number one cause of homicidal death in women).

[7] *Symposium: A Leadership Summit; The Link Between Violence and Poverty in the Lives of Women and Their Children*, 3 GEO. J.F.P. 5, 5 (Fall 1995) (keynote speech of Attorney General Janet Reno).

[8] Sarah Buel, *Dealing With Family Violence Through Community Partnerships*, Audio Tape of Plenary Session, held by A.P.P.A. 19th Annual Training Institute (Sept. 11-14, 1994) (on file with the author) [hereinafter Buel Tape].

[9] Welch, *supra* note 3, at 1136-37, n.29. *See* MURRAY A. STRAUS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 3, 122 (1980). *See* Helen Rubenstein Holden, Comment, *Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection*, 21 ARIZ. ST. L.J. 705, 708 (1989) (relating links between poverty, social isolation, race, age, and family abuse).

[10] Buel Tape, *supra* note 8.

[11] *Id.*

[12] *Id.* (commenting on a study at the University of Washington which has documented the number one common factor among pregnant teens is that they grew up in a violent household).

lives, they now represent 92 percent of the convicted felons between the ages of 19 and 34.[13] The cycle repeats, as about one out of every four children of the most violent households uses at least some physical force on his spouse in any given year;[14] one in ten of the husbands who grew up in violent families seriously injure their family and household members,[15] over three times the rate for men who did not grow up in such violent homes.[16] By cutting off the recurring generational cycle of violence in the family, we can also cut off the primary cause of drug addiction, alcoholism, juvenile delinquency and gang activity.[17]

In the first seven years after Hawai'i first enacted Hawaii Revised Statutes ("H.R.S.") section 709-906, Abuse of Family and Household Members,[18] only three batterers were convicted.[19] Only one of the three was sentenced to jail time, and his sentence was suspended.[20] Section 709-906 was amended on May 25, 1985 to require the present mandatory minimum sentence of 48 hours in jail,[21] but it also provided for the optional one-year sentence which has caused backlogs and resulted in many batterers going free.[22] Under present law, a first offense of abuse of family and household members without serious physical injury is classified as a full misdemeanor,[23] carrying a possible one year jail sentence,[24] which automatically triggers the constitutional right to a

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[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] STRAUS, *supra* note 9, at 150-51; William J. Goode, *Force and Violence in the Family*, 33 J. MARRIAGE & FAM. 624, 633 (1971).

[17] STRAUS, *supra* note 9, at 121-22; Robert Geffner & Alan Rosenbaum, *Characteristics and Treatment of Batterers*, 8 BEHAV. SCI. & L. 131, 132 (1990); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 63 (1984).

[18] REPORT, *supra* note 1, at 4.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *See id.* at 6.

[23] HAW. REV. STAT. § 709-906(5) (abuse of family or household member) and HAW. REV. STAT. § 709-906(4) (refusal to comply with lawful order of a police officer) are full misdemeanors. *See* text of HAW. REV. STAT. § 709-906, *infra* Appendix D. HAW. REV. STAT. § 586-4 (violation of temporary restraining order) and HAW. REV. STAT. § 586-11 (violation of a domestic abuse order for protection) are also full misdemeanors. *See* text of HAW. REV. STAT. § 586-11, *infra* Appendix D.

[24] HAW. REV. STAT. § 706-663 (1993). It provides:

> After consideration of the factors set forth in sections 706-606 and 706-621, the court may sentence a person who has been convicted of a misdemeanor or a petty misdemeanor to imprisonment for a definite term to be fixed by the court and not to exceed *one year in the case of a misdemeanor* or *thirty days in the case of a petty misdemeanor.*

Id. (emphasis added).

jury trial under both the Hawai'i and United States Constitutions.[25] Defendants charged under the present law ask for jury trials because jury trials are inherently more expensive and time-consuming than bench trials.[26] With forty to fifty new cases coming into the system weekly,[27] courts quickly become backlogged,[28] resulting in as many as one-third of those charged with abuse of family and household members having their cases dismissed before trial because of the courts' backlogs.[29] In 92 percent of the cases that do go to trial, the jury acquits the defendant, in part because juries in domestic violence cases tend to blame the victim and exonerate the attacker.[30] (This is in stark contrast with other criminal cases, in which roughly 90 percent of those charged are convicted).[31]

Simple mathematics tell a shocking story: under our present misdemeanor law, of 100 men arrested for misdemeanor household violence, 66 will go to trial, and 61 will be acquitted. With such a high probability of acquittal at trial, few plead guilty.[32] For every 100 arrests resulting in charges filed, we bear the burden of 66 jury trials to get five convictions. The five who are convicted will be sentenced to approximately 48 hours. Most of those who

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[25] *See* U.S. CONST. amend. VI; HAW. CONST. art. I, § 13. This right refers to the constitutional guarantee of jury trial in "serious" criminal cases; the right to jury trial does not apply in the case of "petty" offenses. *See, e.g.*, State v. Kasprzycki, 64 Haw. 374, 641 P.2d 978 (1982) (citing State v. Shak, 51 Haw. 612, 466 P.2d 422, *cert. denied*, 400 U.S. 930 (1970)) (defendant charged with petty misdemeanor subject to maximum sentence of thirty days confinement and/or fine is not entitled to jury trial).

> Under the Federal Constitution, the United States Supreme Court has held that two criteria are relevant in determining whether an offense is petty or serious. The first is whether the offense is by its nature serious. If so, the size of the penalty that may be imposed is only of minor relevance, and the right of trial by jury attaches . . . . If the offense is not by its nature serious, however, the magnitude of the potential penalty set for its punishment becomes important, since it is an indication of the ethical judgments and standards of the community.

51 Haw. at 614-15, 466 P.2d at 424 (citations omitted). Six months is the dividing line between serious and petty offenses. Baldwin v. New York, 399 U.S. 66, 70 (1970) (potential sentence exceeding six months' imprisonment is sufficiently severe to take offense out of the category of "petty"). *See also, e.g.*, Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974), *cited with approval in Kasprzycki*, 64 Haw. at 375, 641 P.2d at 979 (thirty day possible maximum sentence cannot trigger right to jury trial).

[26] Notes from Penal Code Commission deliberations (on file with the author) (comments of Office of the Public Defender). *See also infra* Appendix B (many cases dismissed because of backlog).

[27] *See infra* Appendix B.

[28] *See id.*

[29] *See id.*

[30] Notes from Penal Code Commission deliberations, *supra* note 26.

[31] *Id.*

[32] *Id.*

are sentenced will have served that time during their initial pre-trial detention,[33] so they will walk out of the courtroom free and clear. This is not the fault of the courts. The problem is simply that the sentencing range for a first offense is set at a level that triggers the right to jury trial.[34] As the Committee noted:

> As this comment is written, efforts are being made to reduce the number of household member abuse cases awaiting jury trials in O'ahu's family court, but every week occasions an average of 40 to 50 more jury trial demands. Existing and foreseeable judicial resources are inadequate to adjudicate these cases; in consequence, many cases are dismissed for want of speedy trials, pled to other charges in order to avoid the mandatory 48 hours. Defense counsel cannot be faulted for seeking jury trials in a system that guarantees jury trials. Nor can the Judiciary be faulted for giving priority to murder and other serious felony cases. Nor should the Legislature be faulted if it opts to solve the problem by reclassifying the crime so as to eliminate a penalty — on the books but never employed — that, because of sheer availability, triggers the right to jury trial.[35]

Clearly, something needs to be done. After more than a year of study, the Hawai'i Committee to Conduct Comprehensive Review of the Hawai'i Penal Code recommended a simple step toward stopping the violence that has become the serpent in our paradise: repealing the current section 709-906,[36] and enacting in its place a statute that would read, in pertinent part:

> § 709-912. Abuse of family or household members; penalty.
>
> (1) A person commits the offense of abuse of family or household members if the person intentionally, knowingly, or recklessly physically abuses a family or household member.
> (2) A person who commits the offense of abuse of a family or household member shall be sentenced as follows:
> (a) For a first offense, to a one-year term of probation with a mandatory condition of imprisonment of not less than forty-eight hours and not more than thirty days; and
> (b) For any subsequent offense which occurs within five years of a previous offense which resulted in a conviction under this section, to a one-year term of probation with a mandatory condition of imprisonment of not less than thirty days and not more than one year.[37]

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[33] *Id.*

[34] *See infra* Appendix B.

[35] *Id.*

[36] *See* text of current HAW. REV. STAT. § 709-906 (abuse of family and household members), *infra* Appendix D.

[37] *See* text of proposed §§ 709-910 through 709-915 and Committee Commentary, *infra* Appendix A and B.

This essay recommends, as a first step, adoption of a proposal set forth in the Final Report of the Committee to Conduct Comprehensive Review of the Hawai'i Penal Code submitted to the Legislature of the State of Hawai'i.[38] This proposal, which has not yet been acted upon, would change the sentencing provisions of Abuse of Family and Household Member to reduce a first offense without serious injury from a full misdemeanor to a petty misdemeanor, thus eliminating the right to jury trial for those defendants.

This proposal is likely to be controversial; it generated significant discussion in the Committee, and this controversy will no doubt be reflected in the Legislature and the community at large. The most controversial of the proposed changes are those to the punishment provisions for section 709-912 (abuse of family and household member) and section 709-913(2) (refusal to comply with a police officer's order to leave). Opponents of this proposal argue fervently and sincerely that reclassification of first offenses to the petty misdemeanor level represents a failure to support the victims of domestic violence,[39] but as the Committee notes, "What better way to combat the problem we rightly deplore than with actual punishment administered promptly?"[40] The first step in attacking Hawai'i's crime problems at their roots is to adopt the Committee's recommendations and to enact section 709-912, which would eliminate the right to jury trial that exists under current section 706-663,[41] by eliminating the purely symbolic one-year sentencing option, retaining the 48 hour mandatory minimum prison sentence, and adding a

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[38] Final Report of the Committee to Conduct Comprehensive Review of the Hawai'i Penal Code, [hereinafter FINAL REPORT], as submitted to the Eighteenth Legislature of the State of Hawai'i on December 28, 1994 (on file with the author). According to State Senator Ray Graulty's office, the revised Code has not yet been reported to the full Legislature for action. Telephone interview with Sen. Graulty's office (Sept. 9, 1996).

The Committee to Conduct Comprehensive Review of the Hawai'i Penal Code was created pursuant to the mandate of 1993 Haw. Sess. L., Act 284, § 2 at 525-26 (H.B. No. 741, H.D. 2, S.D. 2, C.D. 1). The Committee consisted of thirty members, including judges at the appellate, first, second, and third circuit courts; the district courts of the first circuit; representatives of the Adult Probation Division, the Department of the Attorney General of Hawai'i, the Department of Public Safety's Office of the Director, Special Services Division, and Hawai'i Paroling Authority; the Adult Mental Health Division of the Department of Mental Health; the William S. Richardson School of Law faculty; the Center for Youth Research; the Sex Abuse Treatment Center; the Domestic Violence Legal Hotline; the Honolulu Police Department; the Offices of the Prosecuting Attorney of the City and County of Honolulu and County of Maui; the Office of the Public Defender, and the private defense bar. Letter from Associate Hawai'i Supreme Court Justice Steven Levinson to the Honorable Norman Mizuguchi, December 28, 1994, at 1-2 (on file with the author).

[39] FINAL REPORT, *supra* note 38.

[40] *Id.*

[41] *See* text of HAW. REV. STAT. § 706-663, *supra* note 24.

mandatory one-year probation period. This essay explores some of the reasons for the Committee's proposed changes, the emotional responses these proposed changes have triggered, and why implementation of these changes would benefit Hawai`i.

II. THE PROPOSAL FOR CHANGE: INTERVENTION AT THE PETTY MISDEMEANOR STAGE

To discuss these issues rationally, it is important to be clear on what is being proposed. The proposed enactment will not apply to repeat offenses, or to cases involving serious injury; these matters will continue to be prosecuted as assaults under section 707-710 or section 707-711.[42] The proposed changes likewise would not reduce felony assault to a misdemeanor.[43] The amendments will apply solely to cases that do not rise to the felony assault levels of 707-710 and 711,[44] assuring that there are consequences for the very first offense. Ninety-five percent of the sentences imposed under section 709-906[45] are for the minimum 48 hours of imprisonment,[46] and the proposed amendments retain 48 hours of imprisonment as a mandatory minimum sentence.[47] In addition, the proposed law would add a one year mandatory probation,[48] which has the advantage of not triggering the right to jury trial.[49] Additionally, probation makes it possible for the system to provide supervision, counseling, and further penalties for any infraction.[50]

It is understandable that we are reluctant to label any abuse of a family or household member "petty." Symbolism is potent, and the word "petty" carries a lot of emotional baggage. Nevertheless, it is inexcusable to let our

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[42] See *infra* Appendix B; *see* text of HAW. REV. STAT. §§ 707-710 (Assault in the First Degree) and 707-711 (Assault in the Second Degree), *infra* Appendix D.

[43] *See infra* Appendix B. By contrast, the Domestic Violence Advocacy Project in Chicago, Illinois, estimated that in 1987, about 90 percent of the domestic violence cases in Cook County were charged as misdemeanors, regardless of the severity of the injuries. Matthew Litsky, Note, *Explaining the Legal System's Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149, 166-67 (1990).

[44] *See infra* Appendix B. *See* text of HAW. REV. STAT. §§ 706-710 and 706-711, *infra* Appendix D.

[45] *See* text of HAW. REV. STAT. § 706-906, *infra* Appendix D.

[46] REPORT, *supra* note 1, at 6 (most persons convicted under HAW. REV. STAT. § 709-906 receive only the mandatory minimum sentence of 48 hours in jail). *See* Notes from Penal Code Commission deliberations, *supra* note 26 (comments of Office of the Public Defender). *See also infra* Appendix B.

[47] *See infra* Appendix B.

[48] *See id.*

[49] *See id.*

[50] Notes from Penal Code Commission deliberations, *supra* note 26 (comments of Office of Public Defender). *See also infra* Appendix B.

squeamishness over terminology prevent us from enacting a powerful crime-fighting weapon. It is not the label that controls the availability of the jury trial, after all it is the availability of that never-invoked one-year sentence for first offenses without serious injury. Intervening at the petty misdemeanor stage would eliminate this stumbling block.[51]

If we can't bring ourselves to call this offense a "petty" misdemeanor, we can call it something else. One proposal before the Committee was to re-label what are now called petty misdemeanors and misdemeanors with the less emotionally-loaded terms "A and B misdemeanors."[52] So long as we cap the available sentence for this category of crime below the level where a jury trial is triggered, it does not matter what we call it.

III. THE FAILED REMEDIES OF THE PAST

A compelling argument for adopting the Committee's proposal is that the remedies of the past have failed to stem the problem.

A. Safety Orders

Hawai'i is in the forefront in making safety orders (also known as protective orders) accessible to victims of domestic violence.[53] Safety orders are enforceable in criminal courts and offer some protection,[54] but a safety order is not a magic bullet.[55] It cannot stop the batterer unless he believes that

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[51] The Committee noted:

> Current law classifies all instances of these offenses as misdemeanors, even though the mandatory jail sentence for first offenders is only 48 hours. The committee proposes, in §§ 709-912 and 709-913, to specify the punishment for first offenders as "a one-year term of probation with a mandatory condition of imprisonment of not less than forty-eight hours and not more than thirty days."

Committee Commentary, *infra* Appendix B.

[52] Notes from Penal Code Commission deliberations, *supra* note 26 (comments of Office of the Public Defender).

[53] *See* Kim, *supra* note 1 (describing protective or safety orders). *See* text of HAW. REV. STAT. § 586-4 (Temporary Restraining Order), *infra* Appendix D.

[54] Lisa R. Beck, Note, *Protecting Battered Women: A Proposal for Comprehensive Domestic Violence Legislation in New York*, 15 FORDHAM URB. L.J. 999, 1014 n.87 (1987). *See* Buel Tape, *supra* note 9.

[55] Beck, *supra* note 54, at 1015. *See* Mary Lou Boland, Note, *Domestic Violence: Illinois Responds to the Plight of the Battered Wife - The Illinois Domestic Violence Act*, 16 J. MARSHALL L. REV. 77, 90 (1982) (discussing protective (or safety) orders in Illinois). Such an order directs the batterer to stay away from the home or victim and to refrain from further abusive conduct. *See, e.g.*, N.Y. FAM. CT. ACT § 842 (McKinney 1983 & Supp. 1994) (requiring a defendant to stay away from the person or premise or to refrain from verbal or physical violence).

he will be punished for violating it. If the courts lack the capacity to enforce them, safety orders are little more than a symbolic defense against household violence, and obtaining one may be the last act the victim ever takes on her own behalf.[56] Tragically, she may die with her safety order in hand.[57]

B. Mandatory Arrest

In the landmark Minneapolis Domestic Violence Experiment,[58] the Minneapolis Police Department and Professors Lawrence Sherman and Richard Berk found that arrest for household violence was the most effective deterrent to repeat incidents of battering.[59] Such findings led to the adoption of what are known as "mandatory arrest" policies, such as that in Hawai'i.[60]

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[56] Kim, *supra* note 1. *See* Litsky, *supra* note 43, at 155 (state legislative response to family violence in the 1970s was "grossly inadequate"). *See also* Greg Anderson, Note, *Sorichetti v. City of New York Tells The Police That Liability Looms for Failure to Respond to Domestic Violence Situations*, 40 U. MIAMI L. REV. 333 (1985) (discussing a case which held that a protective order creates a "special relationship" between the protected party and the police, thereby providing the basis for police liability if the protected party is injured).

[57] *See* Kim, *supra* note 1, at 50 ("My daughter died with her protective order in her hand."). *See* REPORT, *supra* note 1, at 2-3 ("most domestic violence homicides occur when victims attempt to escape or to end the relationship . . . . Victims who testify in court or at probation hearings against their abusers risk threats, retaliation, and further abuse . . . . Most victims are killed when they try to flee their abusers"). *See* Abigail Trafford, *The Divorce Violence Link*, WASH. POST, June 21, 1994, § Z, at 6.

[58] *See* Lawrence W. Sherman & Ellen G. Cohn, *The Impact of Research on Legal Policy: The Minneapolis Domestic Violence Experiment*, 23 LAW & SOC'Y REV. 117, 117-19 (1989) (encouraging replication of Minnesota experiment in other cities); *see also* Lawrence W. Sherman and Richard A. Berk, *The Specific Deterrence Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984) (advocating adoption of Minnesota experiment by other jurisdictions).

[59] Sherman & Berk, *supra* note 58, at 261 (six months after police intervention, official and victim-based recidivism reports showed significantly less post-intervention violence where arrests were made than in cases where the batterer was simply ordered to leave).

[60] *See* Kim, *supra* note 1 (describing Hawai'i's mandatory arrest policy). *See* REPORT, *supra* note 1, at 4, which notes:

> The Hawai'i statute is a presumptive arrest law, which means that police officers may make an arrest in any apparent domestic abuse situation. Pursuant to General Order 91-4, internal police policies in all Hawai'i jurisdictions mandate an arrest when there is probable cause to believe abuse of a household member has occurred. During the last decade, enforcement of Section 709-906 has increased the number of domestic violence arrests from 300 in 1986 to 4,665 in 1995 (Honolulu Police Department figures). The 1995 figure means that police found at least probable cause, or facts and evidence sufficient for arrest, 4,665 times . . . .
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> . . . .
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> Police agencies are required to make arrests, gather initial evidence, file reports and refer cases to prosecutors . . . . Prosecutors are required to file charges, work with witnesses,

Arrest tells a batterer "that his behavior is a crime, that it must stop, that punishment will follow, and that it is sensible to secure treatment to avoid repeating the behavior."[61] Mandatory arrest policies require that in certain situations, police officers must treat the incident as any other assault and must arrest the assailant.[62]

It seems logical to assume that a mandatory arrest policy would be a panacea for the problem of household violence. In fact, however, mandatory arrest is a classic example of a "get tough" policy that has symbolic value with the electorate, but which can lead to a host of problems. Unfortunately, mandatory arrest statutes can lead to what is sometimes called the "dual arrest" problem, where both partners to a domestic dispute have injuries and accuse the other; an officer in such a case may have no choice but to arrest both parties, even if it appears that one was clearly the aggressor.[63] To avoid this potentially harsh result, many states have adopted permissive arrest policies which allow, but do not require, police to make an arrest without a warrant if they have probable cause.[64] Presumptive arrest statutes, by contrast, provide that the police shall arrest the abuser in certain defined circumstances, preserving some level of police discretion in determining whether a particular case fits within those circumstances.[65]

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address issues of evidence, and prosecute cases in court . . . .
Id.

[61] Anthony Bouza, *Responding to Domestic Violence*, *in* WOMAN BATTERING: POLICY RESPONSES 191, 195 (Michael Steinman ed., 1991).

[62] Nicole M. Montalto, Note, *Mandatory Arrest: The District of Columbia's Prevention of Domestic Violence Amendment Act of 1990*, 8 J. CONTEMP. HEALTH L. & POL'Y 337, 344 (1992).

[63] Hoffman, *supra* note 6, at 26. The New Jersey statute, in an attempt to eliminate the "dual arrest" scenario, requires an officer in such a case to assess "the comparative extent of the injuries, the history of domestic violence (if any), and other relevant factors." N.J. STAT. ANN. § 2C:25-21(c)(2) (West Supp. 1993).

[64] *See, e.g.*, ALASKA STAT. § 12.25.030(b) (Supp. 1996) (warrantless arrest when spouse is victim); ARIZ. REV. STAT. ANN. § 13-3601(B) (Supp. 1994) (warrantless arrest on probable cause for felony or misdemeanor domestic violence); FLA. STAT. ANN. ch. 901.15(6), (7)(a) (Harrison 1985 & Supp. 1996) (warrantless arrest on probable cause for violating domestic protective order, with evidence of bodily harm or potential for further violence); IDAHO CODE § 19-603(6) (Supp. 1996) (warrantless arrest upon reasonable cause to believe arrestee assaulted spouse); 750 I.L.C.S. § 60/301 (1994) (warrantless arrest for crime or violation of protective order, on probable cause); MASS. GEN. LAWS ANN. 209A, § 6(7) (West Supp. 1996) (warrantless arrest on probable cause for felony or misdemeanor domestic violence, or violating restraining order); MONT. CODE ANN. § 46-6-311(2) (1996) (warrantless arrest on probable cause for domestic violence or assault upon family or household member); R.I. GEN. LAWS §§ 12-29-3(B), 15-15-5(A) (Supp. 1996) (permitting warrantless arrest on probable cause for felony or misdemeanor if failure to arrest could result in further violence).

[65] *See* Beck, *supra* note 54, at 1036. *See, e.g.*, ARK. CODE. ANN. § 5-53-101 (Michie 1993) (noting that "immediate intervention through arrest upon probable cause to protect the victim

Arrest alone, however, has never been shown to be an effective deterrent.[66] Follow-up studies to the Minneapolis study showed that unless arrest was part of a comprehensive program that actually resulted in convictions, arresting the batterers could be worse than useless — it could actually be harmful.[67] Professor Sherman, coauthor of the original Minneapolis report, did a similar study in Milwaukee, Wisconsin in which the batterer's employment status

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from physical injury is one remedy which should be provided in this state as in other states."). In addition, Idaho law states that:

> [T]he legislature finds that a significant number of homicides, aggravated assaults, and assaults and batteries occur within the home between adult members of families . . . . Domestic violence can . . . be deterred, prevented or reduced by vigorous prosecution by law enforcement agencies and prosecutors and by appropriate attention and concern by the courts whenever reasonable cause exists for arrest and prosecution.

IDAHO CODE § 39-6302 notes (1993).

[66] *See* Richard A. Berk & Phyllis J. Newton, *Does Arrest Really Deter Wife Battery? An Effort to Replicate the Findings of the Minneapolis Spouse Abuse Experiment*, 50 AM. SOC. REV. 253 (1985) (discussing changes in California law and the results of a follow-up study of residents prone to family violence); Beck, *supra* note 54, at 1035-36. In Connecticut:

> Whenever a peace officer determines upon . . . information that a family violence crime . . . has been committed within his jurisdiction, he shall arrest the person or persons suspected of its commission . . . . The decision to arrest and charge shall not (1) be dependent on the specific consent of the victim, (2) consider the relationship of the parties or (3) be based solely on a request by the victim.

CONN. GEN. STAT. ANN. § 46b-38(b) (West Supp. 1994); *see also, e.g.*, D.C. CODE ANN. § 16-1031 (Supp. 1993) ("A law enforcement officer shall arrest a person if the law enforcement officer has probable cause to believe that the person: (1) Committed an intrafamily offense that resulted in physical injury . . . ."); KAN. STAT. ANN. § 22-2307 (Supp. 1993) ("[T]he officers shall make an arrest when they have probable cause to believe that a crime is being committed or has been committed."); NEV. REV. STAT. § 171.1225 (1991) (requiring officers to inform suspected victims of acts of domestic violence that "[i]f I have probable cause to believe that an act of domestic violence has been committed against you in the last 4 hours I am required, unless mitigating circumstances exist, to arrest immediately the person suspected of committing the act"); N.J. STAT. ANN. § 2C:25-21 (West Supp. 1993) ("[T]he law enforcement officer shall arrest the person who is alleged to be the person who subjected the victim to domestic violence . . . ."); OR. REV. STAT. § 133.055(2)(a) (1993) (noting that "the officer shall arrest and take into custody the alleged assailant or potential assailant"); R.I. GEN. LAWS § 12-29-3(B) (Supp. 1993) ("When a law enforcement officer responds to a domestic violence situation and has probable cause to believe that a crime has been committed . . . the officer shall arrest and take into custody the alleged perpetrator [in certain situations] . . . ."); V.I. CODE ANN. tit. 16, § 94 (1991) (noting that an officer "shall make an arrest without a warrant if the officer has probable cause to believe that a misdemeanor or felony involving domestic violence . . . has been committed").

[67] *See, e.g.*, Daniel Goleman, *Do Arrests Increase the Rates of Repeated Domestic Violence?*, N.Y. TIMES, Nov. 27, 1991, at C8 (disputing the value of arrest alone in deterring repeated abuse). The Omaha Experiment, one of six similar studies funded by the National Institute of Justice, also did not support the findings of the Minneapolis experiment as to the value of arrest alone as a deterrent. Franklin W. Dunford et al., *The Role of Arrest in Domestic Assault: The Omaha Police Experiment*, 28 CRIMINOLOGY 183, 204 (1990).

significantly affected the deterrent effect of arrest, a factor not considered in the original Minneapolis study.[68] Sherman concluded that the deterrent effect of arrest alone shown in Minneapolis was a statistical fluke related to the low unemployment rate in that city at the time the study was conducted.[69] Unemployed batterers, in contrast to the employed arrestees in the original Minneapolis study, were not significantly deterred by arrest alone.[70] As Sherman and Berk cautioned:

> [W]e favor a presumption of arrest; an arrest should be made unless there are good, clear reasons why an arrest would be counterproductive. We do not, however, favor requiring arrests in all misdemeanor domestic assault cases. Even if our findings were replicated in a number of jurisdictions, there is a good chance that arrest works far better for some kinds of offenders than others . . . . We feel it best to leave police a loophole to capitalize on that variation.[71]

Honolulu Police Chief Michael Nakamura has recognized the importance of training police about the seriousness of family abuse, and the necessity of providing guidance as to the decision to arrest.[72] However, in urban Honolulu, limited jail space coupled with a serious backlog in the courts makes it unlikely that batterers will face incarceration. This is not just a Hawai'i problem; it happens on the mainland as well. For example, in Milwaukee, Wisconsin, out of 8,000 misdemeanor arrests for household violence last year, only fifty percent were prosecuted, and of those prosecuted only thirty percent resulted in convictions.[73]

It seems clear that mandatory arrest statutes, if not part of a coordinated program, come "perilously close to encouraging greater jeopardy for victims unless accompanied by recommendations for massive changes in prosecutorial and judicial practices. In a judicial system which seldom tries spouse abuse offenders and rarely convicts them, women are seldom protected from violent reprisals."[74]

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[68] Dunford, *supra* note 67. The Milwaukee project found that among employed men, arrest deterred repeated battering, resulting in a 16 percent decrease in recidivism. Among the unemployed, however, arrest increased repeat violence by 44 percent. *Id.*

[69] Goleman, *supra* note 68. *See also* Roger Worthington, *Value of Mandatory Arrest for Woman Beaters Questioned*, CHI. TRIB., Nov. 19, 1991, at C5 ("Mandatory arrest puts us in the moral dilemma of reducing violence against women who are relatively well off (living with or married to an employed assailant), at the price of increasing violence against women whose abusers are unemployed.") (quoting Professor Lawrence Sherman). *See* STRAUS, *supra* note 9, at 31.

[70] *See* STRAUS, *supra* note 9, at 31.

[71] Sherman & Berk, *supra* note 58, at 270.

[72] *See* Kim, *supra* note 1 (quoting Honolulu Police Chief Michael Nakamura).

[73] *World News Tonight*, *infra* note 81.

[74] Sarah F. Berk & Donileen R. Loseke, *"Handling" Family Violence: Situational Determinants of Police Arrest in Domestic Disturbances*, 15 LAW & SOC'Y REV. 317, 343

In 1981, Duluth, Minnesota became the first jurisdiction to enact a mandatory arrest policy for misdemeanor assaults.[75] A follow-up study documented that with this program in place, 87 percent of the victims going through their court system's domestic violence program were living violence-free three years later, meaning that the offenders had not committed new crimes.[76] The 47 percent decrease in recidivism in the Duluth program could not be traced solely to arrest, but rather to the coordinated effort of various agencies.[77] A key factor in both Duluth and Minneapolis was that the men who were arrested actually served time in jail.[78] Unless arrest results in conviction and punishment, it does not reliably deter further violence. Where punishment is certain, abusers quickly learn that the laws on the books are not empty threats, and violence drops. However, where an arrest is not accompanied by at least some amount of incarceration, the victim may be placed in an even more precarious position.[79] Unfortunately, that is the present situation in Hawai'i, where the abuser is unlikely to spend any time in jail following the arrest, and is therefore unlikely to be deterred from future acts of abuse.

C. No-Drop Policies

Victims are often reluctant to follow through with charges, because the abuser, through coercion, promises, or emotional ties, may force his victim to shield him from legal accountability.[80] A "no-drop" prosecutorial policy such as that in Hawai'i is a crucial part of a systematic program of deterring abuse, but it brings with it its own problems. Under a no-drop order, the victim can be arrested, jailed for contempt, and forced to pay court costs for failing to testify against the criminal who is still terrorizing her.[81] Thus, making the

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(1980-81); *see also* Robert E. Worden & Alissa A. Pollitz, *Police Arrests in Domestic Disturbances: A Further Look*, 18 LAW & SOC'Y. REV. 105, 118 (1984) (announcing replication of the findings of the Berk & Loseke study).

[75] Hoffman, *supra* note 6, at 23.

[76] Buel Tape, *supra* note 8. *See also* Ellen Pence, *The Duluth Domestic Abuse Intervention Project*, 6 HAMLINE L. REV. 247, 258 (1983) (police had contact with only 16% of domestic assailants from the seven to twelve months after arrest).

[77] Sarah Mausolf Buel, *Recent Developments: Mandatory Arrest for Domestic Violence*, 11 HARVARD WOMEN'S L.J. 211, 216 (1988).

[78] Sherman & Berk, *supra* note 58, at 268.

[79] Sari Horwitz, *D.C. Police to Make Arrests in Domestic Violence Disputes: Cases to be Treated as Criminal Offenses*, WASH. POST, June 3, 1987, at A1, A7.

[80] Litsky, *supra* note 43, at 167; Pence, *supra* note 77, at 250.

[81] *See* Pence, *supra* note 76, at 260. "[T]he program offers safety for victims while providing abusers with clear limits on their behavior, certain intervention, and a more systematic program for the purpose of changing their behavior." *Id.* at 255-69. In Brooklyn, New York, prosecutors will drop charges at the victim's request only after the victim has had counseling. *Id.* Madison, Wisconsin, prosecutors will prosecute with or without the victim's

victim responsible for the prosecutor's job of pursuing justice can reward the batterer and reinforce his sense of power and immunity from legal consequences.[82] If the victims lack confidence that their attackers will be convicted, they may well be discouraged from coming forward in the first place. It is not enough that we in Hawai'i work in concert with the police, and encourage arrests and prosecutions; it is even more critical that we make it possible for our courts to handle the cases that the police and prosecutors bring to them.

IV. THE MIND OF A BATTERER

To understand how the Committee's proposal for early intervention at the petty misdemeanor level can help end battering, we must understand why the batterer batters.[83] Batterers tend to have a strong sense of entitlement;[84] their life experience has led them to believe that violence is justifiable to get what they want, and to maintain control of their family and household members.[85] Control is the batterer's life, and he typically feels entitled to batter when he feels out of control or powerless.[86] Overcoming this sense of entitlement, rather than reinforcing it, is the key to overcoming abuse.

The batterer shows a high capacity for planning, and an appreciation of cause and effect.[87] He may show this by putting the children in another room, so they won't hear, taking off his rings to avoid leaving scars, or only hitting areas that will be covered by clothing.[88] The man who attacks and injures family and household members does not beat up the police officer who gives him a speeding ticket, or the co-worker who makes him look bad, or the boss who yells at him for being late to work, because he knows full well that there

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cooperation. *World News Tonight* (ABC television broadcast, June 27, 1994), *available in* LEXIS, News Library, File No. 4126-4.

[82] *See* David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 65 OHIO ST. L.J. 1153, 1215 n. 80, 244-51 (1995) (discussing the prosecutor's role in stopping spousal abuse).

[83] RENATA VASELLE-AUGENSTEIN & ANNETTE EHRLICH, MALE BATTERERS: EVIDENCE FOR PSYCHOPATHOLOGY IN INTIMATE VIOLENCE: INTERDISCIPLINARY PERSPECTIVES 139, 144 (Emilio C. Viano ed., 1992).

[84] *See id.* at 139. *See also* BARBARA STAR, HELPING THE ABUSER: INTERVENING EFFECTIVELY IN FAMILY VIOLENCE 34-35 (1983), *cited in* Welch, *supra* note 3, at n.34.

[85] Buel Tape, *supra* note 8.

[86] VASELLE-AUGENSTEIN & EHRLICH, *supra* note 83, at 143.

[87] *Id.*

[88] Buel Tape, *supra* note 8.

would be serious repercussions if he did.[89] To put it bluntly, he chooses to use violence against his wife or girlfriend because he can do so with impunity.[90]

Asking why battered women stay is the wrong question; it is a bit like asking why a hostage or prisoner of war "chooses" to stay with his tormentor.[91] Even if it is possible to get away, leaving does not mean safety, and may trigger a fatal attack.[92] Rather than put the onus on victims to escape their tormentors, we should impress upon batterers at the earliest possible stage that their actions have consequences. This is the first step in changing their behavior.[93] Repeat offenses are significantly fewer where there is early intervention and a coordinated program leading to conviction.[94] In other words, the first step in reducing abuse is increasing the costs associated with battering. A coordinated program which intervenes at the first sign of violence has been shown to change the cost/benefit basis of battering without increasing the risks to the victim.[95] To be effective, such a policy cannot be isolated; it must exist as part of a fully integrated response to violence, combining mandatory arrest, police training, guidelines for judges and prosecutors, services for victims, and rehabilitation and counselling for batterers, giving the community, victims, assailants and children a clear message that battering is not acceptable "even" in the family.[96]

Sarah Buel, a Quincy, Massachusetts prosecutor specializing in household violence cases, has demonstrated that when the first "petty" misdemeanor carries consequences, batterers choose another option.[97] Buel grew up in a violent home, saw a brother murdered in connection with his involvement in gangs and drugs, and was herself a battered wife before becoming a prosecutor.[98] Her innovative leadership in pursuing early intervention into household violence won her community a $100,000 Ford Foundation Innovations Award

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[89] *Id.*

[90] Welch, *supra* note 3, at 1138 (citing VASELLE-AUGENSTEIN & EHRLICH, *supra* note 84, at 140).

[91] *See* Dee L.R. Graham and Edna Rawlings, *Survivors of Terror: Battered Women, Hostages, and the Stockholm Syndrome, in* FEMINIST PERSPECTIVES ON WIFE ABUSE (Kerri Yllo & Michelle Bogard eds., 1988). Several researchers have applied the characteristics outlined by the Amnesty International "Report on Torture" (1973) to battered women. *See, e.g.*, Mary Ann Dutton, *The Dynamics of Domestic Violence: Understanding the Response From Battered Women*, 68 FL. B.J. 24, 28 n.7 (Oct. 1994).

[92] Buel Tape, *supra* note 8.

[93] *Id.*

[94] Buel, *supra* note 77, at 216.

[95] Welch, *supra* note 3, at 1139-40.

[96] Pence, *supra* note 76, at 254-55.

[97] Buel Tape, *supra* note 8.

[98] *Id.*

for the Quincy Court Domestic Violence program.[99] She started the Quincy program after she recognized that mandatory arrest alone was not enough; she realized that the reason for Duluth, Minnesota and Seattle's 47 percent reduction in repeat domestic violence cases, and San Diego's 59 percent reduction in its domestic homicide rate, was that in these programs the arrests resulted in convictions.[100] The Quincy program shows that batterers choose another option when they know there will be consequences.[101]

Duluth, Minnesota's violence intervention program, focusing on the psychology of the batterer, showed remarkable success from the start, as 77 percent of those arrested for misdemeanor crimes of household violence pled guilty.[102] The program effectively shifted the focus of intervention from the victim to the assailant, and in so doing, "enhanced the ability of the system to deter assailants by increasing the numbers of assailants convicted of assault and establishing serious consequences for battering."[103] The costs of arrest are not solely financial, of course; they can include time in jail, shame, the risk of divorce or separation from their partners, and loss of a job.[104] Failure to arrest, on the other hand, tells the man that terrorizing and brutalizing "his" woman is not a crime and that he has nothing to fear if he beats the woman with whom he is, or was, involved.[105]

If we accept the overwhelming evidence that batterers batter by choice, and because the costs do not outweigh the rewards, we should expect this criminal behavior to decrease as the costs of committing it increase. In other words, we must intervene early enough and consistently enough to convince potential batterers not to engage in violence at all, and must teach batterers that what they are doing is wrong, illegal and will be punished.[106] Early intervention

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[99] Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329, 338-63 (1994) (citing Patricia Nealon, *Quincy Antibattering Effort Gets Grant*, BOSTON GLOBE, Sept. 23, 1992, at 10) (Ford Foundation selected Quincy from 1600 contenders for its Innovations in State and Local Government Awards Program, including a $100,000 grant to duplicate the program nationwide).

[100] Buel Tape, *supra* note 8.

[101] *Id.*

[102] Pence, *supra* note 76, at 257-58.

[103] *Id.* at 269.

[104] Michael Steinman, *Coordinated Criminal Justice Interventions and Recidivism Among Batterers*, *in* WOMAN BATTERING: POLICY RESPONSES, 221, 222 (Michael Steinman ed., 1991).

[105] EVA JEFFERSON PATERSON, HOW THE LEGAL SYSTEM RESPONDS TO BATTERED WOMEN, *in* BATTERED WOMEN, 79, 82-83 (Donna M. Moore ed., 1979).

[106] Specific deterrence rationales focus on the individual who has already committed an act of violence, and seeks to discourage him from committing further criminal acts. Alan Wertheimer, *Criminal Justice and Public Policy: Statistical Lives and Prisoners' Dilemmas*, 33 RUTGERS L. REV. 730, 734 (1981) (goal of specific deterrence is to stop criminals from committing future crimes).

also provides a "quarantine" effect whereby punishment may prevent some crime simply by isolating the criminal from society.[107]

Abuse does not start with a fatal or crippling attack; it starts small, with a slap, or a push.[108] Battering is addictive, and if nothing happens to stop it, battering is progressive.[109] Domestic violence is not about "losing it; it is about power, control, coercion."[110] Batterers show higher-than-normal levels of possessiveness, jealousy, and paranoia in a clinical setting.[111] They demonstrate power and control by isolating their victim from friends, family, and community until the victim has nowhere to go, and no-one to turn to.[112] A man who batters typically will not allow "his woman" to make any independent decisions, and will want to know everything that she does.[113] The batterer may appear "nice, humorous, charming, and sensitive," outside the family circle while showing a "Jekyll and Hyde" personality at home.[114] He may appear guilty and contrite after he batters, but this is often a form of manipulation rather than an indicator of change.[115] A batterer may go so far as to establish a list of "offenses" for which "his woman" can expect a beating.[116] If confronted, he will explain that he slapped her because she burned the toast, or that he gave her a black eye because she flirted with the mailman.[117] This, however, is not uncontrollable rage; this is "premeditation in every sense of the word."[118]

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[107] *Id.* at 734-35.

[108] *See, e.g.*, Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1885 (1996) (If the batterer is not held accountable for his actions, domestic violence generally increases in both severity and frequency). The author notes, "[B]atterers are generally repeat criminal offenders. 'Males who make a habit of assaulting their female partners may commit serious crimes in the home as frequently as other offenders with more serious criminal records do on the street.'" *Id.* at 1888.

[109] *Id.* Roni Young, Baltimore City State's Attorney and Director of the Domestic Violence Unit, notes: "It's not just Warren Moon. And it's not just O.J. [Simpson]. People ask me why society is in denial over this issue. They're not in denial. They're in acceptance — accepting of the one slap, the one punch, not realizing what it can escalate into . . . ." *Id.* at 1910 n.265.

[110] Buel Tape, *supra* note 8.

[111] VASELLE-AUGENSTEIN & EHRLICH, *supra* note 83, at 141, discussing the use of the Minnesota Multiphasic Personality Inventory (MMPI) test in understanding batterers' personalities.

[112] Michael Steinman, *Lowering Recidivism Among Men Who Batter Women*, 17 J. POLICE SCI. & ADMIN. 124 (1990).

[113] VASELLE-AUGENSTEIN & EHRLICH, *supra* note 83, at 142; *see also* STAR, *supra* note 84, at 34.

[114] *See* VASELLE-AUGENSTEIN & EHRLICH, *supra* note 83, at 146.

[115] Welch, *supra* note 3, at 1138-39 (citing VASELLE-AUGENSTEIN & EHRLICH, *supra* note 83, at 145).

[116] *Id.*

[117] *Id.*

[118] *Id.*

Why do we condone this carnage? At least part of the reason is that condonation of "wife abuse" has deep historical roots, so that it became news when law enforcement decided to treat it "as a crime."[119] In the mid-to-late 19th century, courts became somewhat less willing to give express approval of physical abuse,[120] but criminal prosecutions were rare until the 1970s, and there were few attempts to study the inadequacies of the existing legal and social responses.[121]

Our culture has tended to see household violence as a private concern; an attack on a member of the household was seen as a personal matter of a dysfunctional relationship, rather than as a vicious, violent crime committed by one citizen upon another. The view has been that "a man's home is his castle,"[122] and that police should stay out of "private" family matters.[123] Is it any wonder that those who prey on their family and household members may believe that they have the right to do so, and do not take seriously the risk of punishment?[124] By now it is clear that we must see domestic violence as

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[119] *See* REPORT, *supra* note 1, at 2 (socialization of boys and girls leads directly to acceptance of violence against women; the view that men should dominate women and children, and that women and children should be punished when they resist domination is pervasive among batterers and many others in our community). *See also* Horwitz, *supra* at A1, A7. *See, e.g.*, Bradley v. State, 1 Miss. (1 Walker) 156, 158 (1824) (approving physical "chastisement" of wife by husband), *overruled by* Harris v. State, 14 So. 266 (1894); State v. Rhodes, 61 N.C. (Phil. Law) 291, 291 (1868) (husband who attacked wife did not commit battery, though his violence would have been battery if victim had not been his wife); State v. Black, 60 N.C. (Win.) 263, 263 (1864) (law will not interfere with a man's "right" to inflict physical punishment on his wife).

[120] *See* Fulgham v. State, 46 Ala. 143, 148 (Ala. 1871) (holding that husband and wife "may be indicted for assault and battery upon each other"). *See generally* Thurman v. City of Torrington, 595 F. Supp. 1521, 1528 (D. Conn. 1984) (giving history of law of spouse abuse).

[121] Barbara K. Finesmith, *Police Response to Battered Women: A Critique and Proposals for Reform*, 14 SETON HALL L. REV. 74, 80 (1983). *See* STRAUS, *supra* note 9, at 10.

[122] Welch, *supra* note 3, at 1145.

[123] *See* Litsky, *supra* note 43, at 162. Only recently have courts in most of the United States moved away from the express approval of inter-familial rape, striking down laws permitting a husband to rape his wife. *See, e.g.*, Merton v. State, 500 So. 2d 1301 (Ala. Crim. App. 1986) (marital exception to first-degree rape and sodomy statutes were unconstitutional under 14th amendment equal protection clause); People v. M.D., 595 N.E.2d 702 (Ill. 1992) (marital exemptions to criminal sexual assault statutes unconstitutional; right to marital privacy extends only to consensual marital relations); People v. Liberta, N.E.2d 567 (N.Y. 1984), *cert. denied*, 471 U.S. 1020 (1985). *But see, e.g.*, People v. Brown, 632 P.2d 1025 (Colo. 1981) (marital exception to rape statute does not create an arbitrary and irrational distinction and does not violate due process or equal protection) *cited with approval in* People v. Flowers, 644 P.2d 916 (Colo. 1982), *appeal dismissed*, 459 U.S. 803 (1982) (lack of substantial federal question); State v. Taylor, 726 S.W.2d 335 (Mo. 1987) (marital exception to non-forcible sexual offenses does not violate constitution).

[124] *Id.*

something that concerns us all. We cannot be silent and pretend that this is not happening in the families of Hawai'i.[125]

V. CONCLUSION

Despite our best efforts, abuse of family and household members remains a difficult and intractable problem with no easy solutions.[126] We must follow through on the efforts that have already been made by taking innovative steps to enable the courts to handle the cases that result from existing enforcement efforts. Even if we arrest, prosecute, and refuse to drop cases, our attempts will be a mockery unless we are able to send the batterers to jail.[127]

There is no doubt that the idea of reducing the classification of a battering offense carries a potent emotional symbolism. It is difficult not to feel, on an emotional level, that diminishing the maximum available sentence for first offenders somehow diminishes the importance of the crime. For this reason, the idea that "less is more" may challenge some of our preconceived notions about retribution and crime, but we need to rise to the challenge. We cannot let our desire to send a symbolic message overrule the demonstrated need for early intervention.[128]

We have all seen parents who constantly threaten their misbehaving children with dire punishments that the children know will not be carried out.

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[125] *See* REPORT, *supra* note 1, at 3. The REPORT notes:

> The Hawai'i Crime Brief issued by the Attorney General in April 1996 found that nearly 30% of all homicides from 1985-1994 in the state were the result of domestic violence .... a study conducted by the Hawai'i State Commission on the Status of Women (1993) estimated that nearly 50,000 women in this state between the ages [of] 18 and 64 have been victims of domestic violence. The Department of Health's Plan for the Prevention of Injuries in Hawai'i (June 1995) reported that between 1989 and 1994 almost 100 women were killed by men in Hawai'i. Most of the killers were partners, boyfriends, or acquaintances.

Id. at 3. *See also* Buel Tape, *supra* note 8.

[126] *See* REPORT, *supra* note 1, at Summary (unpaginated) (Hawai'i passed its first spousal abuse law in 1972; all police jurisdictions in Hawai'i follow policies of mandatory arrest upon probable cause to believe abuse has occurred, yet between 1989 and 1992 almost 100 women in Hawai'i were killed by men, most by partners, husbands, boyfriends, or acquaintances).

[127] REPORT, *supra* note 1, at 20 (many persons arrested for HAW. REV. STAT. § 709-906 violations agree to plead to a lesser offense, usually HAW. REV. STAT. § 707-712 (assault in the third degree) and serve no jail time). *See also* Litsky, *supra* note 43, at 169-70. In 1986, Massachusetts District Court Judge Paul Heffernan scolded Pamela Dunn for "wasting his time" on domestic matters when she sought a safety order; the judge granted the order, but refused to order increased protection. Ms. Dunn's husband then kidnapped, shot, stabbed, and strangled her, and left her body in the town dump. *Court Challenged in Massachusetts*, N.Y. TIMES, Nov. 30, 1986, at A61.

[128] Buel Tape, *supra* note 8.

Not surprisingly, the children ignore the empty threats, and their behavior becomes more incorrigible. Why can't we recognize that the same principle applies to the somewhat infantile personality of the batterer? Why are we surprised when he repeats his behavior after not being punished for early, relatively mild offenses, before his behavior is ingrained and incorrigible — and before someone in his household dies?

The first slap or shove must result in serious consequences, or the abuse will escalate.[129] We lack the resources to attack crime fully and effectively on all fronts, but targeting family abusers for prosecution at the petty misdemeanor stage, before their behavior escalates to the point where a jury trial is called for, can help decrease not only household violence, but all of the crime and social ills that flow from it. We cannot ignore this problem until the violence escalates to the felony level, just to preserve the purely symbolic deterrent of the one year misdemeanor sentence.

It seems logical to assume that longer and harsher sentences would deter crime, especially on the part of family abusers, who in most cases are not otherwise career criminals, but as H.L. Mencken once noted, "for every problem, there is some solution that is simple, neat, and wrong."[130] The solutions of the past — upgrading offenses and tough mandatory sentences, seem simple and neat, but they are demonstrably wrong, because they carry within them a Catch-22 that prevents their being carried out. Get-tough measures may send a symbolic message to the electorate that their elected officials are "tough" on crime, but when the batterer knows that the "tough" sentence is an empty threat, there is no deterrence. The symbolic message is lost in the bloody reality. Unless the defendant believes that the punishment is highly certain to be imposed, symbolic statutory punishments are a cruel joke on the victims.[131]

It is unfortunate that any proposal to reduce domestic violence penalties is seen by some victims' advocates as symbolizing a lack of support for victims of violence.[132] However, if we have it in our power to improve the deterrent value of the law by imposing the mandatory 48 hours and discretionary month of imprisonment upon first offenders more swiftly and more predictably,[133]

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[129] REPORT, *supra* note 1, at 1 ("physical abuse is part of a continuum that typically begins with actions that undermine self-esteem, escalating verbal assaults, and attempts to isolate a victim from friends and family . . . . In most situations, the physical violence increases in severity and frequency over time").

[130] Frank Daily, *Preserve the Lawyer's Tools*, 7 A.B.A.J. (Feb. 1986) 38, 40 (quoting H.L. Mencken).

[131] Steinman, *supra* note 104, at 222.

[132] Notes from Penal Code Commission deliberations, *supra* note 26 (comments of Nanci Kriedman, Victims' Advocate). *See also infra* Appendix B.

[133] *Id.*

and if we instead choose symbols over substance, that is a true failure to support those victims. As things stand now, abusers are getting the message that their actions have no consequences.[134] The present law creates the paradoxical result that more assailants are freed than punished, and teaches these violent men that attacking others is acceptable, as long as it is "only" a member of the family or household.

We should ask ourselves what message it sends to have a one-year sentence on the books for a first offense, when there is virtually no chance of actually receiving it. Even if Hawai'i's courts could cease trying any other kind of case but household violence, it would take an increase of 10 percent more courts, judges, and staffs, costing millions more tax dollars, to eliminate permanently the backlog in domestic cases,[135] and that would undoubtedly create a backlog in the prosecutions of other serious crimes, such as murder, rape and robbery.

There is no way around this dilemma as long as a first offense without serious injury remains a full misdemeanor and qualifies for a jury trial. One could reasonably conclude that the present law's deterrent effect is nil, as evidenced by the high recidivism rate of these offenders. If we can change our responses to family terrorism from the symbolic to the practical, we can expect to see some real success in curbing *all* forms of crime in Hawai'i by cutting it off at the source: the violent family.

It is time to stop clinging to symbols — we need results. To achieve this we must look beyond our cherished preconceptions and get-tough rhetoric and try to understand what does and doesn't work. If we don't attempt some real solutions, we are not only abandoning our children, but we are colluding with the batterers. We are ensuring that they get the message that this behavior will be tolerated, and that we will maintain a system that ensures that there are no consequences as long as the violence is "only" in the family.

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[134] Notes from Penal Code Commission deliberations, *supra* note 26 (comments of Office of the Public Defender). *See also infra* Appendix B (many cases dismissed because of backlog).

[135] Notes from Penal Code Commission deliberations, *supra* note 26.

Appendix A: Committee to Conduct Comprehensive Review of the Hawai'i Penal Code's Proposed Changes to Selected Sections of the Hawai'i Revised Statutes

Part II. ABUSE OF FAMILY OR HOUSEHOLD MEMBERS

§ 709-910. Definitions of terms in this part. In this part, unless a different meaning is plainly required, "family or household members" means spouses or former spouses, parents, children, and persons jointly residing or formerly residing in the same dwelling unit.

§ 709-911. Duty of police in investigation of abuse of family or household members.

(1) the police, in investigating any complaint of abuse of a family or household member, may, upon request, transport the abused person to a hospital or safe shelter.
(2) Any police officer may, with or without a warrant, arrest a person if the officer has probable cause to believe that the person is physically abusing, or has physically abused, a family or household member.
(3) Any police officer who arrests a person pursuant to this part shall not be subject to any civil or criminal liability; provided that the police officer acts in good faith, upon reasonable belief, and does not exercise unreasonable force in effecting such arrest.

§ 709-912. Abuse of family or household members; penalty.

(1) A person commits the offense of abuse of family or household members if the person intentionally, knowingly, or recklessly physically abuses a family or household member.
(2) A person who commits the offense of abuse of a family or household member shall be sentenced as follows:
    (a) For a first offense, to a one-year term of probation with a mandatory condition of imprisonment of not less than forty-eight hours and not more than thirty days; and
    (b) For any subsequent offense which occurs within five years of a previous offense which resulted in a conviction under this section, to a one-year term of probation with a mandatory condition of imprisonment of not less than thirty days and not more than one year.
(3) Whenever a court sentences a person pursuant to subsection (2), it shall also require that the offender undergo any available domestic violence treatment and appropriate program(s) ordered by the court. The court may suspend any portion of the term of imprisonment imposed, except for the required minimum period of imprisonment under subsection 2(a) and (b) upon the condition that the defendant remain conviction-free and complete any court-ordered treatment and

counseling. Upon a finding of good cause, the court may grant early discharge from probation.

(4) If a person is ordered by the court to undergo any treatment or counseling, that person shall provide adequate proof of compliance with the court's order. The court shall order a subsequent hearing at which the person is required to make an appearance, on a date certain, to determine whether the person has completed the ordered treatment. The court may waive the subsequent hearing and appearance where a court officer has established that the person has completed the treatment ordered by the court.

§ 709-913. Safety order; refusal to comply; penalty.

(1) Any police officer, with or without a warrant, may take the following course of action where the officer has reasonable grounds to believe that there was recent physical abuse inflicted by one person upon a family or household member, whether or not such physical abuse occurred in the officer's presence:

(a) The police officer may make reasonable inquiry of the family or household member upon whom the officer believes recent physical abuse has been inflicted, and of other witnesses as there may be;

(b) Where the police officer has reasonable grounds to believe that there is probable danger of further physical abuse being inflicted by one person upon a family or household member, the police officer may lawfully order the person to leave the premises for a period of twenty-four hours; provided that the person is allowed to enter the premises with police escort to collect any necessary personal effects;

(c) Where the police officer makes the finding referred to in (b) and the incident occurs after 12:00 p.m. on any Friday, or on any Saturday, Sunday, or legal holiday, the order to leave the premises shall commence immediately and be in full force but the twenty-four hour period shall be enlarged and extended until 4:30 p.m. on the first day following the weekend or legal holiday;

(d) All persons who are ordered to leave as stated above shall be given a written warning citation stating the date, time, and location of the warning and stating the penalties for violating the warning. A copy of the warning citation shall be retained by the police officer and attached to a written report which shall be submitted in all cases. A third copy of the warning citation shall be given to the abused person; and

(e) If the person so ordered refuses to comply with the order to leave the premises or returns to the premises before the expiration of the safety period, the person shall be placed under arrest.

(2) A person commits the offense of refusal to comply with a safety order when the person refuses to comply with the lawful order of a police officer under this section. The person shall be sentenced as follows:
   (a) For any offense not preceded within a one-year period by a conviction under this section, to a one-year term of probation with a mandatory condition of imprisonment of not less than forty-eight hours and not more than thirty days; and
   (b) For any subsequent offense which occurs within one year of a previous conviction under this section, to a one-year term of probation with a mandatory condition of imprisonment of not less than thirty days, and not more than one year.

(3) Whenever a court sentences a person pursuant to subsection (2), it shall also require that the offender undergo any available domestic violence treatment and appropriate program(s) ordered by the court. The court may suspend any portion of the term of imprisonment imposed, except for the required mandatory minimum period of imprisonment under subsection (2)(a) and (b), upon the condition that the defendant not engage in conduct that would constitute an offense under this part and complete any court-ordered treatment and counseling. Upon a finding of good cause, the court may grant early discharge from probation.

(4) An offender shall provide adequate proof of compliance with any order of the court entered pursuant to subsection (3). The court shall order a subsequent hearing at which the person is required to make an appearance, on a date certain, to determine whether the person has completed the ordered treatment. The court may waive the subsequent hearing and appearance where a court officer has established that the person has completed the treatment ordered by the court.

§ 709-914. Rights of the family or household member.

(1) A family or household member who alleges physical abuse by another person may petition the family court, with the assistance of the prosecuting attorney of the applicable county, for a penal summons or arrest warrant to issue forthwith, or may file a criminal complaint through the prosecuting attorney of the applicable county.

(2) When the respondent is taken into custody pursuant to an arrest warrant, the respondent shall be brought before the family court at the first possible opportunity. The court may then dismiss the petition or hold the respondent in custody subject to bail. Where the petition is not dismissed, a hearing shall be set.

(3) This section shall not operate as a bar against prosecution under any other section of this Code in lieu of prosecution under this part.

(4) It shall be the duty of the prosecuting attorney of the applicable county to assist any complainant under this section in the preparation of the penal summons or arrest warrant.

(5) This section shall not preclude the physically abused family or household member from pursuing any other remedy under law or in equity.

§ 709-915. Expungement. If the offense committed under this part is the only crime committed by the defendant for a period of not less than ten years, the person may apply for an order to expunge from all official records all recordation relating to the person's arrest, trial, and finding of guilt.

Appendix B: Committee to Conduct Comprehensive Review of the Hawai'i Penal Code Committee Commentary

Some of the amendments to the household member abuse offense are purely formal, as in the creation of a new Part II, which will heighten the visibility of this law. The proposed definition of "family or household members" in § 709-910, for example, differs in no substantial way from the definition of the same term currently contained in the second paragraph of § 709-906(1). But having a separate definition section, with its own title, has two advantages: (1) It conforms the formulation of this offense to the model used throughout the Hawaii Penal Code; *see e.g.*, §§ 701-118, 703-300, 707-700, 708-800, and 712-1240; and (2) it facilitates recognition and location of this provision by users and researchers, and thus makes the law more accessible. The same can be said of proposed §§ 709-911 (compare existing § 709-906[136] (1), (2), (3), and (7), 709-913 (1)) (compare existing § 709-906 (8), (9), (10), (11), and (12), and 709-915) (compare existing § 709-906 (13)). The expungement provision of proposed § 709-915 requires ten years of abuse-free behavior which represents a doubling of the current period of qualification for expungement.

The significant changes to current law are in proposed §§ 709-912 and 709-913 (2), the punishment provisions for household member abuse and refusal to comply with a police officer's safety order. Current law classifies all instances of these offenses as misdemeanors, even though the mandatory jail sentence for first offenders is only 48 hours. The committee proposes, in §§ 709-912 and 709-913, to specify the punishment for first offenders as "a one-year term of probation with a mandatory condition of imprisonment of not less than forty-eight hours and not more than thirty days." The current mandatory 48 hours of imprisonment is thus retained, the real difference being that the proposal caps the available discretionary imprisonment for first offenders at 30 days, whereas the current misdemeanor classification, *see* § 706-663,[137] envisions possible imprisonment for up to one year. The reasons for the shift from one year to 30 days are (1) that the amendments will have little or no effect on the lengths of sentences actually imposed on first offenders, and (2) the amendment will eliminate the right to jury trial, reduce (if not eliminate) the backlog of household member abuse cases awaiting jury trials, and thus enable the Family Court efficiently to administer the law in this area.

There is no need to retain first-offense household member abuse at the misdemeanor level. Imprisonment sentences in excess of 30 days are extremely rare, bearing in mind that cases involving any substantial degree of bodily injury are prosecuted as assaults under §§ 707-710 or 707-711.[138] Indeed, the committee has learned that 95 percent of the sentences for § 709-906 convictions are for the minimum 48 hours of imprisonment. First

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[136] *See* text of HAW. REV. STAT. § 706-906, *infra* Appendix D.

[137] *See* text of HAW. REV. STAT. § 706-663, *supra* note 24.

[138] *See* text of HAW. REV. STAT. §§ 707-710, 707-711, *infra* Appendix D.

offenders whose abuse does not physically injure their victims do not deserve more than 30 days imprisonment. What counts is the mandatory 48 hours, and the proposal wisely retains this deterrent feature of existing law. The result of this analysis is that the current misdemeanor classification is functionally unnecessary, and therefore offers no benefit to balance the enormous cost occasioned by jury demands and clogged court calendars.

As this comment is written, efforts are being made to reduce the number of household member abuse cases awaiting jury trials in O'ahu's family court, but every week occasions an average of 40 to 50 more jury trial demands. Existing and foreseeable judicial resources are inadequate to adjudicate these cases; in consequence, many cases are dismissed for want of speedy trials, pled to other charges in order to avoid the mandatory 48 hours. Defense counsel cannot be faulted for seeking jury trials in a system that guarantees jury trials. Nor can the Judiciary be faulted for giving priority to murder and other serious felony cases. Nor should the Legislature be faulted if it opts to solve the problem by reclassifying the crime so as to eliminate a penalty — on the books but never employed — that, because of sheer availability, triggers the right to jury trial.

Another key feature of this proposal is the mandatory sentencing of first offenders and repeat offenders to one year of probation, which will facilitate the imposition and completion of the treatment programming that is mandated by §§ 709-912(3) and 709-913(3).

Repeat offender sentencing is unaffected by this proposal, except that a mandatory one-year term of probation is added to the mandatory 30 days imprisonment.

This proposal will encounter opposition, not because of reduction in punishment, but because of fears that the symbolism of an apparent downward reclassification will somehow mark us all as having failed to support the victims of domestic violence. But the proposal is designed to improve the deterrent efficacy of the law by imposing the mandatory 48 hours and discretionary month of imprisonment upon first offenders more swiftly and with more predictability. And it will surely do that. What better way to combat the problem we rightly deplore than with actual punishment administered promptly?

The committee's ch. 709 proposal should be read in connection with its recommendation that a fourth degree assault offense at the petty misdemeanor level, see proposed § 707-712.5, and consisting of the "physical abuse" of another person, be established by the Legislature. The intent is to achieve symmetry between the ordinary assault and household member abuse sections, and thus to avoid even an implication that the code views domestic violence more permissively than other forms of interpersonal assault.

Appendix C: Proposed Amendment to Hawai'i Revised Statutes § 707-712.5

The Committee proposed the following additional provision to bring non-family assaults in line with assaults on family and household members:

§ 707-712.5 Assault in the fourth degree.

(1) A person commits the offense of assault in the fourth degree if the person intentionally, knowingly, or recklessly physically abuses another person.

(2) Assault in the fourth degree is a petty misdemeanor.

Comment:

The intent is to achieve parity between the lowest assault offense and the crimes against household members, see ch. 709, Part II, (proposed). Since there seems to be no good reason to treat either of these groups of victims differently from the other, the proposed fourth degree assault offense parallels the constitutionally "petty" abuse of household member offense, § 709-912 (proposed). The intent is that cases construing "physical abuse" in the ch. 709 context, *e.g.*, *State v. Laborde*, 71 Haw. 53, 781 P.2d 1041 (1989) (dictum that hitting another person constitutes "physical abuse"); *State v. Kameenui*, 69 Haw. 620, 753 P.2d 1250 (1988) (punching in the face and shoving against a wall); *State v. Garcia*, 9 Haw. App. 325, 839 P.2d 530 (1992) (hitting in face), be applicable here as well.

Appendix D: Selected Current Sections of the Hawai`i Revised Statutes

§ 134-7.5 Seizure of firearms in domestic abuse situations; requirements; return of.

(a) Any police officer who has reasonable grounds to believe that a person has recently assaulted or threatened to assault a family or household member may seize all firearms and ammunition that the police officer has reasonable grounds to believe were used or threatened to be used in the commission of the offense. The police officer may seize any firearms or ammunition that are in plain view of the officer or were discovered pursuant to a consensual search, as necessary for the protection of the officer or any family or household member. Firearms seized under this section shall be taken to the appropriate county police department for safekeeping or as evidence.

(b) Upon taking possession of a firearm or ammunition, the officer shall give the owner or person who was in lawful possession of the firearm or ammunition a receipt identifying the firearm or ammunition and indicating where the firearm or ammunition can be recovered.

(c) The officer taking possession of the firearm or ammunition shall notify the person against whom the alleged assault or threatened assault was inflicted of remedies and services available to victims of domestic violence, including the right to apply for a domestic abuse restraining order.

(d) The firearm or ammunition shall be made available to the owner or person who was in lawful possession of the firearm or ammunition within seven working days after the seizure when:
  (1) The firearm or ammunition are not retained for use as evidence;
  (2) The firearm or ammunition are not retained because they are possessed illegally;
  (3) The owner or person who has lawful possession of the firearm or ammunition is not restrained by an order of any court from possessing a firearm or ammunition; and
  (4) No criminal charges are pending against the owner or person who has lawful possession of the firearm or ammunition when a restraining order has already issued.

§ 586-4 Temporary restraining order.

(a) Upon petition to a family court judge, a temporary restraining order may be granted without notice to restrain either or both parties from contacting, threatening, or physically abusing each other, notwithstanding that a complaint for annulment, divorce, or separation has not been filed. The order may be granted to any person who, at the time such order is granted, is a family or household member as defined in section 586-1 or who filed a petition on behalf of a family

or household member. The order shall enjoin the respondent or person to be restrained from performing any combination of the following acts:

(1) Contacting, threatening or physically abusing the petitioner(s);
(2) Contacting, threatening or physically abusing any person(s) residing at the petitioner(s)'s residence;
(3) Telephoning the petitioner(s);
(4) Entering or visiting the petitioner(s)'s residence; or
(5) Contacting, threatening or physically abusing the petitioner(s) at work.

(b) The family court judge may issue the ex parte temporary restraining order orally, if the person being restrained is present in court. The order shall state that there is probable cause to believe that a recent past act or acts of abuse have occurred, or that threats of abuse make it probable that acts of abuse may be imminent. The order shall further state that the temporary restraining order is necessary for the purpose of preventing acts of abuse, or a recurrence of actual domestic abuse, and assuring a period of separation of the parties involved. The order shall describe in reasonable detail the act or acts sought to be restrained. Where necessary, the order may require either or both of the parties involved to leave the premises during the period of the order, and may also restrain the party or parties to whom it is directed from contacting, threatening, or physically abusing the applicant's family or household members. The order shall not only be binding upon the parties to the action, but also upon their officers, agents, servants, employees, attorneys, or any other persons in active concert or participation with them. The order shall enjoin the respondent or person to be restrained from performing any combination of the following acts:

(1) Contacting, threatening or physically abusing the petitioner(s);
(2) Contacting, threatening or physically abusing any person(s) residing at the petitioner(s)'s residence;
(3) Telephoning the petitioner(s);
(4) Entering or visiting the petitioner(s)'s residence; or
(5) Contacting, threatening or physically abusing the petitioner(s) at work.

(c) When a temporary restraining order is granted pursuant to this chapter and the respondent or person to be restrained knows of the order, violation of the restraining order is a misdemeanor. A person convicted under this section shall undergo treatment or counseling at any available domestic violence program as ordered by the court. The court shall additionally sentence a person convicted under this section as follows:

(1) For a first conviction for violation of the temporary restraining order the person shall serve a mandatory minimum jail sentence of forty-eight hours;

(2) For the second and any subsequent conviction for violation of the temporary restraining order the person shall serve a mandatory minimum jail sentence of thirty days.

The court may suspend any jail sentence, except for the mandatory sentences under paragraphs (1) and (2), upon condition that the defendant remain alcohol and drug-free, conviction-free or complete court-ordered assessments or counseling. Nothing in this section shall be construed as limiting the discretion of the judge to impose additional sanctions authorized in sentencing for a misdemeanor.

§ 586-11 Violation of an order for protection.

Whenever an order for protection is granted pursuant to this chapter, a respondent or person to be restrained who knowingly or intentionally violates the order for protection is guilty of a misdemeanor. The court shall sentence a violator to appropriate counseling and shall sentence a person convicted under this section as follows:

(1) For a first conviction for violation of the order for protection:
   (A) That is in the nature of non-domestic abuse, a violator may be sentenced to a jail sentence of forty-eight hours;
   (B) That is in the nature of domestic abuse, a violator shall be sentenced to a mandatory minimum jail sentence of not less than forty-eight hours;

(2) For a second conviction for violation of the order for protection:
   (A) That is in the nature of non-domestic abuse, and occurs after a first conviction for violation of the same order that was in the nature of non-domestic abuse, a violator shall be sentenced to a mandatory minimum jail sentence of not less than forty-eight hours;
   (B) That is in the nature of domestic abuse, and occurs after a first conviction for violation of the same order that was in the nature of domestic abuse, a violator shall be sentenced to a mandatory minimum jail sentence of not less than thirty days;
   (C) That is in the nature of non-domestic abuse, and occurs after a first conviction for violation of the same order that was in the nature of domestic abuse, a violator shall be sentenced to a mandatory minimum jail sentence of not less than forty-eight hours, unless the court, in writing, finds that the violation does not warrant a jail sentence and provides the reasons for its decision;
   (D) That is in the nature of domestic abuse, and occurs after a first conviction for violation of the same order that is in the nature of

non- domestic abuse, a violator shall be sentenced to a mandatory minimum jail sentence of not less than forty-eight hours;

(3) For any subsequent violation that occurs after a second conviction for violation of the same order for protection, the court shall impose a mandatory minimum sentence of not less than thirty days imprisonment.

The court may suspend any jail sentence under subparagraphs (1)(A) and (2)(C), upon appropriate conditions such as that the defendant remain alcohol and drug-free, conviction-free, or complete court-ordered assessments or counseling. Nothing in this section shall be construed as limiting the discretion of the judge to impose additional sanctions authorized in sentencing for a misdemeanor offense. All remedies for the enforcement of judgments shall apply to this chapter.

§ 707-710 Assault in the first degree.

(1) A person commits the offense of assault in the first degree if he intentionally or knowingly causes serious bodily injury to another person.

(2) Assault in the first degree is a class B felony.

§ 707-711 Assault in the second degree.

(1) A person commits the offense of assault in the second degree if:
   (a) The person intentionally or knowingly causes substantial bodily injury to another;
   (b) The person recklessly causes serious bodily injury to another person;
   (c) The person intentionally or knowingly causes bodily injury to a correctional worker, as defined in section 710-1031(2), who is engaged in the performance of duty or who is within a correctional facility;
   (d) The person intentionally or knowingly causes bodily injury to another person with a dangerous instrument; or
   (e) The person intentionally or knowingly causes bodily injury to an educational worker who is engaged in the performance of duty or who is within an educational facility. For the purposes of this section, "educational worker" means any administrator, specialist, counselor, teacher, or employee of the department of education, or a person who is a volunteer in a school program, activity, or function that is established, sanctioned, or approved by the department of education or a person hired by the department of education on a contractual basis and engaged in carrying out an educational function.

(2) Assault in the second degree is a class C felony.

§ 709-906 Abuse of family and household members; penalty.

(1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member, or to refuse compliance with the lawful order of a police officer under subsection (4). The police, in investigating any complaint of abuse of a family or household member may, upon request, transport the abused person to a hospital or safe shelter.

For the purposes of this section, "family or household member" means spouses or former spouses, parents, children, and persons jointly residing or formerly residing in the same dwelling unit.

(2) Any police officer may, with or without a warrant, arrest a person if the officer has reasonable grounds to believe that the person is physically abusing, or has physically abused, a family or household member, and that the person arrested is guilty thereof.

(3) A police officer who has reasonable grounds to believe that the person is physically abusing, or has physically abused, a family or household member shall prepare a written report.

(4) Any police officer, with or without a warrant, may take the following course of action where the officer has reasonable grounds to believe that there was recent physical abuse or harm inflicted by one person upon a family or household member, whether or not such physical abuse or harm occurred in the officer's presence:

(a) The police officer may make reasonable inquiry of the family or household member upon whom the officer believes recent physical abuse or harm has been inflicted and other witnesses as there may be;

(b) Where the police officer has reasonable grounds to believe that there is probable danger of further physical abuse or harm being inflicted by one person upon a family or household member, the police officer may lawfully order the person to leave the premises for a cooling off period of twenty-four hours; provided that the person is allowed to enter the premises with police escort to collect any necessary personal effects;

(c) Where the police officer makes the finding referred to in (b) and the incident occurs after 12:00 p.m. on any Friday, or on any Saturday, Sunday or legal holiday, the order to leave the premises shall commence immediately and be in full force but the twenty-four hour period shall be enlarged and extended until 4:30 p.m. on the first day following the weekend or legal holiday;

(d) All persons who are ordered to leave as stated above shall be given a written warning citation stating the date, time, and location of the warning and stating the penalties for violating the warning. A copy of the warning citation shall be retained by the police officer and attached to a written report which shall be

submitted in all cases. A third copy of the warning citation shall be given to the abused person; and

(e) If the person so ordered refuses to comply with the order to leave the premises or returns to the premises before the expiration of the cooling off period, the person shall be placed under arrest for the purpose of preventing further physical abuse or harm to the family or household member; and

(f) The police officer may seize all firearms and ammunition that the police officer has reasonable grounds to believe were used or threatened to be used in the commission of an offense under this section.

(5) Abuse of a family or household member, and refusal to comply with the lawful order of a police officer under subsection (4) are misdemeanors and the person shall be sentenced as follows:

(a) For the first offense the person shall serve a minimum jail sentence of forty-eight hours; and

(b) For a second offense and any other subsequent offense which occurs within one year of the previous offense the person shall be termed a "repeat offender" and serve a minimum jail sentence of thirty days.

(6) Whenever a court sentences a person pursuant to section 709-906(5), it shall also require that the offender undergo any available domestic violence treatment and counseling programs ordered by the court. However, the court may suspend any portion of a jail sentence, except for the mandatory sentences under section 709-906(5)(a) and (5)(b), upon the condition that the defendant remain arrest-free and conviction-free or complete court ordered counseling.

(7) Any police officer who arrests a person pursuant to this section shall not be subject to any civil or criminal liability; provided that the police officer acts in good faith, upon reasonable belief, and does not exercise unreasonable force in effecting such arrest.

(8) The family or household member who has been physically abused or harmed by another person may petition the family court, with the assistance of the prosecuting attorney of the applicable county, for a penal summons or arrest warrant to issue forthwith, or may file a criminal complaint through the prosecuting attorney of the applicable county.

(9) The respondent shall be taken into custody and brought before the family court at the first possible opportunity. The court may then dismiss the petition or hold the respondent in custody, subject to bail. Where the petition is not dismissed, a hearing shall be set.

(10) This section shall not operate as a bar against prosecution under any other section of this Code in lieu of prosecution for abuse of a family or household member.

(11) It shall be the duty of the prosecuting attorney of the applicable county to assist any victim under this section in the preparation of the penal summons or arrest warrant.

(12) This section shall not preclude the physically abused or harmed family or household member from pursuing any other remedy under law or in equity.

(13) Upon dismissal of such person and discharge of the proceeding against the person under this section, such person, if the offense is the only offense against the other family or household member for a period of not less than five years, may apply for an order to expunge from all official records all recordation relating to the person's arrest, trial, finding of guilt, and dismissal and discharges pursuant to this section. If the court determines, after hearing, that such person was dismissed and the proceedings against the person were discharged and that no other similar offenses were charged against the person for a period of not less than five years, it shall enter such order.

(14) If a person is ordered by the court to undergo any treatment or counseling, that person shall provide adequate proof of compliance with the court's order. The court shall order a subsequent hearing at which the person is required to make an appearance, on a date certain, to determine whether the person has completed the ordered treatment. The court may waive the subsequent hearing and appearance where a court officer has established that the person has completed the treatment ordered by the court.

The Application of the Collateral Order Doctrine to Criminal Appeals in Hawai`i

Michael K. Tanigawa*

I. INTRODUCTION

In Hawai`i, criminal appeals from the circuit courts had, until 1994, been blessed with the attribute of simplicity. The judgment from which an appeal could be taken in criminal cases was simply defined as "[t]he sentence of the court."[1] .It required no more than "the plea, the verdict or findings, . . . the adjudication and sentence" and to be signed by the judge and filed.[2] Any appeal by a defendant taken prior to the imposition of a sentence was an interlocutory appeal governed by section 641-17 of the Hawai'i Revised Statutes and thereby subject to the discretion of the circuit court judge.[3] Under these simple rules governing criminal appeals, practitioners were never driven, as were their civil counterparts, to file multiple notices of appeal out of "fear that the right to appeal will be lost if a notice of appeal is not filed."[4]

The clarity and simplicity of prior practice was lost as a result of *State v. Baranco*.[5] In *Baranco*, the collateral order doctrine allowing appeals after

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[1] HAW. REV. STAT. § 641-11 (1993). It states:

> Any party deeming oneself aggrieved by the judgment of a circuit court in a criminal matter, may appeal to the supreme court, subject to chapter 602 in the manner and within the time provided by the Hawai'i Rules of Appellate Procedure. The sentence of the court in a criminal case shall be the judgment. All appeals, whether heard by the intermediate appellate court or the supreme court, shall be filed with the clerk of the supreme court and shall be subject to one filing fee.

Id.

[2] HAW. R. PENAL P. 32(c)(1).

[3] HAW. REV. STAT. § 641-17 (1993). It reads:

> Upon application made within the time provided by the rules of the supreme court, an appeal in a criminal matter may be allowed to a defendant from the circuit court to the supreme court, subject to chapter 602, from a decision denying a motion to dismiss or from other interlocutory orders, decisions, or judgments, whenever the judge in the judge's discretion may think the same advisable for a more speedy termination of the case. The refusal of the judge to allow an interlocutory appeal to the appellate court shall not be reviewable by any other court.

Id.

[4] *See* Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1995).

[5] 77 Hawai'i 351, 884 P.2d 729 (1994)

final orders, in addition to judgments, was applied to criminal cases.[6] The extension of the collateral order doctrine liberated the appellate process in criminal cases from the statutory requirement of a sentence.[7] In the context of a double jeopardy issue such as that faced in the *Baranco* case, the right to appeal prior to trial allows for review before an error results in prejudice. However, by approving an appeal as the appropriate vehicle for obtaining that review without sentence or the consent of the trial court, the Hawai'i Supreme Court severed the bond between statutory authority and the right to appeal. The recognition of a right to appeal unassociated with any statutory authority places in doubt the necessity of a statutory basis for an appeal and creates the possibility of a previously unrecognized constitutional right to appeal. This article examines the often conflicting decisions of Hawai'i appellate courts on appellate jurisdiction in criminal cases and attempts to reconcile case law, court rules, and the Hawai'i Revised Statutes under a single, coherent justification for criminal appeals.

II. THE STATUTORY JUSTIFICATION FOR APPELLATE JURISDICTION

The Hawai'i Supreme Court has repeatedly held that there is no constitutional right to an appeal.[8] The right to appeal, the manner in which an appeal is taken, and the scope of the appellate courts' jurisdiction are all matters determined by the legislature and defined by statute.[9] By statute, an appeal may be taken by a criminal defendant in one of two ways. Section 641-11 of the Hawai'i Revised Statutes provides for an appeal from a judgment.[10] The term "judgment" is defined as the "sentence of the court."[11] Alternatively, section 641-17 provides for an interlocutory appeal with the permission of the circuit court.[12]

The Hawai'i Supreme Court's strict limitation of appeals to those authorized by statute has long created a sense of certainty in the area of criminal appeals. If a statute did not authorize an appeal, no appeal would be

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[6] *Id.* at 354-55, 884 P.2d at 732-33.

[7] HAW. REV. STAT. § 641-11 (1993). *See supra* note 1.

[8] *See, e.g.*, State v. Ontiveros, 82 Hawai'i 446, 449, 923 P.2d 388, 391 (1996); Raines v. State, 79 Hawai'i 219, 223 n.2, 900 P.2d 1286, 1290 n.2 (1995); State v. Wells, 78 Hawai'i 373, 376, 894 P.2d 70, 73 (1995), *recon. denied* 78 Hawai'i 373, 894 P.2d 70 (1995); Briones v. State, 74 Haw. 442, 460, 848 P.2d 966, 975 (1993); State v. Dannenberg, 74 Haw. 75, 78, 837 P.2d 776, 778 (1992); *see also* Abney v. United States, 431 U.S. 651, 656 (1977); McKane v. Durston, 153 U.S. 684, 687 (1894).

[9] *See* Grattafiori v. State, 79 Hawai'i 10, 13, 897 P.2d 937, 940 (1995) (*citing In re* Tax Appeal of Lower Mapunapuna Tenants Ass'n, 73 Haw. 63, 69, 828 P.2d 263, 266 (1992)).

[10] HAW. REV. STAT. § 641-11 (1993). *See supra* note 1.

[11] *Id.*

[12] HAW. REV. STAT. § 641-17 (1993). *See supra* note 3.

permitted.[13] The importance of a statutory basis for an appeal has been particularly apparent for interlocutory appeals from circuit court orders by defendants. In those cases, the Hawai'i Supreme Court has refused to tolerate any deviation from statutory requirements.[14]

The Hawai'i Supreme Court's insistent demand for a statutory basis for an appeal has compelled it to conclude that no interlocutory appeals are permitted from district court.[15] Under section 641-12 of the Hawai'i Revised Statutes, appeals are allowed from "all final decisions and final judgments of district courts in all criminal matters."[16] The Hawai'i Supreme Court construed the reference in section 641-12 to "final decisions and final judgments" to be exclusive and to preclude appeals from interlocutory decisions.[17] The court further noted that the statute on interlocutory appeals refers only to interlocutory appeals from circuit court and therefore interlocutory appeals are not permitted from district court.[18]

The prosecution has also been strictly limited to appeals allowed by statute.[19] Even if no alternative to an appeal existed for the State to obtain relief, the court has suggested that the statutory restrictions would prevail.[20]

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[13] *See supra* notes 8-9 and accompanying text.

[14] *See* State v. Mohr, 68 Haw. 261, 262, 709 P.2d 981, 982 (1985) (finding no jurisdiction in the absence of a written order allowing the interlocutory appeal); State v. Johnston, 63 Haw. 9, 11, 619 P.2d 1076, 1077 (1980) (holding that it is without jurisdiction to consider an interlocutory appeal from a motion to dismiss indictment unless the appeal is filed pursuant to HAW. REV. STAT. § 641-17).

[15] See *infra* note 18 and accompanying text.

[16] HAW. REV. STAT. § 641-12 (1993). It states, in relevant part:

> Appeals upon the record shall be allowed from all final decisions and final judgments of district courts in all criminal matters. Such appeals may be made to the supreme court, subject to chapter 602 whenever the party appealing shall file notice of the party's appeal within thirty days, or such other time as may be provided by the rules of the court.

Id.

[17] State v. Corpus, 62 Haw. 297, 297, 613 P.2d 362, 362 (1980); State v. Valiani, 57 Haw. 133, 134, 552 P.2d 75, 76 (1976); *see also* State v. Rosa, 51 Haw. 279, 279-80, 458 P.2d 668, 669-70 (1969) (construing prior statutes that denied jurisdiction to hear direct appeals from district court judgments). However, the court's refusal to allow interlocutory appeals from district court fails to give significance to the reference to appeals from "final decisions" as well as "final judgments" in section 641-12 of the Hawai'i Revised Statutes.

[18] *Valiani*, 57 Haw. at 134-35, 552 P.2d at 76; HAW. REV. STAT. § 641-17 (1993).

[19] *See* State v. Wells, 78 Hawai'i 373, 376, 894 P.2d 70, 73 (1995); State v. Lincoln, 72 Haw. 480, 488, 825 P.2d 64, 69 (1992) *recon. denied*, 72 Haw. 616, 829 P.2d 859 (1992), *cert denied*, 506 U.S. 846 (1992); State *ex rel.* Marsland v. Ames, 71 Haw. 304, 306, 788 P.2d 1281, 1283 (1990); State v. Oshiro, 69 Haw. 438, 441, 746 P.2d 568, 570 (1987); State v. Bikle, 60 Haw. 576, 578-79, 592 P.2d 832, 834 (1979); State v. Johnson, 50 Haw. 525, 526, 445 P.2d 36, 37 (1968); State v. Miura, 6 Haw. App. 501, 502, 730 P.2d 917, 919 (1986).

[20] *See State ex rel. Marsland* at 306-07, 788 P.2d at 1283. In *State ex rel. Marsland*, the prosecution sought a writ of mandamus to compel Judge Ames to vacate certain discovery

Based upon the uniformity of the court's requirement of a statutory basis for criminal appeals and the variety of situations in which that requirement has been imposed, the issue of appellate jurisdiction gave the impression of relative calm and certainty. However, disturbances in the quietude of jurisdiction in criminal appeals arose, in spite of the number of cases in which the Hawai'i Supreme Court and the Intermediate Court of Appeals reaffirmed the necessity of a statutory basis for an appeal.

III. THE SEARCH FOR A JUSTIFICATION FOR APPELLATE JURISDICTION IN CRIMINAL CASES INDEPENDENT OF STATUTORY AUTHORITY

The Hawai'i Supreme Court's insistence upon statutory authority for appellate jurisdiction in criminal cases is not without exception. In two instances, court rules purport to create a right of appeal inconsistent with the restrictions of section 641-11 of the Hawai'i Revised Statutes. In addition, a line of decisions developed exceptions to the final judgment rule not apparent in the statute.

A. The Creation of a Right to Appeal by Court Rule

The limitation of appellate courts' jurisdiction by statute is established by the Hawai'i State Constitution and the Hawai'i Revised Statutes. In spite of these limitations, court rules give the appearance of allowing appeals in situations other than those specifically provided for by statute.

The Hawai'i State Constitution limits the jurisdiction of all courts "as provided by law."[21] By statute, the supreme court is authorized to promulgate rules which have the "force and effect of law."[22] However, the court cannot create rules which "abridge, enlarge, or modify" the jurisdiction of the court.[23]

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orders in two misdemeanor cases. *Id.* at 305, 788 P.2d at 1281. Preliminarily, the court considered whether or not the State was entitled to the extraordinary remedy of a writ of mandamus. *Id.* at 306, 788 P.2d at 1283. In reaching its conclusion, the court held that the State could not have appealed the discovery orders under section 641-13 of the Hawai'i Revised Statutes, but the mere fact that no appeal was available did not automatically entitle the State to consideration of its petition for writ of mandamus. *Id.* at 306-07, 788 P.2d at 1283.

[21] HAW. CONST. art. VI, § 1. It reads:

> The judicial power of the State shall be vested in one supreme court, one intermediate appellate court, circuit courts, district courts and in such other courts as the legislature may from time to time establish. The several courts shall have original and appellate jurisdiction as provided by law and shall establish time limits for disposition of cases in accordance with their rules.

Id.

[22] HAW. REV. STAT. § 602-11 (1993).

[23] *Id.* Section 602-11 reads:

In spite of the statutory prohibition against creating jurisdiction by court rule, the court rules recognize appeals in criminal cases from orders other than judgment for post-conviction and pretrial release orders.

Rule 40 of the Hawai'i Rules of Penal Procedure (HRPP) which governs motions for post-conviction relief represents a deviation from reliance upon a statutory basis for an appeal. Under Rule 40, any party may appeal a decision on a Rule 40 post-conviction proceeding.[24] HRPP Rule 40(h) refers to the decision on the motion as a judgment.[25] However, such use of the term "judgment" conflicts with the statutory definition of judgment as the sentence under section 641-11.[26] The numerous appeals from HRPP Rule 40 post-conviction proceedings have not generated any attention to this apparent conflict between the court rule and the statute.[27]

Rule 9(a) of the Hawai'i Rules of Appellate Procedure (HRAP) is not as clear in its creation of jurisdiction by court rule, but seems to suggest the existence of authority to appeal from an order related to pretrial release. Rule 9(a) provides for expedited disposition of "[a]n appeal authorized by law from an order refusing or imposing condition of release . . . ."[28] The note to rule 9 states that prior to the creation of HRAP 9(a), relief was obtained by writ of habeas corpus and by implication suggests that the presence of the rule changes that practice.[29] A direct appeal from a pretrial release order would be

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> The supreme court shall have power to promulgate rules in all civil and criminal cases for all courts relating to process, practices, procedure and appeals, which shall have the force and effect of law. Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant, nor the jurisdiction of any of the courts, nor affect any statute of limitations.
>
> Whenever in a statute it is provided that the statute is applicable "except as otherwise provided," or words to that effect, these words shall be deemed to refer to provisions of the rules of court as well as other statutory provisions.

Id.

[24] HAW. R. PENAL P. 40(h). Rule 40 states: "Any party may appeal to the supreme court from a judgment entered in the proceeding in accordance with Rule 4(b) of the Hawaii Rules of Appellate Procedure." *Id.*

[25] *Id.*

[26] *See supra* note 1.

[27] *See, e.g.*, Grattafiori v. State, 79 Hawai'i 10, 897 P.2d 937 (1995); Raines v. State, 79 Hawai'i 219, 900 P.2d 1286 (1995); Domingo v. State, 76 Hawai'i 237, 873 P.2d 775 (1994); Stanley v. State, 76 Hawai'i 446, 879 P.2d 551 (1994); Cacatian v. State, 70 Haw. 402, 772 P.2d 691 (1989); State v. Mamalias, 69 Haw. 581, 751 P.2d 1029 (1988) (deciding appeals from HRPP Rule 40 petitions without discussion of the jurisdiction of the appellate court).

[28] HAW. R. APP. P. 9(a).

[29] *Id.* "NOTE: Under the practice prior to the promulgation of these rules, such relief in the appellate courts could be obtained only by way of a writ of habeas corpus." *Id. E.g.*, Huihui v. Shimoda, 64 Haw. 527, 644 P.2d 968 (1982) (arising from a petition for writ of habeas corpus from an order denying bail); Sakamoto v. Chang, 56 Haw. 447, 539 P.2d 1197 (1975) (arising from a petition for writ of habeas corpus based upon a claim of excessive bail);

consistent with the federal application of the collateral order doctrine.[30] However, since the effective date of HRAP Rule 9(a) there have been no reported decisions on appeals arising from orders pertaining to pretrial release.

A recent challenge to the use of a bail schedule subsequent to the effective date of HRAP 9(a) was raised in *Pelekai v. White*[31] by means of an application for writ of mandamus or writ of prohibition. In granting the requested relief, the Hawai'i Supreme Court held that the petitioner did not have an "appropriate remedy by way of appeal."[32] The court's conclusion in *Pelekai* that a remedy by appeal did not exist would suggest that HRAP Rule 9(a) does not create a right to appeal and such an appeal is not otherwise permitted by law.

In the absence of a direct discussion by the Hawai'i Supreme Court of the jurisdictional issues raised by appeals from HRPP Rule 40 cases and petitions from pretrial release orders, it is difficult to reach any meaningful conclusion regarding the court's recognition of jurisdiction based upon a court rule. A clearer picture of the expansion of appellate jurisdiction beyond statutory limits can be found in case law unfettered by statute or court rule.

B. Direct Appeal From Orders Transferring Juveniles to Adult Court

The Hawai'i Supreme Court took the first step away from the requirement of a statutory basis for an appeal by requiring direct appeals from orders transferring juveniles to adult court.[33] In *State v. Stanley*,[34] the court determined that a juvenile facing criminal charges as an adult as the result of a waiver order can challenge the waiver order only by direct appeal from that order.[35] Under those circumstances, a defendant cannot wait until after entry of judgment in adult court.[36] In the absence of any statutory basis for the

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Bates v. Hawkins, 52 Haw. 463, 478 P.2d 840 (1970) (arising from a petition for writ of habeas corpus from an order denying bail). *But see* State v. Pokini, 1 Haw. App. 98, 614 P.2d 405 (1980) (interlocutory appeal taken pursuant to section 641-17 of the Hawai'i Revised Statutes).

[30] *See* United States v. Loya, 23 F.3d 1529, 1530 n.1 (9th Cir. 1994); Lee v. Jabe, 989 F.2d 869, 870 (6th Cir. 1993) (denial or grant of bail is appealable under collateral order doctrine).

[31] 75 Haw. 357, 358-59, 861 P.2d 1205, 1206-07 (1993).

[32] *Id.* at 362, 861 P.2d at 1208.

[33] *See infra* notes 34-40 and accompanying text. HAW. REV. STAT. § 571-22 (1993) allows the family court to waive jurisdiction over a child and order the minor to be held for criminal proceedings under certain circumstances. *Id.* If waiver is ordered, the jurisdiction of the family court is terminated as to the minor for that case and any subsequent criminal acts. *Id.* After waiver, jurisdiction over the minor is conferred on the adult court of competent jurisdiction. *Id.*

[34] 60 Haw. 527, 592 P.2d 422 (1979).

[35] *Id.* at 533, 592 P.2d at 426.

[36] *Id.* at 532-33, 592 P.2d at 425-26.

appeal, the court authorized the direct appeal from a waiver order by stating that:

> Upon careful reconsideration of this entire problem, however, we are convinced that, absent legislative resolution, this issue can and should be resolved by this Court in favor of a requirement of direct appeal from a family court order waiving jurisdiction.[37]

Rather than a statutory basis for the appeal,[38] the court relied upon "sound practical consideration"[39] such as "the burden of an unnecessary trial on the accused" and judicial economy.[40] One year after the *Stanley* decision, the legislature enacted section 571-22.5 which repudiated *Stanley* and required that appeals from waiver orders be delayed until after judgment.[41]

C. A Reinterpretation of Judgment

The following year, the Hawai'i Supreme Court took another step away from the constraints of the requirement of statutory authority for criminal appeals. In *State v. Johnston*,[42] a defendant filed an appeal from an order denying the defendant's motion to dismiss indictment without complying with the requirements of an interlocutory appeal under section 641-17 of the Hawai'i Revised Statutes.[43] The court held that the denial of the motion to dismiss was an interlocutory order and therefore an appeal could not be taken as an appeal from judgment under section 641-11.[44] In reaching that conclusion, the court quoted the statutory definition of judgment which states

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[37] *Id.* at 531, 592 P.2d at 425.

[38] While the court in *Stanley* did not rely upon the collateral order doctrine to justify its decision, subsequent federal cases have applied the collateral order doctrine to juvenile transfer orders. *See, e.g.*, United States v. Bilbo, 19 F.3d 912, 914 (5th Cir. 1994); United States v. Gerald N., 900 F.2d 189, 189-90 (9th Cir. 1990); *In re* Sealed Case, 893 F.2d 363, 366-68 (D.C. Cir. 1990); United States v. A.W.J., 804 F.2d 492, 492-93 (8th Cir. 1986); United States v. C.G., 736 F.2d 1474, 1476-77 (11th Cir. 1984).

[39] "[S]ound practical considerations demand that a juvenile court finding of unfitness and certification [waiver] order should not be reviewed on appeal from a criminal judgment of conviction." *Stanley* at 532, 592 P.2d at 425 (quoting People v. Chi Ko Wong, 557 P.2d 976, 985 (Cal. 1976)).

[40] *Stanley*, 60 Haw. at 532, 592 P.2d at 425 (citing People v. Chi Ko Wong, 557 P.2d at 986).

[41] HAW. REV. STAT. § 571-22.5 (1993). It states, in part, "[a]n order waiving jurisdiction shall not be appealable as a final order, but may only be appealable in conjunction with an appeal of all other issues after a trial on the charge against such minor or adult." *Id.*

[42] 63 Haw. 9, 619 P.2d 1076 (1980).

[43] *Id.* at 9-10, 619 P.2d at 1076.

[44] *Id.* at 11, 619 P.2d at 1077.

that "the sentence of the court in a criminal case shall be the judgment."[45] However, in the very next paragraph, the court held that the appeal was not proper because the order was not "a final order or judgment."[46] The court provided no explanation as to the relevancy of "a final order" to the determination of the propriety of an appeal in a criminal case.

The language in *Johnston* referring to a final order was used in *State v. Ui*[47] to create doubt that a judgment in a criminal case meant the sentence for the purposes of appellate jurisdiction.[48] According to the Hawai'i Supreme Court:

> *Johnston* did not definitively rule that an appeal under HRS § 641-11 must be from a sentence in a criminal case. It could be read to imply an appeal may also be brought from an order deemed to be final. An order awarding attorneys fees under the Criminal Justice Act to counsel appointed for indigent defendants has been ruled as being a final order within the meaning of *Cohen v. Beneficial Industrial Loan Corp.*. Thus, the viability of this appeal may depend in part upon whether the judgment appealed from must be a sentence; however, since we conclude appellant lacks standing to bring this appeal, we do not need to decide this issue.[49]

The *Johnston* decision made the definition of judgment as used in section 641-11 an open question in spite of the unequivocal statutory definition of judgment as the sentence of the court.

The stage was set for *Baranco* by a series of decisions by the appellate courts relating to the payment or waiver of costs and attorneys' fees for indigent criminal defendants. The series began with *Re Edward J. Carvelo*.[50] At issue in that case were the procedures for obtaining review of a criminal conviction *in forma pauperis*.[51] At that time, review of criminal convictions was obtained by a bill of exceptions or writ of error.[52] Although the matter in *Carvelo* was an original proceeding, the court referred to petitioner's counsel on the petition as appellate counsel in order "to distinguish him from petitioner's counsel at the trial . . ."[53] The court also dispensed with the distinction between a petition for writ of error and appellate review in the following statement: "[W]e shall use the word 'appeal' to mean appellate review by writ of error, for such obviously is the sense in which appellate counsel has used it in the briefs filed on petitioner's behalf and at the oral

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[45] *Id.* (quoting HAW. REV. STAT. § 641-11(1993)).

[46] *Id.* (citations omitted).

[47] 66 Haw. 366, 663 P.2d 630 (1983).

[48] *Id.* at 369, 663 P.2d at 632.

[49] *Id.* (citations omitted).

[50] 44 Haw. 31, 352 P.2d 616 (1959).

[51] *Re* Edward J. Carvelo, 44 Haw. at 35, 352 P.2d at 622.

[52] *Id.* at 34, 352 P.2d at 621.

[53] *Id.*

argument."[54] By treating both the Petition of Edward J. Carvelo and the writ of error petitioner intended to file if he prevailed on the petition as if they were appeals, the court made the distinction between original proceedings and appellate review seem unimportant.[55] The court's failure to preserve the distinction between an appeal and a petition for a writ would later serve as a justification for recognizing a right to appeal under similar circumstances.[56]

Twelve years later, the Hawai`i Supreme Court in *State v. Pence*,[57] relying upon *Re Edward J. Carvelo*, did not question the use of an appeal as the proper vehicle for challenging an order denying a motion for leave to appeal *in forma pauperis*.[58] In *Pence*, the defendant filed a notice of appeal from a criminal conviction and made a request to proceed on the appeal *in forma pauperis*.[59] The court denied the request to proceed *in forma pauperis* and the appellant filed a notice of appeal from that order.[60] Citing to *Re Edward J. Carvelo*, the court simply held that "[a] circuit court order denying a motion for leave to appeal *in forma pauperis* upon such certification is reviewable by this court."[61] No statutory basis for the appeal was identified by the court.

The third case of the series was the first to actually use the collateral order doctrine as a justification for an appeal from an order in a criminal case. In *State v. Przeradzki*,[62] the court-appointed private attorney for defendant Przeradzki filed an appeal from an order of the court authorizing less than the amount requested by counsel for attorney's fees.[63] In concluding that an appeal from the order regarding attorney's fees was proper, the Intermediate Court of Appeals held that "an order awarding attorney fees under HRS § 802-5 is 'a final order within the meaning of *Cohen v. Beneficial Industrial Loan Corp.*'"[64] Although the court never mentioned the collateral order doctrine, the *Cohen* case cited by the court is the seminal case in the creation of the collateral order doctrine.[65] The adoption of the collateral order doctrine and its extension to criminal cases in Hawai`i was thereby accomplished by the Intermediate Court of Appeals simply by reference to *Cohen*.[66]

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[54] *Id.*

[55] *Id.*

[56] *See* State v. Pence, 53 Haw. 157, 488 P.2d 1177 (1971).

[57] *Id.*

[58] *Id.* at 158, 488 P.2d at 1178.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 159, 488 P.2d at 1178.

[62] 6 Haw. App. 20, 709 P.2d 105 (1985).

[63] *Przeradzki*, 6 Haw. App. at 21, 709 P.2d at 107.

[64] *Id.* at 21, 709 P.2d at 107 (quoting State v. Ui, 66 Haw. at 369, 663 P.2d at 632).

[65] "The collateral order exception was initially announced in *Cohen v. Beneficial Indus. Loan Corp.*." *State v. Baranco*, 77 Hawai`i 351, 353, 884 P.2d 729, 731 (1994).

[66] *See Przeradzki*, 6 Haw. App. at 21, 709 P.2d at 107.

In 1994, the Hawai'i Supreme Court explicitly applied the collateral order doctrine to criminal cases in *State v. Baranco*.[67] In *Baranco*, the defendants filed a motion to dismiss an indictment following a mistrial and before commencement of the retrial.[68] The defendants argued that a retrial would violate the prohibition against double jeopardy.[69] The motion to dismiss was denied and the defendants moved pursuant to section 641-17 of the Hawai'i Revised Statutes for permission to file an interlocutory appeal.[70] The circuit court denied the request.[71] The defendants persevered and filed a notice of appeal.[72] The State filed a motion to dismiss the appeal on the grounds that the Hawai'i Supreme Court lacked jurisdiction.[73] The court denied the State's motion and a subsequently filed motion for reconsideration.[74]

As with the Intermediate Court of Appeals in *Przeradzki*, the Hawai'i Supreme Court relied upon United States Supreme Court precedent in finding that a right of appeal existed from a final order.[75] In *Baranco*, the court relied upon the Supreme Court's decision in *Abney v. United States*.[76] The Hawai'i Supreme Court stated:

> [W]e adopt the *Abney* rationale and hold that the collateral order exception to the final judgment rule permits an interlocutory appeal of an order denying a pretrial motion to dismiss an indictment on double jeopardy grounds.[77]

Thus, based upon United States Supreme Court precedent, the Hawai'i Supreme Court adopted a policy of accepting interlocutory appeals in criminal cases contrary to the requirements of the statutory provision governing interlocutory appeals.[78] The Hawai'i Supreme Court explained that:

> While we generally require the trial court's permission before bringing an interlocutory appeal, we have held that such permission is not necessary

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[67] 77 Hawai'i at 354-55, 884 P.2d at 732-33.

[68] *Id.* at 352, 884 P.2d at 730.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* at 352-53, 884 P.2d at 730-31.

[74] *Id.* at 353, 884 P.2d at 731.

[75] *See id.*

[76] *See id.* In Abney v. United States, the defendants moved to dismiss the indictment on grounds that it violated the prohibition against double jeopardy. 431 U.S. 651, 655 (1977). The motion was denied and the denial affirmed in the circuit court of appeals. *Id.* The United States Supreme Court held that the denial of a motion to dismiss based upon a double jeopardy violation was a final decision that was immediately appealable. *Id.* at 662.

[77] *Baranco*, 77 Hawai'i at 354-55, 884 P.2d at 732-33.

[78] *Id.*; HAW. REV. STAT. § 641-17 (1993).

> where the trial court denies a pretrial motion to dismiss an indictment on double jeopardy grounds.[79]

This departure from the requirement of a statutory basis for an appeal is not as clearly supported by U.S. Supreme Court precedent as either *Przeradzki* or *Baranco* suggest.

IV. THE BASIS OF THE UNITED STATES SUPREME COURT'S COLLATERAL ORDER DOCTRINE

The U.S. Supreme Court decisions establishing the collateral order doctrine and the rationale which extended the rule to criminal appeals are based upon a single interpretation of the term "final order." Appeals from a federal district court are governed by title 28, section 1291 of the United States Code which states:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all *final decisions* of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.[80]

It is the interpretation of the phrase "final decisions" in section 1291 that forms the basis for the collateral order doctrine.[81]

In *Cohen v. Beneficial Industrial Loan Corporation*,[82] the United States Supreme Court interpreted section 1291 to allow appeals from decisions short of final judgment "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[83] The recognition of a right to appeal from a decision other than judgment and independent of the specifically authorized instances of interlocutory appeal contained in title 28, section 1292 of the United States Code, was based upon the language of section 1291.[84] Because the statute refers to final decisions rather than judgments, the Court reasoned that judgments were not the only decisions

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[79] State v. Minn, 79 Hawai'i 461, 464, 903 P.2d 1282, 1285 (1995).

[80] 28 U.S.C. § 1291 (1982) (emphasis added).

[81] Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545 (1949).

[82] *Id.*

[83] *Id.* at 546.

[84] *Id.* at 545.

from which an appeal could be taken.[85] "It is obvious that, if Congress had allowed appeals only from those final judgments which terminate an action, this order would not be appealable."[86]

In *Abney v. United States*,[87] the Court extended the collateral order doctrine created in *Cohen* to criminal cases.[88] The Court held that the denial of a motion to dismiss based upon double jeopardy satisfied the *Cohen* criteria as a collateral order and was therefore appealable.[89] The Court made it clear that its decision in *Abney* was based upon the statutory interpretation set forth in *Cohen*.[90] At the very outset of the Court's discussion, the Court emphasized that there was no constitutional right to appeal in criminal cases.[91] The Court held that "[t]he right of appeal, as we presently know it in criminal cases, is purely a creature of statute; in order to exercise that statutory right of appeal one must come within the terms of the applicable statute in this case, 28 U.S.C. § 1291."[92] Because both criminal and civil appeals from a federal district court are governed by section 1291 the Court in *Abney* had no difficulty in transferring the *Cohen* interpretation of "final decision" from civil appeals to criminal appeals.[93]

The creation of the collateral order doctrine based upon an interpretation of, section 1291 was subsequently approved by Congress with the enactment of 28 U.S.C. § 2072.[94] Section 2072 states that rules promulgated by the Supreme Court "may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title"[95] leaving little doubt as to the firm statutory basis for the decisions in *Cohen* and *Abney*.

V. The Uneasy Transfer of the Collateral Order Doctrine to Criminal Appeals in Hawai'i

The smooth transition of the collateral order doctrine from civil appeals to criminal appeals under federal law cannot be duplicated in Hawai'i. Unlike the federal system which governs the right to appeal whether civil or criminal

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[85] *Id.* at 545.
[86] *Id.*
[87] 431 U.S. 651 (1977).
[88] *Id.* at 659 n.4.
[89] *Id.* at 659.
[90] *Id.* at 659 n.4.
[91] *Id.* at 656.
[92] *Id.*
[93] *See id.* at 659 n.4.
[94] 28 U.S.C. § 2072 (1988).
[95] *Id.* § 2072(c).

by a single statute, Hawai'i relies upon two separate statutes that are entirely different.[96]

In civil cases, section 641-1(a) of the Hawai'i Revised Statutes allows appeals "from all final judgments, orders, or decrees . . ."[97] The statutory reference to orders and decrees in addition to judgments has allowed the Hawai'i Supreme Court to apply the *Cohen* interpretation of "final orders" to section 641-1(a).[98] Even with the clear statutory basis for appellate jurisdiction over final orders, the Hawai'i Supreme Court has felt compelled to "construe the collateral order doctrine narrowly and be parsimonious in its application."[99]

The court's hesitancy to broadly apply the collateral order doctrine in civil cases did not deter it from broadening the scope of the doctrine to include criminal cases.[100] But while the application of the doctrine in civil cases might be clearly supported by statutory construction, no such basis exists in the context of criminal appeals.

Criminal appeals from the circuit court in Hawai'i are governed by section 641-11 of the Hawai'i Revised Statutes.[101] Section 641-11 allows an appeal by a party "aggrieved by the judgment of a circuit court."[102] The "judgment" is defined as "the sentence of the court."[103] No reference is made by section 641-11 to final orders or decrees. The absence of any reference to decisions other than judgments in section 641-11 is particularly striking when contrasted with the language of section 641-12 relating to appeals in criminal cases from district court. In section 641-12, appeals from the district court in criminal cases are allowed from "all final decisions and final judgments."[104] The explicit reference to final decisions as the basis for appeals from district

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[96] Section 641-1 of the Hawai'i Revised Statutes governs civil appeals while section 641-11 governs criminal appeals from circuit court. HAW. REV. STAT. §§ 641-1, 641-11 (1993).

[97] HAW. REV. STAT. § 641-1(a)(1993).

[98] *See, e.g.*, TBS Pacific, Inc. v. Tamura, 5 Haw. App. 222, 225, 686 P.2d 37, 42 (1984) (specifically connecting the collateral order doctrine with the interpretation of "final decision" in section 641-1(a) (1979) of the Hawai'i Revised Statutes).

[99] Siangco v. Kasadate, 77 Hawai'i 157, 162, 883 P.2d 78, 83 (1994).

[100] State v. Baranco, 77 Hawai'i 351, 354-55, 884 P.2d 729, 732-33 (1994).

[101] *See supra* note 1.

[102] HAW. REV. STAT. § 641-11 (1993).

[103] *Id*; *see also* State v. Johnston, 63 Haw. 9, 11, 619 P.2d 1076, 1077 (1980); State v. Bikle, 60 Haw. 576, 580, 592 P.2d 832, 834 (1979); State v. Ferreira, 54 Haw. 485, 487, 510 P.2d 88, 89 (1973).

[104] HAW. REV. STAT. § 641-12 (1993). However, "judgment" has been defined the same for purposes of sections 641-11 and 641-12 of the Hawai'i Revised Statutes. State v. Masaniai, 7 Haw. App. 586, 588, 788 P.2d 176, 177 (1990).

court suggests that the absence of such reference in the statute allowing criminal appeals from circuit court was both intentional and significant.[105]

The statutory limitation of criminal appeals from circuit court to appeals from judgments was not addressed by the Hawai'i Supreme Court when it extended the collateral order doctrine to criminal appeals.[106] While recognizing that the Supreme Court decision in *Abney* was based upon a statute, the Hawai'i Supreme Court failed to explain the statutory basis for the doctrine under Hawai'i law.[107] The court in *Baranco* focused instead upon the nature of the right protected by the double jeopardy clause as the justification for the appeal.[108] The court held that:

> We agree that "if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his [or her] double jeopardy claim must be reviewable before that subsequent exposure occurs." Therefore, we adopt the *Abney* rationale and hold that the collateral order exception to the final judgment rule permits an interlocutory appeal of an order denying a pretrial motion to dismiss an indictment on double jeopardy grounds.[109]

The Hawai'i court's adoption of the *Abney* rationale was therefore limited to the need of double jeopardy protection for immediate review. By adopting the

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[105] This conclusion is consistent with the following rule of statutory construction:

> It is a cardinal rule of statutory construction that courts are bound to give effect to all parts of a statute and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute.

State v. Ortiz, 74 Haw. 343, 351-352, 845 P.2d 547, 551-552 (1993); *see also* Franks v. City and County, 74 Haw. 329, 339, 843 P.2d 668, 673 (1993); State v. Wallace, 71 Haw. 591, 594, 801 P.2d 27, 29 (1990); Camara v. Agsalud, 67 Haw. 212, 215-16, 685 P.2d 794, 797 (1984).

[106] *See* State v. Baranco, 77 Hawai'i 351, 884 P.2d 729 (1994).

[107] *See id.* The Hawai'i Supreme Court's only discussion of the statutory basis of the collateral order doctrine was in the following footnote:

> Because of the statutory basis for the United States Supreme Court's decision in *Abney*, several state courts have determined that *Abney* does not promulgate a federal constitutional requirement of immediate review of a pretrial motion that raises a double jeopardy claim. *See* Burleson v. State, 552 So.2d 186 (Ala. Crim. App.1989); State v. Joseph, 92 N.C.App. 203, 374 S.E.2d 132 (1988), cert. denied, 324 N.C. 115, 377 S.E.2d 241 (1989); State v. Miller, 289 S.C. 426, 346 S.E.2d 705 (1986). Cf. People ex rel. Mosley v. Carey, 74 Ill.2d 527, 25 Ill.Dec. 669, 387 N.E.2d 325, cert. denied sub nom. Mosley v. Illinois, 444 U.S. 940, 100 S.Ct. 292, 62 L.Ed.2d 306 (1979) (holding that Abney was not binding, but stating that a criminal defendant who raises a meritorious double jeopardy claim may file a motion for leave to file an original petition for writ of prohibition, mandamus, or habeas corpus, as appropriate).

Id. at 354 n.4, 884 P.2d at 732 n.4.

[108] *Id.*

[109] *Id.* at 354-55, 884 P.2d at 732-33 (citation omitted).

result, the court avoided resolving the underlying problem which is that Hawai'i does not have a statute authorizing criminal appeals from any decision other than judgments.[110]

If the decision in *Baranco* were a complete adoption of the collateral order rule as defined by *Cohen* and *Abney*, and thus reliant upon statutory construction, the court would be required to construe section 641-11 the Hawai'i Revised Statutes as allowing appeals in criminal cases from final decisions in addition to judgments. In order to reach that conclusion under Hawai'i law, the court would be compelled to interpret "[t]he sentence of the court in a criminal case shall be the judgment"[111] to mean that decisions other than a sentence may constitute a judgment. While the possibility of such a transmogrification was left open by *State v. Ui*,[112] *Baranco* gave no indication that it had adopted such an interpretation or even that a reinterpretation of section 641-11 was necessary.[113] Instead, *Baranco* held that in order for constitutional prohibition against double jeopardy to be effectively preserved, there must be available immediate review.[114] This reliance upon the nature of the double jeopardy protection as the justification for permitting the appeal suggests that the right to appeal arose from the double jeopardy clause of the Hawai'i State Constitution rather than section 641-11 of the Hawai'i Revised Statutes.[115]

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[110] In a case decided subsequent to *Baranco*, State v. Ontiveros, 82 Hawai'i 446, 923 P.2d 388 (1996) involving the application of the collateral order doctrine to a case involving the double punishment aspect of the double jeopardy clause, the Hawai'i Supreme Court entitled a section of its opinion "Statutory basis for appellate jurisdiction" but still failed to identify the statutory basis for the application of the collateral order doctrine to criminal cases in Hawai'i.

[111] HAW. REV. STAT. § 641-11 (1993).

[112] 66 Haw. 366, 369, 663 P.2d 630, 632 (1983). In *Ui*, the court held that in spite of the plain language of section 641-11 of the Hawai'i Revised Statutes, it was still unclear as to whether or not "an appeal may only be had from a sentence of the circuit court" under that statutory section. *Id.*

[113] *See Baranco*, 77 Hawai'i at 353, 884 P.2d at 731. In *Baranco*, the court never refers to HAW. REV. STAT. § 641-11 (1989) except in its characterization of the defendant's argument. *See id.* The issue of a statutory basis is even further confused by the court's characterization of an appeal from the denial of a motion to dismiss based upon double jeopardy as an "interlocutory appeal." *See id.* at 354 n.4, 884 P.2d at 732 n.4. As an interlocutory appeal, the defendant would have had to obtain the circuit court's permission to take the appeal and the refusal to grant such permission would be unreviewable. *See* HAW. REV. STAT. § 641-17 (1993). In fact the defendant in *Baranco* had attempted to obtain such permission and failed. *Baranco*, 77 Hawai'i at 352, 884 P.2d at 730.

[114] *Baranco*, 77 Hawai'i at 354, 884 P.2d at 732.

[115] The court's failure to address section 641-11 of the Hawai'i Revised Statutes may be due to the court's mischaracterization of the U.S. Supreme Court's application of the collateral order doctrine to criminal cases in *Abney* as an "exception to the final judgment rule" rather than as an interpretation of the phrase "final decision" contained in title 28, section 1291 of the United States Code. *See Baranco*, 77 Hawai'i at 335, 884 P.2d at 733. In *Abney*, the Court referred

VI. AN ALTERNATIVE BASIS FOR THE RIGHT TO APPEAL COLLATERAL ORDERS IN CRIMINAL CASES

The application of the collateral order doctrine to criminal appeals in Hawai'i is impaired by an unaccommodating statute[116] and a history of inconsistent case authority[117] over the basis for the right to appeal. The challenge then is to achieve the intent of *Baranco* to provide a timely remedy for double jeopardy cases in a manner consistent with the Hawai'i Revised Statutes and consonant with existing case law. Hopefully such a challenge can be met without disrupting the relative certainty of when to take an appeal in criminal cases.

Preliminarily, any attempt to fit the collateral order doctrine within section 641-11 of the Hawai'i Revised Statutes[118] should be abandoned. Contrary to the suggestion of *State v. Ui* that an order other than a sentence might constitute a judgment under section 641-11,[119] the plain and apparent meaning of section 641-11 should be preserved and no attempt should be made to force the collateral order doctrine into the limitations of section 641-11.[120]

Since appellate jurisdiction may be based upon either a "constitutional or statutory provision,"[121] the double jeopardy clause provides as suitable a basis for appellate jurisdiction as section 641-11. Reliance upon the constitutional provision itself as authority for the appeal is consistent with the analysis in *Baranco* which focused on the requirements of the protection as the justification for entertaining the interlocutory appeal.[122]

Rejection of the applicability of section 641-11 and recognition that double jeopardy issues require review prior to the second trial would trigger the application of section 602-4.[123] In the absence of any other remedy, section

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to the collateral order doctrine as the "*so-called* 'collateral order' exception to the final-judgment rule . . ." *Abney*, 431 U.S. at 657 (emphasis added).

[116] *See* HAW. REV. STAT. § 641-11 (1993).

[117] *See supra* Section III.

[118] *See supra* note 1.

[119] *See* State v. Ui, 66 Haw. 366, 369, 663 P.2d 630, 632 (1983).

[120] Rather than the court impose an absurd interpretation on the present language of section 641-11 of the Hawai'i Revised Statutes, the legislature should amend section 641-11 to include final orders. There is no apparent justification for allowing an appeal from final orders of the district court in criminal cases while precluding such appeals from circuit court.

[121] Grattafiori v. State, 79 Hawai'i 10, 13, 897 P.2d 937, 940 (1995); State v. Dannenberg, 74 Haw. 75, 78, 837 P.2d 776, 778 (1992).

[122] *See* State v. Baranco, 77 Hawai'i 351, 354-55, 884 P.2d 729, 732-33 (1994).

[123] HAW. REV. STAT. § 602-4 (1993). It states: "Superintendence of inferior courts. The supreme court shall have the general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by

602-4[124] empowers the Hawai'i Supreme Court to act to prevent inferior courts from committing "errors and abuses."[125] Use of the supervisory powers of the court under section 602-4 rather than section 641-11 as the statutory basis for the interlocutory appeal of double jeopardy issues circumvents the need for a tortured interpretation of section 641-11.

The application of the supervisory powers provision as a statutory basis for an appeal would also provide a consistent statutory basis for other instances in which appeals have been authorized in criminal cases independent of section 641-11. In the cases of juvenile waivers and pretrial release orders, an appeal from judgment does not provide an adequate remedy and therefore section 602-4 authorizes the supreme court to create the remedy.[126] The implementation of section 602-4 in each of these instances would create a logical basis for this selected class of interlocutory appeals[127] consistent with case law prior to *Baranco* and the Hawai'i Revised Statutes.

Reliance upon section 602-4 rather than the collateral order doctrine would conflict with *Baranco* only to the extent that *Baranco* explicitly adopted the *Abney* rationale and applied the collateral order doctrine to criminal cases.[128] However, in spite of the conflict, the intent of *Baranco* to provide a timely review of double jeopardy issues would still be fulfilled without the irreconcilable conflict with section 641-11 or the uncertainty accompanying the collateral order doctrine as it is applied in civil cases.

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law." *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] The court has also given some indication of its intent to apply the collateral order doctrine in criminal cases beyond the double jeopardy clause, but has not yet issued a published opinion firmly establishing that intent. In the Order of Dismissal in *State v. Aloha Bail Bond*, No. 18768 (Haw. May 8, 1995), the court held that a "judgment of bail forfeiture is a collateral judgment that was immediately appealable under the collateral order doctrine" and therefore an appeal must be taken within thirty days of that order. *Id.* Section 804-51 of the Hawai'i Revised Statutes refers to the forfeiture of bond as a "judgment" and provides for an appeal from an order overruling a motion to prevent execution of that judgment filed by a surety. *See* HAW. REV. STAT. § 804-51 (1993). The Hawai'i Supreme Court has preliminarily accepted jurisdiction on an appeal from an order authorizing involuntary medication in State v. Kotis.

[128] *See Baranco*, 77 Hawai'i at 354-55, 884 P.2d at 732-33. The Hawai'i Supreme Court stated, "[t]herefore, we adopt the *Abney* rationale and hold that the collateral order exception to the final judgment rule permits an interlocutory appeal of an order denying a pretrial motion to dismiss an indictment on double jeopardy grounds." *Id.*

VII. THE FUTURE OF APPEALS FROM COLLATERAL ORDERS IN CRIMINAL CASES

Any application of the collateral order doctrine in criminal cases beyond the double jeopardy cases will unavoidably create confusion as to what orders must be appealed immediately in order to avoid the risk of waiver of a right to appeal due to the failure to correctly identify a collateral order.[129] A broad application of the collateral order doctrine in criminal cases would inject into criminal appeals the kind of uncertainty generated by the collateral order doctrine in civil appeals. An example of the confusion can be found in *Excelsior Lodge Number One, Independent Order of Odd Fellows v. Eyecor, Ltd.*[130] In that case, Defendant Eyecor, Ltd. filed a notice of appeal from an order based upon section 658-3[131] relating to an arbitration agreement after thirty days had elapsed.[132] The appeal was dismissed as untimely.[133] After judgment, Defendant Eyecor, Ltd. filed a timely notice of appeal again identifying the section 658-3 order as error.[134] The court held "that a reviewing court shall not consider an unappealed section 658-3 order compelling arbitration on an appeal from a final judgment in the same case."[135] In so holding, the court showed little sympathy for the Intermediate Court of Appeals' concern that "'[a]ny rule that requires forfeiture of appellate opportunities for guessing wrong about an unclear rule would greatly increase the costs of the collateral order doctrine by forcing protective appeals in many situations of doubtful appealability.'"[136] Instead, the court

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[129] This is not to suggest that the Hawai'i Supreme Court is likely to find waiver unless an appeal from judgment would not provide an effective remedy. For example, in the analogous situation of a *Forgay* appeal from a judgment of possession, the court has held that the failure to file a timely appeal from the judgment of possession does not preclude raising the same issue on an appeal from judgment on all claims. *See* Ciesla v. Reddish, 78 Hawai'i 18, 21, 889 P.2d 702, 705 (1995).

[130] 74 Haw. 210, 847 P.2d 652 (1992).

[131] Section 658-3 sets forth the procedure by which a written agreement to arbitrate a dispute is enforced. HAW. REV. STAT. § 658-3 (1972).

[132] *Excelsior*, 74 Haw. at 232-33, 847 P.2d at 662.

[133] *Id.* at 233, 847 P.2d at 662.

[134] *Id.* at 230-31, 847 P.2d at 662.

[135] *Id.* at 234, 847 P.2d at 663.

[136] Kukui Nuts of Hawaii, Inc. v. R. Baird & Co. Inc., 7 Haw. App. 598, 617, 789 P.2d 501, 514 (1990) (quoting 15 C. WRIGHT, ET AL. FEDERAL PRACTICE AND PROCEDURE , § 3911 (1976)), *cert. denied*, 71 Haw. 668, 833 P.2d 900 (1990). Fortunately, the Hawai'i Supreme Court has not taken a Draconian position regarding the waiver of a right to appeal resulting from the failure to appeal collateral orders. In State v. Stanley, the court held that because of "the absence of clear direction in our previous cases regarding the proper time for challenging a waiver order," the requirement of an immediate appeal from the order would be applied prospectively. State v. Stanley, 60 Haw. 527, 533, 592 P.2d 422, 426 (1979).

held that because Eyecor, Ltd. had previously attempted an appeal from the section 658-3 order and there was authority establishing that a section 658-3 order was an immediately appealable collateral order, Eyecor was foreclosed from appealing the section 658-3 order after judgment.[137]

Unfortunately, contrary to the assumption underlying *Excelsior Lodge Number One, Independent Order of Odd Fellows*, there is very little certainty as to what orders are appealable under the collateral order doctrine. In the realm of the collateral order doctrine, the existence of precedent does not ensure subsequent applicability of the doctrine.[138] In *Siangco v. Kasadate*,[139] the Hawai'i Supreme Court rejected the notion that the type of order determined the applicability of the collateral order doctrine.[140] In spite of precedent supporting the application of the collateral order doctrine to sanction orders against a party,[141] the court held that "the applicability of the collateral order doctrine depends on the facts of each case" and rejected jurisdiction over the appeal from an order granting sanctions against Kasadate.[142]

The cost of the benefits of immediate review of a few decisions is the uncertainty as to which decisions are immediately reviewable. In the near term, the absence of certainty in the application of the collateral order doctrine in criminal cases will be troublesome. However, if the appellate courts would address issues such as waiver of the right to appeal collateral orders, what constitutes an appealable collateral order in criminal cases, and identify the rules governing criminal appeals from collateral orders in published opinions that near term confusion would vanish and only the benefits would remain. Unfortunately, the possibility of prolonged confusion exists if issues relating to collateral order appeals are decided by orders based upon HRAP 12.1 statements of jurisdiction.

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[137] *Excelsior Lodge Number One, Independent Order of Odd Fellows*, 74 Haw. at 233-34, 847 P.2d at 663.

[138] The Hawai'i Supreme Court has also rejected federal authority in defining the scope of the collateral order doctrine. *See* Brown v. Wong, 71 Haw. 519, 521, 795 P.2d 283, 284 (1990).

[139] 77 Hawai'i 157, 883 P.2d 78 (1994).

[140] *Id.* at 162, 883 P.2d 83.

[141] *See, e.g.*, Harada v. Ellis, 60 Haw. 467, 480, 591 P.2d 1060, 1070 (1979); De Silva v. Burton, 9 Haw. App. 222, 227, 832 P.2d 284, 287 (1992), *overruled on other grounds, In re* Tax Appeal of Hawaiian Flour Mills, Inc., 76 Hawai'i 15, 868 P.2d 419, 433 (1994); Kukui Nuts of Hawaii, Inc. v. R. Baird & Co. Inc., 6 Haw. App. 431, 433 n.1, 726 P.2d 268, 270 n.1 (1986), *cert. denied*, 71 Haw. 668, 833 P.2d 900 (1990).

[142] *Siangco*, 77 Hawai'i at 162, 883 P.2d at 83.

VIII. CONCLUSION

The unequivocal recognition of the collateral order doctrine by the Hawai'i Supreme Court in *Baranco* presents the court with the challenge of clarifying the application of the collateral order doctrine in the context of criminal appeals. This challenge also presents the court with an opportunity to reconcile conflicting precedent and create a unified theoretical basis for appellate jurisdiction in criminal cases.

A Constitutionally Valid Justification for the Enactment of No-Growth Ordinances: Integrating Concepts of Population Stabilization and Sustainability

I. INTRODUCTION

Imagine a small tropical island of remarkable beauty.[1] Not only is the island beautiful, it is also ecologically unique. Few people live on the island currently, so it is largely unspoiled. However, word has spread of the island's beauty. Each year the island hosts an increasing number of visitors who travel to the island by ferry. Ultimately, the antiquated ferry system is replaced with

[1] This hypothetical is drawn from a true account of the growth control efforts of the residents of Sanibel Island, Florida. *See* RICHARD F. BABCOCK & CHARLES L. SIEMON, THE ZONING GAME REVISITED 95-118 (1985).

a causeway making the island a more convenient place to visit. As a result, the development of the island increases dramatically.[2]

The sudden growth alarms the island's current residents. With the island facing the imminent threat of aesthetic and environmental decline, the residents decide to take action. They develop a comprehensive plan that dramatically limits density and has the effect of capping the ultimate population of the island. The plan, drawing on scientific data, sets density limits based on delineated eco-zones.[3] Building is severely restricted in wetland and coastal areas, with the bulk of development shunted to less ecologically sensitive parts of the island. Developers and landowners, outraged by these actions, sue the municipality.

Does the island community's desire to protect the environmental and aesthetic quality of life by setting limits on growth outweigh the individual rights that are infringed upon by the plan? In many cases the answer is "no." This particular island community, however, was victorious. After extensive litigation the community's rights were held to outweigh private rights.[4] One writer, describing the island controversy, summed up the importance of the community's victory:

> [This] is a perfectly extraordinary demonstration of democracy in action. The people were dissatisfied. They made it known what they wanted in a meaningful way, and now, at long last, we've got control of our own destiny. . . . It is the will of the people that we preserve the unique natural assets of the island, and we plan to see that their mandate is carried out.[5]

These island residents are not alone in their desire to preserve the aesthetic and environmental assets of their community. Citizens throughout the United States are asserting their voting rights to define the future of their communities.[6] Enlisting the support of local governments, citizens are curbing population growth in their locales through the enactment of growth

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[2] In a fourteen year period, the island's dwelling unit numbers swelled to 4,000 from an initial 300. In the following year, building permits were issued for an additional 500 units. *Id.* at 96.

[3] *See generally* JOHN CLARK, THE SANIBEL REPORT: FORMULATION OF A COMPREHENSIVE PLAN BASED ON NATURAL SYSTEMS (1976).

[4] *See* Estuaries Properties, Inc. v. Askew, 381 So.2d 1126 (Fla. Dist. Ct. App. 1980), *aff'd in part, rev'd in part, sub nom.* Graham v. Estuaries Properties, Inc., 399 So.2d 1374, 1382 (Fla.), *cert. denied*, 454 U.S. 1083 (1981); *see also* BABCOCK & SIEMON, *supra* note 1, at 116.

[5] *See* BABCOCK & SIEMON, *supra* note 1, at 117 (quoting Porter Goss, *Eden Fights Back*, SPORTS ILLUSTRATED Feb. 3, 1975, at 35).

[6] *See, e.g.*, William Trombley, *Heated Debate Slow-Growth Sentiment Builds Fast*, L.A. TIMES, July 31, 1988, at 1 (noting that "[i]n the last three years, there have been 76 growth-control ballot measures in the state [of California], and 70% of these have passed").

control regulations.[7] These controls usually seek to slow-growth or to completely stop growth. Regulations that stop growth—sometimes referred to as "no-growth" regulations—are usually implemented through a government's power to zone.[8] No-growth regulations control population usually by limiting the number of people or structures that can occupy a given area.[9] Through the use of no-growth regulations, communities attempt to halt environmental, economic, and social problems by treating the "disease" rather than the "symptoms."[10]

While many citizens see logical reasons for controlling growth within their municipal boundaries, others are diametrically opposed.[11] Critics argue that no-growth regulations generate a host of secondary problems, and are ultimately arbitrary because they are not substantially related to the health, safety, morals, or general welfare of the people.[12] Other critics seize upon the blatant nature of no-growth policies and believe that they are fundamentally inapposite to natural law—and nature itself.[13] Despite the criticisms, most will agree that growth control issues will play an important role in the evolving area of land use law throughout the rest of this century.[14]

In an attempt to find common ground in this debate, this comment seeks to address the benefits and detriments of no-growth regulations from a new perspective.[15] Courts currently analyze no-growth controls by beginning with

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[7] *See* Daniel J. Curtin, Jr., *Growth Control: Ballot Box Planning, in* HANDLING LAND USE AND ENVIRONMENTAL PROBLEMS OF REAL ESTATE 1991 (Real Estate Law and Practice Course Handbook Series, PLI Order No. N4-4550, 1991) (listing other states that have enacted growth control measures, including Colorado, Florida, Hawai'i, Maine, New Jersey, North Carolina, Oregon, Rhode Island and Vermont).

[8] *See infra* part III.

[9] *Id.*

[10] *See, e.g.*, LEON F. BOUVIER & LINDSEY GRANT, HOW MANY AMERICANS? 3 (1994) (arguing that the time is long past for technological fixes. Instead, "most of our problems are driven by population growth, technological change and, in the United States, high individual rates of consumption.").

[11] *See, e.g.*, National Land and Investment Company v. Kohn, 215 A.2d 597 (Pa. 1965).

[12] *See, e.g.*, Susan Ellenberg, *Judicial Acquiescence in Large Lot Zoning: Is it Time to Rethink the Trend?*, 16 COLUM. J. ENVTL. L. 183 (1991); James H. Wickersham, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 498-512 (1994). Wickersham identifies three persistent problems with traditional zoning: (1) because planning is not required, it is difficult to predict long term development trends; (2) political fragmentation of metropolitan areas leads to ineffective local regulations of large-scale problems; (3) susceptibility to exclusionary tendencies encourages communities to keep out unwanted activities and people. *Id.* at 498.

[13] *See infra* part IV.

[14] *See* DONALD G. HAGMAN & JULIAN C. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW §§ 1.3, 9.1 (2nd ed., 1986).

[15] *See infra* part V.

the premise that population growth is an inevitable phenomenon.[16] This comment, instead, attempts to analyze no-growth controls beginning with the premise that human populations are, in their natural state, stable. Therefore, reasonable, non-draconian attempts to moderate population growth can benefit society.[17] Additionally, this comment argues that the concept of sustainability offers a new and compelling justification for no-growth ordinances—one that may give traditional no-growth ordinances greater staying power when challenged.[18]

This comment concludes that no-growth ordinances enacted to implement sustainability goals are constitutional. However, before broad court endorsement is possible, municipalities seeking to implement no-growth controls must overcome two jurisprudential obstacles. First, municipalities must create an irrefutable link between land use management and the science of sustainability so that courts may see sustainability concepts as rational and conclusive.[19] Second, and potentially more onerous, municipalities must overcome entrenched and unrealistic judicial assumptions regarding population growth by fostering a new jurisprudential ideal—an ideal that acknowledges the appropriateness, and in many instances the compelling necessity, of a stable human population.[20]

II. THE IMPACT OF OUR CURRENT POPULATION

At the time of the United States Constitution's ratification in 1790, its protections were shared among a mere four million citizens.[21] However, the Constitution did not limit its guarantees to its eighteenth century citizens; the Constitution promised that "our posterity" would be provided with the same basic rights as well.[22] Hence, two hundred years later, constitutional protections, such as "justice," "domestic tranquility" and "liberty"[23] must be

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[16] *See infra* part IV.A.

[17] *See infra* part V.

[18] *See infra* parts V, VI.

[19] *See infra* part V.A.

[20] *See infra* part II.

[21] Four million people were counted in the first census conducted in 1790, two years after the Constitution was enacted. *See* BOUVIER & GRANT, *supra* note 10, at 62.

[22] We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defen[s]e, promote the general Welfare, and secure the Blessings of Liberty to ourselves and *our Posterity*, do ordain and establish this Constitution for the United States of America.

U.S. CONST. pmbl (emphasis added).

[23] *See id.*

meted out in equal fashion to more than 263 million individuals.[24] In addition, at current growth rates, these constitutional protections must be reapportioned on a yearly basis among 2.5 million newly added U.S. inhabitants.[25]

The Framers did not define "posterity," just as they did not define other crucial words in the Constitution.[26] Did they have in mind a fixed population for the United States—a population that was in keeping with the plentiful protections guaranteed by the Constitution and the abundant resources residing in the land? Or did they assume that the Constitution could afford its protections to an unlimited number of Americans, collectively sharing a country that has been utilized in uncaring fashion for generations?[27] Answers to these pertinent questions have been successfully ignored and postponed for the last two hundred years, probably due to a combination of factors,[28] such as the United States' plentiful and diverse natural resources, a population growth curve that only recently spiked,[29] a profusion of environmental law

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[24] ZERO POPULATION GROWTH, FACT SHEET: THE DEMOGRAPHIC FACTS OF LIFE IN THE UNITED STATES, (Aug., 1995) (citing POPULATION REFERENCE BUREAU, 1995 WORLD POPULATION DATA SHEET).

[25] *Id.* (quoting U. S. CENSUS BUREAU, POPULATION PROFILE OF THE UNITED STATES 6 (1995)). In 1994 there were 3.95 million births and 2.29 million deaths, which resulted in a net increase of 1.7 million people, plus an additional 816,000 immigrants for a sum total slightly greater than 2.5 million.

It is true that the size of the United States has grown dramatically since 1790. Despite the huge increases in land the United States has acquired or won since then, however, density has risen dramatically. The density in 1790 amounted to a mere 4.5 persons per square mile. Today, a more expansive United States has 70.3 persons per square mile. *See* SAM ROBERTS, WHO WE ARE: A PORTRAIT OF AMERICA BASED ON THE LATEST U.S. CENSUS 138-39 (1993).

[26] The AMERICAN COLLEGE DICTIONARY (C. L. Barnhart & Jess Stein eds., 1969) defines "posterity" as "succeeding generations collectively." However, the RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (Stuart Berg Flexner, ed., 2nd ed., 1987) provides an interestingly different definition of posterity: "all descendants of one person . . . ."

[27] Thomas Jefferson intimated at possible population limits when he wrote that "[t]he earth belongs in usufruct to the living," 7 JEFFERSON'S WORKS (Monticello ed., 1904), a principle he considered to be self evident. *See* Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore, 557 P.2d 473, 492 (Cal. 1976) (Mosk, J. dissenting) (citing Laing, *Jefferson's Usufruct Principle*, THE NATION MAGAZINE, July 3, 1976, at 7.

[28] Population issues were a public concern during the late 1960s and early 1970s. LARRY D. BARNETT, POPULATION POLICY AND THE U.S. CONSTITUTION 3 (1982). In fact, on at least one occasion, a U.S. President discussed population growth. *See infra* note 44; *see also* BOUVIER & GRANT, *supra* note 10, at 80 (quoting Richard M. Nixon, Special Message to the U.S. Congress on Problems of Population Growth, July 18, 1969).

[29] The world population growth rate began to increase around the year 1650. At that time the rate of growth was approximately 0.3 percent per year, a growth rate that would double the population in nearly 250 years. In comparison, the 1970 growth rate was 2.1 percent per year, or the equivalent of a 33 year doubling time. Thus, between the years 1650 and 1970 the population grew in a "super-exponential" fashion from a half billion to 3.6 billion. DONELLA H. MEADOWS ET AL., THE LIMITS TO GROWTH 34 (1972).

enactments, as well as a superficial appearance of ecological well-being exhibited by the earth.[30] In the process, these false signs of health have lulled much of the public into believing that increasing human manipulation of the earth's resources can continue indefinitely.[31]

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[30] "[W]hen ecosystems have absorbed stresses over long periods without much outward sign of damage, they eventually reach a disruption level at which the cumulative consequences of stress finally reveal themselves in critical proportions." Norman Myers, *Population/Environment Linkages: Discontinuities Ahead?*, *in* POPULATION, ENVIRONMENT, AND DEVELOPMENT 20 (E. van Imhoff et al. eds., 1992). Ecologists refer to this phenomenon as the "jump effect." *Id.* Strains put on ecosystems because of human demands may precipitate the jump effect. Consider, for example, current human water consumption demands: We currently withdraw from our nation's surface and underground water supplies 400 billion gallons daily. ZERO POPULATION GROWTH, FACT SHEET: IN TROUBLED WATERS, (Summer, 1990). This level of consumption means we draw 25 percent more water than gets replaced by nature each year. BOUVIER & GRANT, *supra* note 10, at 15 (citing David Pimentel and Marcia Pimentel, *Land, Energy and Water: The Constraints Governing Ideal U.S. Population Size*, *from* TEANECK, N.J.: NEGATIVE POPULATION GROWTH, INC. NPG FORUM SERIES (Jan. 1990) (quoting U.S. WORLD RESOURCES COUNCIL)).

[31] Myers, *supra* note 30, at 19. For example, any grocery store in the United States displays abundance; yet troubling agricultural realities, unseen by most, do exist: Abundance of food became synonymous with the "green revolution"—a technological phenomenon that resulted in an astounding three percent annual harvest increase between the years 1950 and 1984. *Id.* However, the agricultural "advances" which provided these short-term gains may be detrimental to long term productivity. Many crop yields are now diminishing despite a sustained or increased reliance upon fertilizers and pesticides. Between 1985 and 1989, grain output rose negligibly despite a 14 percent increase in the use of fertilizer. *Id.*

This insignificant increase in grain output, when factored with a population increase of 440 million during the same five year period, meant a net 7 percent decline in crop yields per person. *Id.* Additionally, one authority approximates that pesticide applications have increased 33-fold (1000-fold for monoculture cultivation of corn) since World War II. Despite the toxic warfare, crop losses from insect pests alone are estimated to have doubled from 7 to 13 percent during the same period (and quadrupled in the case of corn). BOUVIER & GRANT, *supra* note 10, at 37-38 (citing PIMENTEL AND PIMENTEL, LAND, ENERGY AND WATER 29, and citing Wlademar Klassen, U.S. Dept. of Ag. and Dr. Robert Metcalf, U. of Ill., to the Entomological Society of America, *Entomologists Wane as Insects Wax*, SCIENCE, Nov. 10, 1984, at 754).

Simultaneous with this almost invisible decline in yields has been an unseen diminishment in the nutritional value of harvested foods. For example, in 1948, store-bought spinach had 158 milligrams of iron per hundred grams. In 1965, the maximum iron readings showed 27 milligrams; *and*, in 1973 iron was averaging a minuscule 2.2 grams—this from *one hundred and fifty* grams of spinach. LINDA GROVER, AUGUST CELEBRATION 33 (1993). Intensive agricultural techniques which cause each acre of U.S. farmland to lose 8 tons of mineral-rich topsoil per year—a rate that is sixteen times faster than the replacement rate—accounts for some of this nutritional loss. David Pimentel & Marcial Pimental, *Land, Energy and Water: The Constraints Governing Ideal U.S. Population Size*, *in* ELEPHANTS IN THE VOLKSWAGEN: FACING THE TOUGH QUESTIONS ABOUT OUR OVERCROWDED COUNTRY 23 (Lindsey Grant ed., 1992).

Authoritative sources suggest, however, that the earth is already showing severe signs of wear.[32] The continuing population rise[33] threatens to exact an increasing environmental toll that is beyond the earth's capacity to hide. A once resilient earth now displays signs of ecological finitude to even the most casual observer.[34] In light of these events, continued denial of the detrimental aspects of population growth would appear foolhardy. Postponing the population debate may mean further jeopardizing the earth's ecological well-being, and may additionally mean compromising the sociological and physical well-being of Americans as well[35]—a result which would necessarily mean depriving Americans of essential rights guaranteed by the Constitution.[36] A broad body of demographic data reveals that the growing United States population is a major contributor to many of the country's environmental, economic, and sociological woes.[37] And, despite a flood of prophylactic measures aimed at curing these symptoms, data suggest that the disease spreads more quickly than superficial cures can be created.[38]

For example, consumption and population trends during the past fifteen years have wiped out most of the gains achieved by stringent air and water pollution laws enacted in the early 1970s.[39] Likewise, consumption of natural resources continues to rise even though we now use these resources in a more efficient manner.[40] Additionally, human encroachment continues to threaten

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[32] *See generally* PAUL HARRISON, THE THIRD REVOLUTION: ENVIRONMENT, POPULATION AND A SUSTAINABLE WORLD (1992).

[33] *See supra* note 29; *see also* BARNETT, *supra* note 28, at 3-6 (estimating that the U.S. population will rise by 26 million between 1980 and 2000 without net immigration, and will rise by 21 million between 2000 and 2040).

[34] The increasing NIMBY ("Not In My Back Yard") phenomenon is one example of increasing public awareness. *See* ROBERT HARDAWAY, POPULATION, LAW, ENVIRONMENT 63 (1994).

[35] *See* BOUVIER & GRANT, *supra* note 10, 80-98 (detailing the probable harm to humans from a deteriorating environment); *see also* HARRISON, *supra* note 32, chs. 19 & 20.

[36] *See, e.g.*, BARNETT, *supra* note 28, ch. 3 (discussing how population growth can affect privacy rights).

[37] *See generally* BOUVIER & GRANT, *supra* note 10.

[38] *See* HARDAWAY, *supra* note 34, at 43-57.

[39] *See generally* HARRISON, *supra* note 32, chs. 14 & 15. For example, "over the 1973-87 period, hailed for its growing 'energy efficiency', world energy use grew by 20 per cent. Gains in car fuel efficiency between 1973 and 1988 were wiped out twice over by the rise in car numbers." *Id.* at inside, front cover; *see also* HARDAWAY, *supra* note 34, at 17.

[40] *See, e.g.*, BOUVIER & GRANT, *supra* note 10, figure 1.1 (graphically listing human consumption numbers for the period between 1900 to 1990—a notable figure, in that a consumption trend in any one resource has never stabilized or declined since 1945).

critical habitat and environmentally sensitive land areas despite increasingly restrictive land use laws and other creative land use measures.[41]

However, the impact of population growth does not stop with environmental issues. Population issues go hand in hand with economic and sociological concerns. An increasing number of people demand their fair share of a finite supply of necessities, such as electricity, water, food, health care, education, housing, and jobs. Thus, each person is forced to pay more money for increasingly precious necessities and accept less wages for increasingly scarce jobs.[42] These economic phenomena affect all, but disproportionately burden minorities and people of lower income.[43] Unsurprisingly, these rising economic burdens foster unhappiness, abuse, and crime;[44] meanwhile, the worsening sociological situation is impassively tallied on demographic charts for all to ponder but few to act upon.

That more people do not point to this demographic data and demand policy-makers consider its implications is testament to the controversial nature of the population issue. Moreover, those citizens and policy-makers who do throw

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[41] *See, e.g.*, DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE chs. 7, 8, 9 (2nd ed. 1994). Critical habitat designations have often failed due to an imperfect understanding of ecological principles. Thus, the continued loss of threatened and endangered species has continued. James Drozdowski, Note, *Saving an Endangered Act: The Case for a Biodiversity Approach to ESA Conservation Efforts*, 45 CASE W. RES. L. REV 553, 553-54 nn.2-4, 554 n.5, 555 n.16. One authority notes that human population growth is a major factor in the decline of many species. *Id.* n.4 (citing Peter H. Raven, *The Politics of Preserving Biodiversity*, 40 BIOSCIENCE 769, 771 (1990)).

Land use laws often have a negligible practical effect because they cannot be disentangled from the complex web of constitutional property rights issues. *See* A. Dan Tarlock, *Local Government Protection of Biodiversity: What Is Its Niche?*, 60 U. CHI. L. REV. 555, 586-97 (1993) (discussing takings with respect to biodiversity protections); CALLIES, *supra* note 41, ch. 9 ("Controlling the Use of Environmentally Sensitive Land"). Land use solutions have been further frustrated by an increase in urban flight. "Between 1967 and 1975, three million acres of rural land per year were converted to urban use. One million acres of this rural land came from cropland." CALLIES, *supra* note 41 at 670.

[42] *See* BOUVIER & GRANT, *supra* note 10, ch 3.

[43] *See, e.g.*, ROBERTS, *supra* note 25, ch. VII.

[44] *See generally* GEORGE D. MOFFETT, CRITICAL MASSES: THE GLOBAL POPULATION CHALLENGE (1994). Even a U.S. President accepted the connection between population growth and sociological problems:

> I believe that many of our present social problems may be related to the fact that we have had only fifty years in which to accommodate the second hundred million Americans . . . . Where, for example, will the next hundred million Americans live? . . . How will we educate and employ such a large number of people? Will our transportation systems move them about as quickly and economically as necessary? How will we provide adequate health care when our population reaches 300 million? Will our political structures have to be reordered, too, when our society grows to such proportions?

BOUVIER & GRANT, *supra* note 10, at 80 (quoting Richard M. Nixon, Special Message to the U.S. Congress on Problems of Population Growth, July 18, 1969).

themselves into the vortex of the debate and attempt to define population in their community are often hamstrung by judicial interference.[45] Judicial interference is readily seen in the area of land use law where court reactions to population stabilization measures range from skepticism to genuine intolerance.[46] The next section discusses the types of growth controls available and examines the degree of judicial intolerance to population control measures. The next section also posits a general rule: Growth controls that create only a minimal barrier to continued population growth will normally be upheld; growth controls that create a substantial barrier to continued population growth are usually invalidated.

III. TYPES OF GROWTH CONTROLS

Some initial attempts by legislatures to control population growth were, in retrospect, crudely fashioned.[47] In many cases, the weight of a newly-created regulation fell on just a few members of society, thus burdening fundamental rights.[48] Such discriminatory laws were challenged and quickly struck down.[49] However, the initial rudimentary growth controls have for the most part evolved into viable and fair mechanisms capable of controlling growth while simultaneously maintaining validity as justifiable acts of local power.[50] Problems with these controls still exist and it is possible that other regulations,

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[45] *See infra* part IV.

[46] *See* Ellenberg, *supra* note 12; *see also infra* part IV.

[47] *See* ROBERT M. ANDERSON, AMERICAN LAW OF ZONING 3D ch. 8 (1986) (discussing exclusionary zoning); DANIEL R. MANDELKER, LAND USE LAW, ch. 7 (2nd ed. 1988) (discussing exclusionary zoning).

[48] *See supra* note 47.

[49] In an effort to slow growth by controlling interstate migration, some states in the 1970s enacted durational residency requirements. These statutes required migrants to reside for a year or longer before they could become employed in a given profession or to obtain free medical assistance. *See, e.g.*, HAW. REV. STAT. tit. 7, § 78-1 (Supp. 1977) (repealed 1978) (requiring one-year residency requirements for certain professional occupations and offices); ARIZ. REV. STAT. ANN. §§ 11-291, 11-297A (Supp. 1973-74) (repealed in part 1974) (stating a state mandatory duty to provide medical support only to sick people who had resided in Arizona for one year or more); *see generally* Carl M. Selinger, et al., *Selected Constitutional Issues Related to Growth Management in the State of Hawaii* 5 HASTINGS CONST. L.Q. 639 (1978). Courts struck down most of these durational residency requirements because they violated the Equal Protection Clause of the fourteenth amendment. *See, e.g.*, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (striking down an Arizona statute limiting free medical services to those who had resided in the state for at least one year). As a result, these growth controls are now ignored for the most part.

[50] *See generally* Curtin, *supra* note 7; Stanley D. Abrams, *Casenotes and Comments on Local Growth Control Management Concepts, from* ALI-ABA COURSE OF STUDY, LAND USE INSTITUTE: PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION, C750 ALI-ABA 629 (1992).

perhaps at the state level, would control population growth in a more efficient manner.[51] However, within the United States framework, growth controls mark one of the few ways that local citizens can efficiently assert their concerns regarding the population explosion.

Growth control regulations can be placed into one of two general categories: (1) those that merely seek to *control* growth, and thus presuppose continued population growth ("slow-growth" regulations); and (2) those that seek to, or have the capacity to, *stop* growth, and would thus be appropriate tools for a stable population ("no-growth" regulations).[52] Both categories are discussed separately below.

A. Slow-Growth Controls

Courts have generally preferred slow-growth controls over no-growth controls. Because slow-growth controls do not stop growth but instead seek only to manage growth, courts have over the last twenty years become increasingly willing to accept them as necessary and appropriate regulatory tools.[53] Much of the recent focus in the slow-growth area has been at the state level, often prompting the creation of state comprehensive plans.[54] Where state comprehensive plans exist, local governments are usually required to adhere to the state guidelines when making local land use changes.[55]

However, despite the new trend toward state control of growth, much of the growth control regulation continues to be at the local level.[56] Of the possible regulatory mechanisms used by local governments, "timing," "phasing," or

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[51] *See* NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN PLANNING LAW ch. 160 (1985) (discussing in detail the current land use trend which focuses zoning power at the state and regional level rather than municipal level for purposes of comprehensive protection and uniformity in regulation). Williams and Taylor rely heavily on the seminal work by Bosselman and Callies entitled, THE QUIET REVOLUTION IN LAND USE CONTROL, A REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY (1971). *Id.*

[52] For a comprehensive list of the possible growth control tools, see HAGMAN & JUERGENSMEYER, *supra* note 14, at 262-63, citing URBAN LAND INSTITUTE, MANAGEMENT AND CONTROL OF GROWTH, Vol. I, 24-31 (1975).

[53] *See, e.g.*, Associated Home Builders of Greater Eastbay, Inc. v. Livermore, 557 P.2d 473 (1976); *see generally* Curtin, *supra* note 7; HAGMAN & JUERGENSMEYER, *supra* note 14, § 9.2, at 260-62.

[54] Over the past decade, California, Colorado, Florida, Hawai'i, Maine, New Jersey, North Carolina, Oregon, Rhode Island, and Vermont have each instituted some type of state growth control process. Curtin, *supra* note 7, at WL3.

[55] The level of adherence required varies from state to state. *See* MANDELKER, *supra* note 47, § 3.15.

[56] *See* KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 2.01 (4th ed. 1996).

"sequencing" controls are considered among the most justifiable.[57] Well-planned, well-orchestrated efforts of a municipality to control an existing or impending development problem are usually upheld by reviewing courts.[58]

A case important to the establishment of the validity of slow-growth controls was the Ninth Circuit Court of Appeals' decision of *Construction Industry Association of Sonoma County v. City of Petaluma*.[59] The City of Petaluma reacted to rapidly increasing growth[60] by enacting a sophisticated and complex growth timing plan based on quotas.[61] Developers and landowners challenged the city plan as an arbitrary and unreasonable action that was exclusionary, lacking in any legitimate governmental interest.[62] The Petaluma plan, although a quota plan, provided some development flexibility. While it limited yearly development to 500 housing units, it exempted projects with four units or less, and was limited to a five-year period.[63]

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[57] Timing and phasing controls allow a municipality to control the frequency and location of new development. *See* MANDELKER, *supra* note 47, ch. 10 (discussing cases upholding timing and phasing regulations); Freilich & Ragsdale, *Timing and Sequential Controls, the Essential Bases for Effective Regional Planning*, 58 MINN. L. REV. 1009 (1974). This can be done in a variety of ways, including the following: by an absolute quota on new development; based upon the availability of public facility services, such as sewer service; or by limiting development to within the confines of an established urban growth boundary that is occasionally extended. MANDELKER, *supra* note 47, § 10.01.

[58] *See, e.g.*, J.W. Jones Companies v. City of San Diego, 157 Cal. App. 3d 745 (1984) (upholding city's imposition of developers of facilities benefits assessments); Construction Industry Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975) (upholding city's limitation on the yearly number of new dwelling units), *cert. denied*, 424 U.S. 934 (1976); Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291 (N.Y.) (upholding city's moratorium on new development until municipal facilities were available), *appeal dismissed* 409 U.S. 1003 (1972); *see also* Abrams, *supra* note 50, at 634-37 (providing cases); MANDELKER, *supra* note 47, ch 10 (providing cases).

[59] 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). *See also* Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291 (N.Y.) (upholding a comprehensive plan that restricted development over an eighteen-year period based upon municipal facilities availability), *appeal dismissed*, 409 U.S. 1003 (1972). *Ramapo* enlarged the concept of "reasonable use" originally enunciated by the U.S. Supreme Court in *Village of Euclid v. Ambler*, 272 U.S. 365 (1926) and *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), to "reasonable use *over a reasonable period of time* as measured by a comprehensive plan." CALLIES, *supra* note 41, ¶ 1, at 583 (emphasis in original).

[60] Petaluma's population had doubled between 1950 and 1970—a disturbing trend in itself—but then had increased an additional 25% in slightly more than two years. *Id.* at 900.

[61] *Id.* at 901. Petaluma, aware of the success of Ramapo's growth plan, created a Residential Development Control System which allocated points to developers based on environmental and architectural design, existence of recreational facilities, and availability of affordable housing. *Id.*

[62] *Id.* at 905.

[63] *Id.* at 901.

Important to its ultimate validity, the quota was based on a careful study which substantiated the city's restrictions and justified its goals.[64]

Responding to Plaintiffs' claims, the court noted that all land use regulation could have exclusionary tendencies but that any exclusionary effect could be justified where the plan had a rational relationship to a legitimate state interest.[65] The court, relying on the United States Supreme Court's decision in *Village of Belle Terre v. Borass*,[66] and an earlier Ninth Circuit holding,[67] concluded that "the concept of the public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace."[68] In reaching this decision, the court expressly noted that the realities of such a plan would mean an impact not only to citizens in Petaluma but also to citizens in the region surrounding the community; the court responded, however, that this fact alone would not result in a *per se* invalidation of the plan.[69]

Acceptance of *Petaluma*-style restrictions has been broad.[70] As a result, where a city can substantiate the need for municipal facilities, most courts will allow slow-growth controls that limit development for a specific period of time.[71] Similarly, courts are usually willing to consider other controls that attempt to accommodate rather than restrict growth. The most notable

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[64] Goals included curbing urban sprawl in the eastern portion of the town, retarding "the accelerating growth of the City," *Id.* at 900-01, protecting Petaluma's small town character and surrounding open space, providing for a variety in densities and building types and wide ranges in prices and rents, and ensuring infilling of close-in vacant areas. *Id.* at 902.

[65] The court noted that the Petaluma plan did not completely exclude persons because it allowed for a yearly increase of approximately 1500 persons, roughly a six per cent increase over the current population size. *Id.* at 908, n.15. The court also emphasized that the plan was in fact "inclusionary" "to the extent that it offer[ed] new opportunities, previously unavailable, to minorities and low and moderate-income persons." *Id.* at 908 n.16.

[66] 416 U.S. 1 (1974); *see infra* note 148.

[67] Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974).

[68] Construction Industry Association of Sonoma County v. City of Petaluma, 522 F.2d 897, 908-09 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

[69] *Id.* ("unlike the situation in the past most municipalities today are neither isolated nor wholly independent from neighboring municipalities . . ., consequently, unilateral land use decisions by one local entity affect the needs and resources of an entire region. . . . [However,] the federal court is not a super zoning board and should not be called on to mark the point at which legitimate local interests in promoting the welfare of the community are outweighed by legitimate regional interests.").

[70] *See supra* note 58; *see also* Pelham, *Adequate Public Facilities Requirements: Reflections on Florida's Concurrency System for Managing Growth*, 19 FLA. ST. U. L. REV. 973 (1992) (discussing Florida's legislatively mandated sequencing controls).

[71] *See supra* note 58.

include: planned unit developments ("PUDs"),[72] transfer development rights ("TDRs"),[73] urban growth boundaries,[74] and interim controls.[75] As with timing and sequencing plans, discussed above, these various controls appear reasonable and rational to courts because the controls implicitly accept population growth as a given, and thus aspire only to *manage* population growth to avoid chaotic, unplanned development. They in no way express an intention to "buck the trend."[76] Unfortunately, because slow-growth ordinances merely manage population growth, they are inadequate tools for municipalities that seek to stabilize their population.

B. No-Growth Controls

Unlike slow-growth controls, no-growth controls intuitively threaten the status quo because they have the potential of stopping all population growth within a given area. As a result, no-growth controls have not gained the broad acceptance achieved by slow-growth controls.[77] Nonetheless, no-growth controls often effectively address community problems and, as such, serve an important function.

The most common controls that have the capacity to stop growth are those that limit the maximum density of a given area, either through a zoning

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[72] PUDs allow a municipality to relax specific zoning requirements in a given large project, such as an apartment complex, in return for a measure of design control. This can allow a municipality to "cluster" housing thus preserving larger areas of undeveloped green space. *See* MANDELKER, *supra* note 47, § 9.20 - 9.26; Wickersham *supra* note 12, at 496-97. For a thorough treatment of PUDs, see ANDERSON, *supra* note 47, ch. 11; WILLIAMS & TAYLOR *supra* note 51, ch 48.

[73] TDRs are market-oriented density controls. If a municipality seeks to protect agricultural lands, for example, it may place heavy restrictions on development of such land. However, to protect economic interests, the government allows land owners the opportunity to sell their density rights to owners of less restricted land. *See generally* ANDERSON, *supra* note 47, § 10.13; MANDELKER, *supra* note 47, § 12.13.

[74] Urban growth boundaries restrict growth within certain geographical parameters in an effort to avoid urban sprawl and prevent excessive municipal infrastructure costs. *See* ANDERSON, *supra* note 47, § 10.05; *see, e.g.*, Collins v. Land Conservation and Development Comm'n, 707 P.2d 599 (Or. Ct. App. 1985) (discussing Oregon's urban growth guidelines).

[75] Interim controls provide for a temporary slowing of growth rates within a municipality until the municipality can safely and appropriately accommodate larger numbers of citizens. ANDERSON, *supra* note 47, § 10.03. Interim controls are especially important where a rash of permits is expected because of developers "racing" to receive permit approval prior to the effective date of a more restrictive comprehensive plan. *Id.*

[76] Courts' comfort level with population issues in the land use context is further explored *infra* part IV.

[77] *See* HAGMAN & JUERGENSMEYER, *supra* note 14, § 9.2, at 260.

ordinance,[78] or through a state-enacted regional boundary designation.[79] By limiting density, growth in population will be limited by the availability of housing. Several potential community ills can be addressed by limiting density.[80] For example, minimizing density may relieve future traffic congestion,[81] or, in rural areas, may insure safe public water supplies through sufficient spacing of septic tanks,[82] or promote stewardship and wildlife protection.[83]

Theoretically, density can be limited in a number of ways. The most popular method for limiting density is to define the lot size by ordinance, often labeled "large lot" zoning.[84] Large lot zoning is often criticized as exclusionary for failing to provide people of lesser means with an adequate supply of affordable housing.[85] Large lot zoning truly can be exclusionary where the municipality fails to provide low income alternatives. However, any exclusionary tendency can be overcome if large lot zoning is

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[78] *See, e.g.*, National Land and Investment Company v. Kohn, 215 A.2d 596 (1965) (ordinance establishing four-acre minimum lot requirement); *see generally* WILLIAMS & TAYLOR, *supra* note 51, chs. 34-46 (describing various types of density regulations, including, regulations based on: lot-size, lot area per dwelling unit, lot area per room, lot width, and number of bedrooms).

[79] For example, HAW. REV. STAT., section 205 establishes a conservation zone and agriculture zone and severely limits development in these areas. *See* Wickersham, *supra* note 12, §§ IV-VI (examining and comparing two models for state growth management regulation—the "Model Land Development Code," and the "Planning Consistency model").

[80] The American Public Health Association, Committee on the Hygiene of Housing enumerated one of the "best-known and most carefully thought-out" studies on density and its relationship to human needs. *See* WILLIAMS & TAYLOR, *supra* note 51, § 34.05, at 818. The Association suggested that densities should be limited to provide, *inter alia*, adequate daylight, sunlight, air and open space, adequate space for all community facilities, and a general feeling of openness and privacy. *Id.*

[81] *See* WILLIAMS & TAYLOR, *supra* note 51, § 38.03, 38.07.

[82] *See* WILLIAMS & TAYLOR, *supra* note 51, § 8.02, at 281. *But see* Appeal of Kit-Mar Builders, 268 A.2d 765 (Pa. 1970) (rejecting septic tank concerns as sufficient justification for two- and three- acre lot requirements). *See generally* WILLIAMS & TAYLOR, *supra* note 51, ch 34 (discussing policy considerations on residential density, including issues relating to access to light, privacy, private open space, supervision of children in outdoor play, impersonal buildings and tenant morale, capacity of public facilities, cost of servicing, land shortages, as well as other issues).

[83] *See, e.g.*, Caspersen v. Town of Lyme, 661 A.2d 759 (N.H. 1995) (upholding 50-acre minimum lot size regulation because it was rationally related to Lyme's legitimate goals of encouraging the continuation of large tracts of forest land, encouraging forestry and timber harvesting, protecting wildlife habitat and natural area, and avoiding unreasonable town expenses).

[84] *See* ANDERSON, *supra* note 47, § 10.02; WILLIAMS & TAYLOR, *supra* note 51, § 38.01, at 2.

[85] *See* Ellenberg, *supra* note 12; ANDERSON, *supra* note 47, § 10.02 (describing the judicial history of large lot zoning); WILLIAMS & TAYLOR, *supra* note 51, ch. 65.

accompanied by other affirmative measures, such as subsidizing housing for the poor, or providing a sufficient amount of higher density development, or by accommodating low income housing in an adjacent region as part of a state enacted comprehensive plan.[86]

Other objections to low density regulations arise because of environmental concerns. Large lot zoning, and suburban, and rural zoning tend to decentralize the population. Such decentralization may fragment open spaces and agricultural land, and make residents of low density areas more dependent upon cars due to the long distance between shopping and home.[87] Further, decentralized municipalities lack the tax base and density necessary to take advantage of energy-efficient municipal improvements, such as buslines, subways, and sewer systems.[88] All of these objections, however, presume a large national population and a high level of human consumption. If the population and consumption habits were sufficiently low, the above suppositions might not hold.

Municipalities sometimes employ local moratoria to stop growth.[89] Where a municipality can show a substantial necessity[90] for the indefinite continuance of a moratorium, courts will uphold the restriction.[91] However, where hard data of a public necessity is lacking, moratoria are usually invalidated.[92] For example, a moratorium on water service will survive challenge if it would be unreasonably difficult for the municipality to provide

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[86] Several state comprehensive plans require communities to take active steps to meet their fair share targets of low and moderate income housing. *See* Wickersham, *supra* note 12, at 543 ("Addressing the Problem of Local Exclusion"). In addition, a variety of inclusionary zoning devices (devices that insure a sufficient supply of low-income housing) have been successfully implemented at the local level. *See* MANDELKER, *supra* note 47, at §§ 7.26-7.32.

[87] *See* Joel B. Eisen, *Toward a Sustainable Urbanism: Lessons from Federal Regulation of Urban Stormwater Runoff*, 48 WASH. U. J. URB. & CONTEMP. L. 1, n.29 (1995).

[88] *See, e.g.*, Wickersham, *supra* note 12, at 495 (citing ROBERT G. HEALY & JOHN S. ROSENBERG, LAND USE AND THE STATES (2d ed. 1979).

[89] *See, e.g.*, MANDELKER, *supra* note 47, §§ 6.05-6.10; Dennis J. Herman, Note, *Sometimes There's Nothing Left to Give: The Justification for Denying Water Service to New Consumers to Control Growth*, 44 STAN. L. REV. 429 (1992). While a *permanent* moratorium might act as an effective population stabilizer, a *temporary* moratorium is nothing more than a slow-growth control implemented by the necessity of some emergency—usually the overcapacity of important municipal facility, such as over-crowded schools or inadequate sewage facilities. *See* MANDELKER, *supra* note 47, §§ 6.05-6.07.

[90] Courts will uphold these bans where (1) corrective measures were necessary, (2) the moratorium is temporary, and (3) the municipality makes good faith efforts to rectify the public works shortages. Abrams, *supra* note 50, at 641-43.

[91] *See, e.g.*, Gilbert v. State, 266 Cal. Rptr. 891 (Cal. App. 1990); *see generally* Herman, *supra* note 89.

[92] *See* Abrams, *supra* note 50, at 641-44 (listing relevant cases).

alternative water sources.[93] While moritoria have at times been successfully used by municipalities to prevent environmental harm,[94] in most cases a moratorium will fail unless it is understood to be temporary in nature.[95]

One of the most effective no-growth tools is, not surprisingly, the most maligned and rare: the use of a population "cap" or ceiling.[96] A municipality considering the enactment of a population cap must risk being accused of shirking its regional duties which require it to take its fair share of the growing population.[97] In the rare instance where a population cap has been considered, it has been invalidated as insufficiently linked to the given justifications.[98]

IV. JUDICIAL OBSTACLES TO REGULATIONS INTENDED TO STABILIZE THE POPULATION

Before no-growth controls can be an effective part of a local government's "arsenal" in "combatting" the population problem, judicial endorsement is necessary. It is argued below that three significant obstacles stand in the way of broad judicial endorsement. The first obstacle is a judicial preconception that population growth is a naturally occurring event.[99] The second obstacle is a judicial tendency to subordinate environmental matters when private rights are at stake.[100] A final obstacle, of recent origin, is the enhanced judicial scrutiny applied to legislative acts that are solely or primarily justified

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[93] *See* Herman, *supra* note 89, at 435 n.38 (citing various state statutes that grant water providers express authority to curtail service when there is a bona fide water shortage).

[94] *See, e.g.*, Tisei v. Town of Ogunquit, 491 A.2d 564, 569 (Me. 1985) (finding a genuine issue of material fact existed "as to whether Ogunquit was faced with an emergency in the provision of public services of a nature to justify its enactment of a moratorium on development"); Cappture Realty Corp. v. Board of Adjustment of Borough of Elmwood Park, 313 A.2d 624 (N.J. Super. Ct. Law Div. 1973) (upholding an interim ordinance of two-year's length which placed a moratorium on development in a flood-prone area allowing time for construction of flood control facilities), *aff'd*, 336 A.2d 30 (N.J. Super. Ct. App. Div. 1975). *But cf.* Westwood Forest Estates, Inc. v. Village of South Nyack, 244 N.E.2d 700, 701 (N.Y.) (holding sewer moratorium invalid where pollution problems were "general to the community and not caused by the nature of plaintiff's land"), *reargument denied*, 247 N.E.2d 288 (1969).

[95] *See* MANDELKER, *supra* note 47, §§ 6.05-6.10.

[96] *See* ANDERSON, *supra* note 47, § 10.10; MANDELKER, *supra* note 47, § 10.05. *See also infra* part IV.B (discussing *City of Boca Raton v. Boca Villas Corporation*, 371 So.2d 154 (Fla. Dist. Ct. App. 1979), *cert. denied*, 381 So.2d 765 (Fla. 1980), *and cert. denied*, 449 U.S. 824 (1980), a decision that involved one municipality's attempt to enact a population cap).

[97] *See* ANDERSON, *supra* note 47, § 10.10, n.26 (citing decisions espousing the regional responsibility view); *see also infra* Part IV.

[98] *See supra* note 96.

[99] *See infra* part IV.A.

[100] *See infra* part IV.B.

by the public welfare prong of the police power.[101] Each of these obstacles is discussed separately below.

A. What is Natural

An emotional undertone can often be discerned in judicial opinions discussing growth controls.[102] The heart of this judicial emotion goes beyond procedural, or even substantive aspects; rather, the source of this discomfort appears to be a distaste of any attempt to define optimal population through legislative "manipulation." Instead, some courts appear to view population growth as a "natural" event.[103] These courts speak of the "naturalness" or "inevitability" of population growth in the same way one might speak of the naturalness or inevitability of death. For example, the New Hampshire Supreme Court has made it clear to the municipalities within its jurisdiction that "[a]ny limitations on expansion must not unreasonably restrict *normal growth*."[104] Farther south, the Supreme Court of Pennsylvania questioned

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[101] *See infra* part IV.C.

[102] *See, e.g.*, Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore, 557 P.2d 473, 495 (Cal. 1976) (Mosk, J., dissenting) (courts should "prevent municipalities from selfishly donning blinders to obscure the problems of their neighbors"); Beck v. Town of Raymond, 394 A.2d 847, 852 (N.H. 1978) ("[t]owns may not refuse to confront the future by building a moat around themselves and pulling up the drawbridge"); Appeal of Girsh, 263 A.2d 395, 399 (Pa. 1970) ("[t]his case deals with the right of people to *live on land*") (emphasis in original).

[103] *See, e.g.*, National Land and Investment Company v. Kohn, 215 A.2d 597, 612 (Pa. 1966) ("The question posed is whether the township can stand in the way of the *natural forces* which send our growing population into hitherto undeveloped areas in search of a comfortable place to live.") (emphasis added). *National Land's* "natural forces" language was later implemented by the Pennsylvania Supreme Court as part of a three-part "fair share" test to determine whether a zoning ordinance is exclusionary. *See* Surrick v. Zoning Hearing Bd. of Township of Upper Providence, 382 A.2d 105, 110 (Pa. 1977). Lower Pennsylvania courts have reiterated this test on numerous occasions. *See, e.g.*, East Marlborough Township v. Jensen, 590 A.2d 1321, 1323 (Pa. Commw. Ct. 1991), *appeal denied*, 600 A.2d 956 (Pa. 1991); Cambridge Land Company v. Township of Marshall, 560 A.2d 253, 258 (Pa. Commw. Ct. 1989); Weiner v. Board of Supervisors of Lower Macungie Township, 547 A.2d 833, 836 (Pa. Commw. Ct. 1988).

Other jurisdictions have also assumed without analysis that population growth is a predestined natural event. *See, e.g.*, Rinaldi v. Zoning & Planning Commission of the Town of Suffield, *available in* 1990 WL 269380, at *10-11 (Conn. Super. Ct. 1990); Golden v. Planning Bd. of Town of Ramapo, 285 N.E.2d 291, 301 (N.Y.), *appeal dismissed*, 409 U.S. 1003 (1972); Citizens Utilities Water Co. v. Superior Court In and For County of Pima, 497 P.2d 55, 59 (Ariz.), *cert. denied*, 409 U.S. 1022 (1972).

[104] Beck v. Town of Raymond, 394 A.2d 847, 852 (N.H. 1978) (emphasis added); *see also* Stoney-Brook Development Corp. v. Town of Fremont, 474 A.2d 561, 563-64 (N.H. 1984) (invalidating Fremont's 3% growth rate restrictions and describing them as "unrealistic" when the town "is in the center of the fastest growing area of New Hampshire," and further finding

whether a township could "stand in the way of the *natural forces* which send our growing population into hitherto undeveloped areas in search of comfortable places to live;"[105] and concluded that "[z]oning provisions may not be used . . . to avoid the increased responsibilities and economic burdens which time and *natural growth* invariably bring."[106] And far to the west, at least one judge has opined that inhibiting this natural growth, "[w]hatever the motivation, . . . is both immoral and illegal."[107]

Other courts, while more deferential, continue to evince concern over any growth control that seeks to limit growth indefinitely. Thus, while an enlightened court will uphold a slow-growth plan so that order can be restored to a community recently impacted by dramatic growth, the same court will not allow its holding to be considered a "permanent endorsement" of such a plan.[108] And, another court, reviewing a plan that restricts growth until necessary public facilities are available, will endorse such a plan, but only because the plan "seek[s] not to freeze population at present levels but to maximize growth by the efficient use of land, and in so doing testify to this community's continuing role in population assimilation."[109] The same court adds as a further caveat: "We only require that communities confront the challenge of population growth with open doors."[110]

These opinions are troubling in their implications. First, the generalized assumption that population growth is natural and should not be curtailed by local government regulation appears to be unfounded. For example, no biological data would support such a simplistic premise.[111] In fact, human

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that the 3% cap did not abide by the town's community plan which required it to act in "a reasonable, responsible and conscientious manner").

[105] National Land and Investment Company v. Kohn, 215 A.2d 597, 612 (Pa. 1966) (emphasis added).

[106] Appeal of Girsh, 263 A.2d 395, 398 (Pa. 1970) (emphasis added).

[107] Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore, 557 P.2d 473, 497 (Cal. 1976) (Mosk, J., dissenting); *see also* Building Industry Ass'n of So. California, Inc. v. City of Camarillo, 41 Cal. 3d 810, 825 (1986) (Mosk, J., concurring, but reiterating that "[a]n impermissible elitist concept is invoked when a community constructs a legal moat around its perimeter to exclude all or most outsiders").

[108] Construction Industry Ass'n of Sonoma County v. City of Petaluma, 522 F.2d 897, 909 n.17 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); *see also* Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore, 557 P.2d 473, 488 (Cal. 1976) (holding that the reasonableness of a slow-growth plan includes forecasting the "probable . . . duration of the restriction").

[109] Golden v. Planning Bd. of Town of Ramapo, 285 N.E.2d 291, 302 (N.Y.), *appeal dismissed*, 409 U.S. 1003 (1972).

[110] *Id.*

[111] *See* BOUVIER & GRANT, *supra* note 10, ch. 4.

population growth, historically speaking, is a recent phenomenon.[112] Beginning around the Seventeenth Century, scientific and technological advances led to a substantial decrease in birth mortality rates and a significant increase in life expectancies.[113] At the same time, world-wide birth rates continued to remain high.[114] The result has been an unprecedented population explosion.[115] Faced with this historical fact, it is difficult to consider population growth as a self-evident natural event. Thus, while arguments may be advanced for the sociological and economic benefits of undiminished population growth, it would appear to be a misrepresentation to summarily dismiss it as a natural event.

Second, even if a court were to attempt to determine whether population growth is "natural," and additionally to balance the sociological and economic pros and cons of such growth, it is debatable whether such determinations are within the jurisdictional boundaries of a court.[116] Arguably, it should be left to the legislature to make such findings, leaving the court only to determine whether the resulting regulation bears a rational relationship to the legislative findings.[117]

A third, and more overriding concern, however, is that a court's determination that a growth control measure should be invalidated because it lacks a substantial nexus, may, over the long-term, inhibit more constitutional rights than it helps.[118] While it is impossible to establish beyond a reasonable doubt the truth of such supposition, if verified, it would indicate a need for extreme judicial deference, and the need for courts to invalidate only the most arbitrary of the no-growth ordinances.

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[112] MOFFETT, *supra* note 44, at 6 ("Through most of human history the world's population remained below 300 million.").

[113] JOSEPH J. SPENGLER, POPULATION AND AMERICA'S FUTURE, ch. 1 (1975).

[114] *Id.*

[115] George Moffett effectively portrays the recent population growth spurt with the following analogies:

> It took eighteen centuries from the time of Christ for the earth to reach its first one billion inhabitants but only *one* century to reach its second and only one *decade* to reach its latest billion. . . . It took 10,000 generations to reach the first two billion (in 1930) but only one lifetime to reach the next two (in 1980). . . . Ninety-six hours from now the earth will have one million more inhabitants, which translates into (at 1990 population levels) a new Pittsburgh or Boston every two days, a new Germany every eight months, a new Mexico or two new Canadas every year, a new Africa and Latin America *combined* during the decade of the 1990s alone . . . .

MOFFETT, *supra* note 44, at 7 (emphasis in original).

[116] *See infra* note 148.

[117] *Id.*

[118] *See* BARNETT, *supra* note 28, at 41-48 (analyzing potential privacy violations brought about by increased population density).

B. What is Necessary

Besides making unfounded assumptions regarding what is "normal," courts often make questionable assumptions about what rises to the level of "necessity."[119] For example, a court may determine that a municipality has a duty to keep its doors open to a rising population until the municipality literally lacks the physical capabilities to take more, or until such time when all natural resources have been fully, and literally, utilized.[120] Under this reasoning, a "necessity" will not be found to exist until the need for restricting growth is evident in *human* terms, such as, for example, inadequate water sources or inadequate housing.[121]

Such an assumption can lead to ironic possibilities. Take, for example, an environmentally-conscious community that finds it necessary to limit future growth within its boundaries in order to protect the surrounding environment. Assume, however, that the community currently has a surplus capacity of municipal facilities. It will be difficult for the community to prove the "necessity" of growth restrictions where human amenities abound, such as, a surplus sewage capacity, a low student-to-teacher ratio, or uncrowded roadways.[122] Similarly, where the environmentally-conscious community cannot deny that a source of water remains available for human consumption (even though it is diminishing the underground water table), or where expansive tracts of land remain available for development (even though they provide important habitat for diverse non-human life), a court may be hard-pressed to conclude that the community's growth restrictions are necessary.[123]

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[119] *See infra* note 124 (providing cases).

[120] *See, e.g.*, Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291, 295 (N.Y.) (upholding challenged growth controls, and noting the tremendous growth experienced, and expected, within the city, as well as the anticipated municipal facility shortfalls), *appeal dismissed*, 409 U.S. 1003 (1972).

[121] *See, e.g.*, Westwood Forest Estates, Inc. v. Village of South Nyack, 244 N.E.2d 700, 703 (N.Y.) (holding invalid municipality's temporary moratorium on development established to alleviate the burden on village's sewer disposal plant, and in so holding, balancing the risk of further pollution of the Hudson River against plaintiff's property rights: "whatever the right of a municipality to impose 'a . . . temporary restraint of beneficial enjoyment . . . where the interference is necessary to promote the ultimate good either of the municipality as a whole or of the immediate neighborhood', [sic] such restraint must be kept '*within the limits of necessity*'") (emphasis added, internal quotations in original), *reargument denied*, 247 N.E.2d 288 (N.Y. 1969).

[122] *See, e.g.*, City of Boca Raton v. Boca Villas Corporation, 371 So.2d 154, 156 (Fla. Dist. Ct. App. 1979) (noting adequacy of city's existing utility systems and services, with "no indications of undue strain as a result of further anticipated growth within densities allowed prior to Cap"), *cert. denied*, 381 So.2d 765 (Fla. 1980), *and cert. denied*, 449 U.S. 824 (1980).

[123] *See, e.g.*, *id.* (noting that city's "water resources can abundantly withstand anticipated growth").

The origin of the "necessity" problem is probably rooted in the judicial discomfort of putting, what are incorrectly thought to be purely environmental concerns, before more readily understood human concerns. In such cases, a real environmental necessity may be ignored so that a competing human necessity can be protected.[124] Two cases—both decided by the same court within four years of each other[125]—illustrate how courts improperly analyze environmental necessity.

The City of Boca Raton, Florida enacted a no-growth ordinance which was challenged by two property owners as a taking of property in *City of Boca Raton v. Boca Villas Corporation.*[126] Boca Raton's no-growth ordinance, precipitated by an initiative and referendum, "capped" the total number of dwelling units within the city's boundaries at 40,000.[127] In order for the ordinance to be upheld, the Florida District Court of Appeals for the Fourth District required a showing "of necessity for the public welfare."[128] The appellate court, affirming the trial court's decision, found that the city failed

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[124] *See, e.g.*, Hock v. Board of Supervisors, 622 A.2d 431, 434 (Pa. Commw. Ct. 1993) (stating that minimum lot requirement of three acres was not justified by township's desire to preserve prime farmland); Martin v. Millcreek, 413 A.2d 764, 767-68 (Pa. Commw. Ct. 1980) (finding that ten-acre minimum lot restriction was not necessary to prevent pollution by on-site septic systems); Application of Wetherill, 406 A.2d 827, 828-29 (Pa. Commw. Ct. 1979) (invalidating ordinance requiring ten-acre minimum lot size throughout 37% of the township despite township's intent to preserve the best farmland available). *But see infra* note 185 (listing cases that have acknowledged the link between the environment and societal welfare).

[125] City of Hollywood v. Hollywood, Inc., 432 So.2d 1332 (Fla. Dist. Ct. App.), *petition for review denied*, 441 So.2d 632 (Fla. 1983); City of Boca Raton v. Boca Villas Corporation, 371 So.2d 154 (Fla. Dist. Ct. App. 1979), *cert. denied*, 381 So.2d 765 (Fla. 1980), *and cert. denied*, 449 U.S. 824 (1980).

[126] 371 So.2d 154 (Fla. Dist. Ct. App. 1979), *cert. denied*, 381 So.2d 765 (Fla. 1980), *and cert. denied*, 449 U.S. 824 (1980).

[127] The amended charter stated that the issuance of building permits above the 40,000 dwelling unit limit was prohibited. *Id.* at 155. To implement the referendum, the City Council enacted a 50% across-the-board density reduction for all multi-family zoning categories, and single family zoning categories were reduced by an average of the total constructed units prior to the amendment change. *Id.* The ultimate goal of the 40,000 unit limit was to cap Boca Raton's population at 100,000. ANDERSON, *supra* note 47, § 10.10, at 389.

[128] *Boca Raton*, 371 So.2d at 157 ("If the zoning restriction exceeds the bounds of necessity for the public welfare, as, in our opinion, do the restrictions controverted here, they must be stricken as an unconstitutional invasion of property rights."). At trial, the City of Boca Raton argued that "necessity is not the test for a city's right to amend its comprehensive plan." *Id.* Although the Florida Appeals Court disagreed, the city's view is harmonious with U.S. Supreme Court precedent. *See* Village of Belle Terre v. Borass, 416 U.S. 1 (1974). Interestingly, the Florida District Court of Appeals never mentions *Belle Terre*, handed down only five years before. *Boca Raton*, 371 So.2d 154.

to sufficiently meet this requirement, in part, because the city failed to point to a reasonable justification for the ordinance.[129]

The appellate court's responses to two of the city's enumerated justifications are particularly illuminating. One of the justifications employed by the city was a sustainability concept. Using a "water crop" theory, the city argued that the city's population should be limited by the budget of rainwater falling within city limits. While the appellate court acknowledged that this theory may have merits for regional planning, it rejected that such a theory would be rational for municipalities such as Boca Raton when several governmental agencies were charged with the responsibility of providing water from other sources, and presently capable of doing so, and where water resources were presently sufficient:

> Water resources will not depend upon a "budget" which Boca Raton or other cities may impose, but rather will depend upon hard social choices involving agricultural priorities, environmental demands, quantity of water used in various sectors, and the cost which society is willing to pay. . . . *A cap predicated upon preservation of water resources is a preliminary and unnecessarily drastic solution to an area-water resource issue.*[130]

Concern for air quality and noise levels were a second justification put forth by the city. The court dismissed both of these because the levels were "normal for a community of [Boca Raton's] size and [were] well within state and federal standards and regulations."[131]

The appellate court was clearly troubled by an ordinance that limited growth before the city's facilities and resources were fully maximized. And, despite twenty-one volumes of testimony taken at trial, the court felt that Boca Raton depended upon justifications that were "largely presented in [the] abstract and without [a] specific factual showing of real necessity."[132] However, its simplistic analysis of this complex problem overlooks many important points. For example, Boca Raton's "water budget" could be particularly beneficial to both the municipality and the State as well. By not draining regional water sources, the city and the state are left with future options that would otherwise be foregone. A variety of unforeseeable consequences make such water conservation a rational goal. For example, conserving water would prove important to the public health and safety if the city's own aquifer became contaminated in the future. Or alternatively, the

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[129] City of Boca Raton v. Boca Villas Corporation, 371 So.2d 154, 159 (Fla. Dist. Ct. App. 1979), *cert. denied*, 381 So.2d 765 (Fla. 1980), *and cert. denied*, 449 U.S. 824 (1980).

[130] *Id.* at 156 (emphasis added).

[131] *Id.* at 156.

[132] *Id.* at 157.

general welfare would be benefited if the water was necessary to maintain Florida's wildlife or wildlife habitat.

As to noise and air quality levels, the baseline for "necessity" was whether or not the levels were greater than the national average. Based on this conclusion, a desire to achieve higher standards than normal is "unnecessary," and thus, insupportable. Here, too, the analysis seems shallow. For example, certain aspects of Florida's geography and environment might make it suffer more under national air quality standards—possibly because poor air quality affects the production of oranges, or because it deters tourist travel to the city.

Boca Raton prepared no one for *City of Hollywood v. Hollywood, Inc.*,[133] decided only four years later. In *Hollywood*, the same court *upheld* a city ordinance that set a three thousand unit density cap for a small strip of land along the Atlantic Coastline. The owner of this land challenged the ordinance as a taking. The city, in defending the ordinance, justified this action as necessary because the adjacent street could not handle the increased traffic—especially in the event of a fire or hurricane where traffic mobility was essential to avoid harm to the public. The trial court found the ordinance was arbitrary because the "traffic generation rate [was] patently erroneous."[134]

The District Court of Appeals disagreed and overturned the trial court. However, its decision to do so rested primarily on aesthetics:

> Before us is the last unspoiled beach area on the Gold Coast, a veritable Shangri-La in an otherwise endless Himalayan mountain range of cement to the south. It is surely a laudable governmental purpose to restrain excessive hotel and apartment house building on it and it is neither arbitrary nor capricious to do so.[135]

The Florida appellate court attempted to square its *Hollywood* holding with the inapposite *Boca Raton* holding. The Boca Raton ordinance, the court reminded, was established by public referendum—an "Alice-in-Wonderland approach" in the eyes of the court.[136] In contrast, the court lauded *Hollywood* for its pre-ordinance endeavors: "The record is replete with comprehensive plans, studies, reports, public meetings and actual discussion with the developer over a period of years."[137] The Florida appellate court's concern for comprehensive planning rings hollow considering the court hinged its decision on aesthetics, rather than comprehensive studies.[138] Instead, the

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[133] 432 So.2d 1332 (Fla. Dist. Ct. App.), *petition for review denied*, 441 So.2d 632 (Fla. 1983).

[134] *Id.* at 1334.

[135] *Id.* at 1335.

[136] *Id.*

[137] *Id.*

[138] *See supra* note 135 and accompanying text.

Florida appellate court identified a certain romantic necessity to justify upholding the ordinance—a last ditch effort to preserve a piece of posterity.[139]

While the *Hollywood* story has a desirable ending (coastal land was preserved), the process of getting there is questionable—especially in light of *Boca Raton*. The combination of these two cases creates a disquieting definition of "necessity." First, the *Boca Raton* holding implies that a city, at whatever expense, must fully utilize its physical and natural resources before it will be allowed to promulgate population stabilization measures. Put more bluntly, cities similar to Boca Raton, have a duty to let others "foul the nest" until the worsening situation becomes a problem of human proportions.

Second, the decision suggests that courts may dismiss subtle signs of scientific necessity. This is to be compared to the court's willingness to acknowledge blatant signs of aesthetic necessity. For example, Boca Raton's water budget may have had greater long-term benefits to the public health and safety than Hollywood's preservation of a last remaining strip of coastal environment surrounded by a "mountain range of cement."

Finally, the two holdings suggest that a court is *less likely* to allow an invasion of individual rights where the justification for the ordinance bears an indirect relationship to the public welfare (even though substantial), rather than direct relationship (even though unsubstantial). The *Boca Raton* ordinance, for example, would have minimally burdened individual rights, because the economic impact of the ordinance would have been shared among the whole population. Yet, the court invalidated the ordinance because the link between water reserves and air and water quality was too attenuated for the court—even though the long-term public benefit would have been substantial. In comparison, one landowner was threatened with all of the economic burden of the *Hollywood* ordinance. Despite this, the court upheld the ordinance because development would have immediately altered the last undeveloped stretch of beach on the Gold Coast. Thus, individual rights were substantially burdened even though the offsetting public benefit was insubstantial, being mostly aesthetic value in the eyes of the court.[140]

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[139] *See also* Sturges v. Town of Chilmark, 402 N.E.2d 1346 (Mass. 1980). In *Sturges*, the court spent considerable time differentiating the use of growth controls in rural areas, which it considered valid, from the use of growth controls in urban fringe areas, which it considered invalid. *Id.* at 1350-52. In considering the legitimacy of Chilmark's rate-of-development bylaws, the court emphasized that "[t]he island of Martha's Vineyard has unique and perishable qualities." *Id.* at 1352.

[140] The *Hollywood* court notes other important considerations as well:

> The fact that this . . . [beach area is] filled with desirable rare flora, is ecologically sensitive and crying out for environmental protection, is in desperate need of open space and easy public access to the ocean, were all addressed and considered in agonizing detail.

City of Hollywood v. Hollywood, Inc., 432 So.2d 1332, 1334 (Fla. Dist. Ct. App.), *petition for*

As the two sections above suggest, what courts consciously or unconsciously consider to be "natural" and "necessary" can ultimately influence outcomes in growth control challenges. Furthermore, the contrasting *Boca Raton* and *Hollywood* cases highlight the conflicting judicial policies underlying some growth control decisions. Arguably, these unsound assumptions and conflicting policies weaken a municipality's power to appropriately respond to population and environmental problems. However, these underlying sources do not fully account for the judicial distrust encountered by growth control regulations. Another source of distrust arises from more basic procedural and substantive problems with growth control mechanisms. These problems are explored in the following section.

C. What is Justifiable

> *The area is becoming a concrete jungle. The traffic, the noise, the pollution—it's just awful and ugly—and it's getting worse. What they've done is take a nice middle-class neighborhood and destroy it, block by block.*[141]

This homeowner's complaints echo the sentiments of many throughout the United States. The above complaint also illustrates the complexity of the growth management problem. The homeowner begins his complaint by identifying an aesthetic harm: the "concrete jungle." He proceeds to identify nuisances that may in some cases rise to the level of health and safety issues: "traffic" and "noise." He ends with possibly the most troublesome issue by indicating a general desire for quality of life—a desire which has potentially exclusionary undertones: "a nice middle-class neighborhood."[142]

Such complex complaints as the one above are not new in this country;[143] however, the frequency of such complaints appears to be on the rise concurrent with the rising U.S. population.[144] Citizen complaints regarding land use problems become the grist for the political wheels and force the

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review denied, 441 So.2d 632 (Fla. 1983).

[141] Quote of a homeowner *in* MIKE DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES 186 (1992) (quoting L.A. TIMES, May 31, 1979).

[142] ANDERSON, *supra* note 47, at § 8.02. "Exclusionary" is a land use term signifying intended or unintended actions that deny certain categories of people similar opportunities. *See generally id.*, ch. 8.

[143] *See* Fred P. Bosselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?*, 1 FLA. ST. U. L. REV. 234, 234-38 (1973) (describing the urban problems that were frequently encountered during the United States' early history).

[144] California, one of the fastest growing states, provides excellent examples of increasing frequency of citizen complaints. *See, e.g.*, Barry M. Horstman, *Mind-Boggling Array of Slow-Growth Plans Heads for Ballot*, L.A. TIMES, Aug. 1, 1988, at 1. This is ironic considering California is historically known as a "quality of life" destination.

"powers that be" to respond or risk political suicide.[145] Thus, municipal officials are placed in the unenviable position of having to create regulatory responses to generalized problems of no clear origin such as those described by the homeowner above.

Because of the inherent difficulties a municipality faces in attempting to respond to such complex issues, courts have traditionally given municipalities deferential treatment in the land use area.[146] Judicial deference, in fact has over time led to a broad interpretation of the "police power," the common law principal[147] that authorizes a municipality's activities as long as they are shown to promote the health, safety, morals, and general welfare of the community.[148] Historically, it was necessary for municipalities to justify their

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[145] *See* DAVIS, *supra* note 141, ch. 3 (discussing the political hotbed created by the slow-growth movement's "homegrown revolution").

[146] *See* MANDELKER, *supra* note 47, § 1.12; WILLIAMS & TAYLOR, *supra* note 51, ch. 5 (discussing jurisprudential trends in land use law).

[147] Common law principles are often codified by a state zoning enabling act. A state zoning enabling act sets forth express powers that are deemed by the state to be constitutional and valid zoning powers thus reducing the threat of challenges to land use regulations. *See* CALLIES, *supra* note 41, at 37. Many states adopted the Standard State Zoning Enabling Act ("SZEA"), U.S. Dep't Commerce (rev. ed., 1926). *Id.* The SZEA, *inter alia*, gives a municipality the power to "regulate and restrict" population density. SZEA, § 1.

[148] Three U.S. Supreme Court cases illustrate the expansion of the police power. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the challenged ordinance excluded all business-related buildings, apartment houses, retail stores and shops from certain residential neighborhoods. The Court upheld the ordinance, and zoning in general, finding that all four prongs—health, safety, morals, and general welfare—justified this exercise of police power. The court emphasized that an increasingly complex world justified increasingly restrictive local laws. *Id.* at 386-87.

Later, in *Berman v. Parker*, 348 U.S. 26 (1954), the Court held that the scope of police power included aesthetics aimed at remedying social ills:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Id. at 33 (citations omitted).

The police power expansion reached its zenith in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), where an ordinance prohibited non-family living arrangements to insure the village's tranquility. The court found the regulation's goals to be valid:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Id. at 9. *Cf.* Moore v. East Cleveland, Ohio, 431 U.S. 494 (1977) (holding that a housing code ordinance which had the practical effect of preventing extended families from living together was too intrusive and thus served no legitimate purpose).

regulations by pointing to a legitimate health and safety concern, for example, safety concerns regarding the risk of fire in densely inhabited urban areas.[149] However, beginning in the 1920s[150] courts increasingly acknowledged modern-day realities and showed a willingness to uphold regulations not related to health and safety concerns, but rather based upon the "weaker" prong of the police power—the general welfare prong.[151] This more expansive reading of the police power enabled municipalities to enact ordinances that directly addressed many of their citizens' complaints, even where those complaints did not signal a risk to health or safety.[152]

For example, by enacting ordinances that insure sufficient open spaces, the concrete jungle depicted above could be averted. Under traditional jurisprudence, open space regulations would likely be upheld even though they rested upon an aesthetic concern rather than a legitimate health and safety concern.[153] Courts have found a host of other "quality of life" goals to be a proper exercises of the police power as well. The most common justifications include: preservation of small town charm, checking rampant development, preserving important lands, such as open spaces or agricultural lands, reducing traffic congestion, lowering crime, or building new schools to prevent overcrowding.[154]

Whether public welfare justifications like the ones above will remain viable is now open to debate.[155] Recent United States Supreme Court cases in the "takings" area signal a return to a more narrow interpretation of the police power.[156] Under the new takings analysis, general welfare justifications are

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[149] *See* YOUNG, *supra* note 47, § 3.06, at 90.

[150] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 265 (1926).

[151] *See supra* note 148; *see also* ANDERSON, *supra* note 47, §§ 7.13-7.34 (enumerating and discussing the many general welfare justifications).

[152] *Id.*

[153] *See* WILLIAMS & TAYLOR, *supra* note 51, § 157.03 (discussing public attitudes relating to preservation of open space); *see generally id.*, ch. 157.

[154] *See, e.g.*, Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291 (N.Y.) (holding that general welfare concerns such as, promoting orderly growth, insuring the provision of adequate governmental services, and guarding against future blight were reasonably related to the challenged restrictions), *appeal dismissed*, 409 U.S. 1003 (1972); Construction Industry Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975) (finding a reasonable relationship between the town's building quota and its plan to preserve the rural atmosphere of the community), *cert. denied*, 424 U.S. 934 (1976); *See generally* YOUNG, *supra* note 56, §§ 7.13-7.34.

[155] *See also* David L. Callies, *After* Lucas *and* Dolan: *An Introductory Essay*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* (David L. Callies ed., 1996).

[156] *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). The *Lucas* case is discussed *infra* part VI(C). *See also* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). In *First English*, Justice Stevens, dissenting, expressed concern that the majority's opinion would have a chilling affect on governmental

insufficient reason for a municipality to avoid compensating a landowner when that owner is deprived of all economically beneficial use of his property.[157] It is possible that future Supreme Court cases may adopt a narrowed view of the police power in other constitutional areas of land use law as well. For example, substantive due process or equal protection challenges to land use regulations may, in the future, be subjected to a heightened level of scrutiny.[158] If this happens, municipalities seeking to restrict growth through growth control ordinances will need to abandon aesthetic and other public welfare justifications—even if those are the ones raised by their citizens—in favor of justifications grounded in health and safety concerns. Health and safety concerns are considered by the courts to be more compelling, and thus a more legitimate justification for regulation.[159]

V. OVERCOMING JUDICIAL BARRIERS: JUSTIFYING NO-GROWTH CONTROLS WITH THE CONCEPT OF SUSTAINABILITY

While the above three sections represent significant obstacles for those municipalities seeking to address environmental concerns by controlling growth, the picture is not completely bleak. As discussed above,[160] courts will uphold growth restrictions where a sufficient link exists between the restriction and a human concern. A concept of recent origins—"sustainability"[161]—may offer such a link by evaluating human development in terms of the earth's long-term capacity to support that development.[162] The rest of this comment evaluates the concept of sustainability as a new justification for the enactment of no-growth ordinances. This comment proposes that no-growth ordinances enacted to further sustainability concepts—what shall be termed in this comment as "sustainable no-growth ordinances"—will survive legal challenge where traditional no-growth ordinances failed.[163]

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action—especially when it was related only to the general welfare. 482 U.S. at 340-41.

[157] *See supra* note 156; *see generally* AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION (David L. Callies ed., 1993).

[158] Justice Scalia suggests that a stricter standard of judicial review applies in takings cases. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836 n.3 (1987). Therefore, it would appear that general welfare justifications outside the takings area will continue to be subjected only to traditional, lower levels of scrutiny. *See also* YOUNG, *supra* note 56, § 3A.11.

[159] YOUNG, *supra* note 56, § 7.03, at 737-38.

[160] *See supra* part IV(C).

[161] *See infra* note 165, defining sustainability.

[162] *See infra* parts V.A-B.

[163] While the concept of sustainability needs to be evaluated from many different legal viewpoints, this comment is confined to examining the constitutional ramifications of sustainable no-growth regulations.

A. The Concept of Sustainability

While many definitions exist, the concept of sustainability is simple. The common goal of sustainability is to implement sustainable practices[164] that are harmonious with nature such that both human and non-human life can be sustained indefinitely into the future.[165] The basic premise is that *un*sustainable practices threaten not only nature but the future existence of humans as well.[166] Hence, while sustainable practices endeavor to protect the environment by reducing pollution, preserving ecological diversity, and conserving renewable and nonrenewable resources, each of these endeavors is ultimately aimed at preserving human life.[167]

The science of sustainability has as its mission identifying what practices are sustainable. Among other things, it seeks to determine the "carrying capacity" of the earth by considering both global and local factors. By determining carrying capacity, one can define the optimal ecological balance between human and non-human life.[168] The carrying capacity of a given area

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[164] In this comment, the term "sustainable practices" is meant to cover all areas where the concept of sustainability might be applied, for example, sustainable consumption, sustainable development, sustainable agriculture, and sustainable cities, to name a few.

[165] "Sustainability is the condition of leaving something in as good shape—or better—when you're done with it as it was when you received it." Eisen, *supra* note 87, at n.19. The list below details some of the values necessary to achieve a sustainable society:

— Respecting and caring for the community of life;
— Improving the quality of human life;
— Conserving the Earth's vitality and diversity;
— Minimizing the depletion of nonrenewable resources;
— Keeping within the Earth's carrying capacity;
— Enabling communities to care for their own environments;
— Creating a global alliance.

DEBRA DADD-REDALIA, SUSTAINING THE EARTH: CHOOSING CONSUMER PRODUCTS THAT ARE SAFE FOR YOU, YOUR FAMILY, AND THE EARTH 17 (1994) (quoting THE WORLD CONSERVATION UNION, UNITED NATIONS ENVIRONMENT PROGRAMME, THE WORLD WIDE FUND FOR NATURE, CARING FOR THE EARTH: A STRATEGY FOR SUSTAINABLE LIVING).

For a definition of sustainability that explores the social dimensions, see Christopher D. Stone, *Deciphering "Sustainable Development"* 69 CHICAGO KENT L. REV. 977 (1994). For an excellent source of general reference material on sustainability, see Eisen, *supra* note 87, n.7.

[166] *See* Lester Brown, *The Battle for the Planet: A Status Report in* ENVIRONMENT PERIL 154-80 (Anthony B. Wolbarst ed., 1991).

[167] *Id.*

[168] VIRGINIA D. ABERNETHY, POPULATION POLITICS 245 (1993). A mathematical relationship can relate the linkages between environment, consumption and population, and the resulting carrying capacity of a given place:

P, being population itself, I being environmental impact, A being per-capita consumption (determined by income and lifestyle), and T being environmentally harmful technology

will vary depending on a host of complex variables including: availability of nearby natural resources (e.g., energy, water, forests); sensitivity of the surrounding ecology; consumption habits of the people; land use, farming and industrial practices; and, the number of people in the area.[169] By analyzing these variables, sustainable science attempts to determine whether a particular region or locale is above or below its carrying capacity.[170] Hence, where water is readily available, more intensive farming can take place without surpassing the carrying capacity. In contrast, where the surrounding ecology is more sensitive, less development can take place. Alternatively, where resource consumption is low, a given area may be more densely populated. Because a multitude of variables determine carrying capacity, a particular locale may be able to achieve sustainability by balancing one or several of these variables. For example, a region might implement water conservation measures so that its water supply can remain sustainable.[171]

B. Implementing the Sustainability Concept

Because many of these variables are subject to change, authorities disagree about which and how many of these variables can be manipulated to achieve

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that supplies A. The three factors P, A and T interact in multiplicative fashion, i.e. they compound each other's impacts. So whatever the size of A and T, the role of P is bound to be significant even when a population, its growth rate too, are relatively small. For any type of technology, for any given level of consumption or waste, for any given level of poverty or inequality, the more people there are, the greater is the overall impact on the environment. So we can represent the processes involved in the form of a basic equation, I = PAT.

Norman Myers, *Population/Environment Linkages: Discontinuities Ahead?*, *in* POPULATION, ENVIRONMENT, AND DEVELOPMENT 16 (E. van Imhoff et al. eds., 1992).

[169] *See* sources *infra* note 171.

[170] ABERNETHY, *supra* note 168, at 246.

[171] *See* FREDRICK O. SARGENT ET AL., RURAL ENVIRONMENTAL PLANNING FOR SUSTAINABLE COMMUNITIES chs. 6-9 (1991) (discussing sustainable planning techniques for preserving and protecting natural resources, agricultural lands, lake basins, and river basins). Sargent et al., describe *inter alia* natural science rating systems which can be used by communities to protect natural areas. *Id.* ch 6. *See also* CLARK, *supra* note 3, at 2 (describing the "natural systems study process" employed by residents of Sanibel island to define the island's carrying capacity). The Sanibel natural systems study considered four planning elements: "1) analysis of the island's ecosystem; 2) identification of the principal ecological zones; 3) diagnosis of the condition of these zones; and 4) suggestions for management requirements to conserve the island's natural systems and resources." *Id.* at 18. *See also* NICHOLAS A. ROBINSON AND KEVIN REILLY, ENVIRONMENTAL REGULATION OF REAL PROPERTY ch. 2 (1996) (describing natural constraints on development). Robinson and Reilly also discuss the availability of inventory techniques for identifying ecosystem and natural resource problems. *Id.*, § 2.05.

sustainability.[172] Some authorities believe that sustainability can be achieved through traditional measures, for example by strengthening current environmental laws, reducing human consumption, or by implementing new technologies that will make human activities more environmentally friendly.[173]

However, another contingent argues that technological advances alone are insufficient.[174] This group concedes that laws, technological innovations, and consumption reduction are important, but urge that these alone cannot keep pace with the world's rapidly expanding population.[175] For these authorities, any sustainable practice must include a variety of non-draconian, affirmative measures aimed at stabilizing or reducing the human population.[176] Because the world's population growth and its environmental consequences threaten to outpace traditional mitigating policies, common sense suggests a need for population limitation measures as a necessary part of sustainable policies. Not only does common sense suggest the need to incorporate population issues into the sustainability equation, a substantial amount of scientifically-based data urges this conclusion as well.[177]

The increasing acceptance of sustainability concepts may prove promising for local governments searching for justifications for growth control regulations that will survive judicial scrutiny. As mentioned above,[178] three

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[172] For a historical look at the debate, *see* HARRISON, *supra* note 32, ch. 1; *see also* Eisen, *supra* note 87, n.3; ABERNETHY, *supra* note 168, at 253-56.

[173] *See* Eisen, *supra* note 87, nn. 11-13; HARDAWAY, *supra* note 34, chs. 1 & 2. (summarizing the arguments put forth by the "pro-growthers" who argue that technological advancements will meet the needs of the growing population); *see also* Eisen, *supra* note 87, n.40 (quoting RACHEL CARSON, SILENT SPRING 297 (1962) who stated, "The 'control of nature' is a phrase conceived in arrogance, born of the Neanderthal age of biology and philosophy, when it was supposed that nature exists for the convenience of man.").

[174] *See, e.g.*, THE REPORT OF THE NATIONAL COMMISSION ON THE ENVIRONMENT, CHOOSING A SUSTAINABLE FUTURE 70-75 (1993) (arguing for the importance of population controls in achieving sustainable development); *see also* HARDAWAY, *supra* note 34, ch 1 (listing the proponents of population control); PAUL NEURATH, FROM MALTHUS TO THE CLUB OF ROME AND BACK, ch. 3 (1994) (discussing the need for population control).

[175] *See supra* note 174.

[176] *See, e.g.*, Stephan Bodian, *Simple in Means, Rich in Ends* (interviewing Arne Naess), *in* ENVIRONMENTAL PHILOSOPHY 185 (Michael E. Zimmerman et al. eds., 1993) ("In deep ecology, we have the goal not only of stabilizing the human population but also of reducing it to a sustainable minimum by humane means which do not require a revolution or a dictatorship"); Luciano Minerbi, *Sustainability Versus Growth in Hawaii and Oahu*, Figure I.1 *in* SUSTAINABLE DEVELOPMENT OR SUBURBANIZATION? CUMULATIVE PROJECT IMPACTS IN EWA AND CENTRAL OAHU (1989) (available in University of Hawai'i Hamilton Library) (depicting "Popular and Unpopular Population Control Measures by General Grouping in the Smallest Space Solution").

[177] *See* BOUVIER & GRANT, *supra* note 10, ch. 1; ABERNETHY, *supra* note 168, ch. 18.

[178] *See supra* part IV.

judicial obstacles currently impair the effectiveness of growth controls: (1) judicial preconceptions regarding population growth; (2) judicial confusion regarding environmental necessity; and (3) increasing scrutiny of legislative acts justified by the public welfare prong of the police power.[179] Sustainable no-growth controls could conceivably overcome all of these obstacles by providing an analytical link between population problems, environmental problems, and human health and safety concerns. Before this link can be accepted, however, courts must first recognize the science of sustainability. Needless to say, judicial acceptance of novel scientific principles linking environmental welfare to human welfare may take some time.[180]

Significantly, the U.S. Supreme Court rocked the environmental community with its decision of *Lucas v. South Carolina Coastal Council*,[181] wherein Justice Scalia, writing for the majority, held that South Carolina's desire to protect dunes on barrier islands was insufficient justification to avoid a taking. *Lucas* held that a state is required to compensate a burdened landowner where a regulation, such as a dune protection statute, strips the landowner's property of all economically beneficial use.[182] *Lucas* is particularly troubling because barrier island dunes provide a widely-acknowledged human health and safety benefit by reducing the coastal impact from storm-induced waves.[183] The Court's discounting of the human health and safety benefits of dune protection appears to be unfounded;[184] nonetheless, this decision from our high court depicts the substantial barrier that no-growth regulations will face, even if they are founded on principles of ecological sustainability.

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[179] *See supra* part IV.

[180] *See* Tarlock, *supra* note 41, at 583-86 (discussing a slow trend by courts to accept evidence that involves aspects of scientific uncertainty).

[181] 505 U.S. 1003 (1992). *Lucas* sent a clear message that "[s]tates may not regulate land use solely by requiring landowners to maintain their property in its natural state as part of a functioning ecosystem, even though those natural functions may be important to the ecosystem." Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 Stan. L. Rev. 1433, 1438 (1993). Compare *Lucas* with the Supreme Court's earlier view in Agins v. Tiburon, 447 U.S. 255, 261 n.8 (1980). *Agins* stated that the enumerated justifications for Tiburon's open-space ordinance substantially advanced legitimate governmental goals which included, *inter alia*, protecting against adverse impacts, "such as air, noise and water pollution, . . . [and] disturbance of the ecology and environment." *Id.*

[182] *Lucas*, 505 U.S. at 1019. *See infra* part VI(C) (analyzing takings and *Lucas*).

[183] *See, e.g.*, TIMOTHY BEATLEY ET AL., AN INTRODUCTION TO COASTAL ZONE MANAGEMENT 18 (1994).

[184] Tarlock, *supra* note 41, at 595 (Justice Scalia's theory "reflects an unjustified contempt for all levels of environmental regulation, no matter how clear the scientific link between a land use activity and harm to other land in the area, and a lack of appreciation for the extent to which the teachings of ecology have altered our conception of harmful land use practices.").

Despite Justice Scalia's pronouncements in *Lucas*, lower courts have recognized that healthy natural systems are important to societal welfare.[185] For example, flooding was originally seen as an evil that was to be circumvented by erecting dams and levees.[186] However, planners later learned that providing sufficient room for natural flooding was more beneficial and efficient for both the environment and the people.[187] In recognition of these factors, the federal government enacted incentive legislation[188] that led to the promulgation of flood plain zoning by local governments. Flood plain zoning is now endorsed by courts as a "proper exercise of police power to prevent a misuse of nature . . . ."[189] Similar to sustainable no-growth controls, flood plain zoning prohibits population growth in certain areas. Flood plain zoning is deemed justifiable because it protects the population from the harm of flooding. In contrast, sustainable no-growth controls are arguably justifiable because they aim to maintain the population within sustainable limits, and thus protect future populations from the human harm that might result from environmental and ecological decline.

Other regulatory examples which to some extent rely upon ecological well-being for the furtherance of human health and safety include open spaces

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[185] *See, e.g.*, Caspersen v. Town of Lyme 661 A.2d 759 (N.H. 1995) (upholding a 50-acre minimum lot size ordinance because it was rationally related to the legitimate purposes of *inter alia* encouraging forestry and timber harvesting and protecting wildlife habitat and natural areas); Town of Freeport v. Brickyard Cove Associates, 594 A.2d 556 (Me. 1991) (holding that zoning ordinance which defined permissible limits on timber harvesting was not overly vague); Dune Road Association of Westhampton v. Jorling, 551 N.Y.S.2d 45 (N.Y. App. Div.) (finding no basis for unconstitutionally vague challenge of environmental regulations), *appeal denied*, 557 N.E.2d 1187 (N.Y. 1990); Ketchel v. Bainbridge Township, 557 N.E.2d 779 (Ohio) *reh'g denied* 560 N.E.2d 779 (Ohio 1990), *cert. denied* 498 U.S. 1120 (1991); (validating a three-acre minimum lot size enacted to prevent pollution and protect underlying aquifer recharge areas); Albano v. Mayor & Township Committee of Township of Washington, 476 A.2d 852 (N.J. Super. App. Div. 1984) (upholding a three acre minimum lot size restriction and recognizing that land use regulations should take into account ecological and environmental concerns, but emphasizing that they cannot be used to thwart growth); D & R Pipeline Construction Company, Inc. v. Greene County, 630 S.W.2d 236 (Mo. App. 1982) (holding that large lot ordinance was valid because it sought to prevent pollution of nearby water reservoirs); Sturges v. Town of Chilmark, 402 N.E.2d 1346 (Mass. 1980) (upholding a rate-of-development bylaw justified by *inter alia*, risk of irretrievable harm to "natural, historical, ecological, scientific, [and] cultural values on Martha's Vineyard"); *see also* Tarlock, *supra* note 41, at 584 (noting that recent court decisions "evince[] increasing judicial sophistication in environmental regulation").

[186] ANDERSON, *supra* note 47, § 9.48.

[187] *Id.*

[188] Flood Insurance Act of 1956, 42 U.S.C.S. §§ 2401-2421 (1956).

[189] *See, e.g.*, Christianson v. Gasvoda, 789 P.2d 1234 (Mont. 1990); Usdin v. State, 414 A.2d 280, 290 (N.J. Super. Ct. Law Div. 1980), *aff'd*, 430 A.2d 949 (N.J. Super. Ct. App. Div. 1981); *see also* Tarlock, *supra* note 41, at 576-77.

promotion,[190] agricultural protection,[191] wetlands protection,[192] and sensitive lands protection, such as coastal zone management,[193] groundwater protection zoning, steep slope regulations to prevent erosion, and resource protection zoning.[194] Like flood plain zoning, these regulations directly protect natural functions while simultaneously providing a benefit to the health, safety and general welfare of the public.

Courts were probably willing to accept an inferential relationship between the environment and human health in the above examples because the challenged legislation was based upon scientific data sufficiently evidencing a link between environmental health and human health and safety. In similar fashion, communities seeking to promote sustainable practices may possibly survive constitutional challenge if they can build a thorough record prior to promulgation of population controls.[195] The record will need to identify the health, safety and general welfare harms that will befall the community if it continues to "live" beyond its sustainable means.[196] It will further need to substantiate facts showing that population control and no-growth regulations are necessary to achieving sustainability. The community must perform this task with enough detail to convince a court that a justifiable harm and a substantial nexus exists.[197] It is easily conjectured that building such a record will be complex and expensive, especially to those initial communities that decide to incorporate sustainable policies. However, by building a comprehensive record, a community will be in a powerful defensive position to avoid many of the constitutional pitfalls that have been traditionally encountered in implementing no-growth regulations.

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[190] *See* WILLIAMS & TAYLOR, *supra* note 51, ch. 158 (discussing in detail open space and the police power).

[191] *See, e.g.*, N.Y. AGRIC. & MKTS. LAW §§ 301-307 (McKinney 1991).

[192] *See* WILLIAMS & TAYLOR, *supra* note 51, § 158.29-158.30 (listing state and local regulations protecting wetlands through land use mechanisms).

[193] *See, e.g.*, Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 (1972).

[194] *See generally* Tarlock, *supra* note 41, at 577-83.

[195] *See* sources *supra* note 171, for examples.

[196] *See supra* parts IV.A-B discussing the requirements imposed in two growth control cases: City of Hollywood v. Hollywood, Inc., 432 So.2d 1332 (Fla. Dist. Ct. App.), *petition for review denied*, 441 So.2d 632 (Fla. 1983); City of Boca Raton v. Boca Villas Corporation, 371 So.2d 154 (Fla. Dist. Ct. App. 1979), *cert. denied*, 381 So.2d 765 (Fla. 1980), *and cert. denied* 449 U.S. 824 (1980).

[197] *Id.* For examples of the possible data required, see sources in note 171.

VI. CONSTITUTIONAL LEGITIMACY OF NO-GROWTH REGULATIONS THAT PROMOTE SUSTAINABILITY

Incorporating the above analysis, the following sections consider whether sustainable no-growth controls violate substantive individual rights guaranteed by the United States Constitution.[198] The most common claims brought against growth controls invoke one of the several substantive constitutional guarantees provided by the Fifth and Fourteenth Amendments. The potential claims are analyzed separately below. These include: substantive due process challenges, equal protection claims, and takings claims.

A. Substantive Due Process

Substantive due process claims arise when a plaintiff—usually a property owner or developer—claims that a regulation unreasonably infringes upon the plaintiff's property rights.[199] The right to freely enjoy one's property is considered to be a fundamental right,[200] and thus properly invokes the "substantive" portion of the Due Process Clause. The predominant issue in land use substantive due process challenges is whether the government regulation is a proper exercise of police power.[201] As explained earlier,[202] the police power has traditionally given state and local governments broad discretion when they purport to protect the health, safety, and general welfare of society.[203] Thus, when reviewing substantive due process claims, courts have normally treated the challenged local regulations with "presumptive deference."[204] The presumptive validity of police power regulations means

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[198] This comment's focus is on the balance between individual rights and public welfare rights. As a result, this comment does not address the possible challenges under the Commerce Clause or the Privileges and Immunities Clause which tend to address issues of national unity. For analysis from this point of view, see Keith R. Denny, Note, *That Old Due Process Magic: Growth Control and the Federal Constitution*, 88 MICH. L. REV. 1245 (1990) (arguing that courts should review growth control ordinances from the national unity perspective instead of from a due process or equal protection perspective).

[199] HAGMAN & JUERGENSMEYER, *supra* note 14, § 10.2.

[200] *Id.*

[201] *See* MANDELKER, *supra* note 47, § 2.35, at 55 ("Whether land use regulation serves the general welfare is the major substantive due process question."); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386 (1926) (stating that due process property rights would be violated if the regulations are merely "a guise of the police power"); *see also supra* note 158 and accompanying text.

[202] *See supra* part IV(C).

[203] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[204] *See, e.g., id.* at 395.

that such regulations will be invalidated only if they are found to be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[205] Thus, a regulation will normally survive challenge if it bears an "arguable relationship" to the public welfare; or, stated differently, a regulation will survive challenge if its purported purpose is "fairly debatable."[206]

For example, an ordinance that seeks to preserve historic buildings arguably benefits the general welfare by enhancing the public's understanding of history and architecture.[207] As a result, historic preservation regulations have traditionally withstood challenge even though they concomitantly restrict land owners' rights to alter the character of the subject historic buildings.[208]

Applying the fairly debatable rule to a sustainable no-growth control subjected to substantive due process challenge may also lead to constitutional validation; however, the litigation is likely to be more contentious. Sustainable no-growth controls will likely have a broad impact that affects not only the citizens within the municipality's jurisdictional boundaries but also the citizens in the surrounding regions. One authority has suggested that regional effects of growth control schemes may be a decisive factor in future substantive due process challenges.[209] Nevertheless, some courts have shown a willingness to validate growth controls despite acknowledged regional impacts.[210] It is plausible that the same courts would uphold sustainable no-growth controls, especially where the municipal defendant can substantiate a compelling need for the regulations in order to protect the future health and safety not only of its own citizens, but also the region's citizens. Furthermore, past U.S. Supreme Court decisions have indicated a desire to bury, once and for all, the use of substantive due process challenges in land use litigation.[211] The combination of the above factors suggests that the initial substantive due process hurdle may be overcome.

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[205] *Id.*

[206] *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.").

[207] *See, e.g.*, Penn Central Transportation Co. v. New York, 438 U.S. 104 (1978).

[208] *See id.*; YOUNG, *supra* note 56, § 7.26.

[209] ANDERSON, *supra* note 47, § 10.15, at 400.

[210] *See, e.g.*, Construction Industry Ass'n of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). *Petaluma* is discussed *supra*. *See* notes 59-69 and accompanying text.

[211] *See* HAGMAN & JUERGENSMEYER, *supra* note 14, § 10.2; *see also supra* note 148.

B. Equal Protection

Even though a regulation passes substantive due process review, it may still be subjected to scrutiny under the Equal Protection Clause.[212] And, while substantive due process challenges in the land use area may be waning, equal protection challenges in the same are waxing.[213] A unique term—"exclusionary zoning"—has been coined to describe ordinances that unfairly burden one section of the population more than another.[214] The people burdened by exclusionary zoning tend to be those of lesser economic means.[215] Because racial and ethnic minority groups are often persons of low or moderate income, exclusionary zoning can impact these groups as well, even though this discriminatory result may not have been intended.[216]

Growth controls have the inherent potential to exclude because the restrictions limit the present and future supply of housing, thus causing housing prices to rise as demand rises. Some courts have responded to this exclusionary tendency of growth controls by striking them down, even when the purported governmental purpose was arguably legitimate.[217] However, the U.S. Supreme Court's current equal protection interpretation[218] means that growth regulations are now likely to survive equal protection challenge.[219]

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[212] With respect to growth control regulations, it should be noted that the Equal Protection Clause distinguishes between individuals within a state's jurisdiction, and those without: "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Thus, where a state enacts no-growth policies which, in turn, place a disproportionate burden on another state because of population "spill-over," those injured could not rely on the Equal Protection Clause. However, individuals of other states in this situation may be able to invoke the Commerce Clause or the Privileges and Immunities Clause. *See* Denny, *supra* note 198.

[213] *See* ANDERSON, *supra* note 47, § 8.01 (tracing the history of exclusionary zoning practices and the rising concern over these practices within the legal community).

[214] Robert Anderson extensively surveys the exclusionary zoning problem. *See* ANDERSON, *supra* note 47, ch. 8.

[215] ANDERSON, *supra* note 47, § 8.02.

[216] *Id.*

[217] *See, e.g.*, National Land & Investment Co. v. Kohn, 215 A.2d 597 (Pa. 1965) (striking down as exclusionary a large lot ordinance enacted to insure proper sewage disposal and adequate roads, and to preserve historic sites and rural character); *see generally* Ellenberg, *supra* note 12 (listing other ordinances deemed by state courts to be exclusionary).

[218] *See* Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (upholding municipality's refusal to rezone to permit construction of low and moderate cost multiple dwellings despite evidence of racially disproportionate impact).

[219] STEPHEN L. ISAACS, POPULATION LAW AND POLICY 49 (1981); MANDELKER, *supra* note 47, § 2.43, at 63; Abrams, *supra* note 50, at 632; Herman, *supra* note 89, at 451 n.133. Exclusionary growth controls face greater risk of invalidation at state-level however. *See* ANDERSON, *supra* note 47, §§ 8.17-8.18 (differentiating the greater scrutiny applied at state level versus the lesser scrutiny at federal level).

One of two levels of scrutiny—rational basis or strict scrutiny—usually apply in equal protection review, depending on the interest that has been burdened. A rational relationship test applies where the interest does not rise to the level of being "fundamental",[220] or the burdened class is not "suspect."[221] Under rational basis scrutiny, a regulation will survive if any conceivable reason justifies its promulgation.[222] As such, challenged regulations can almost always pass the rational relationship test.[223] If, however, a fundamental right is implicated, or a suspect class is found, strict scrutiny will apply. A regulation will not survive strict scrutiny unless the regulation is "narrowly tailored" to serve a "compelling" governmental goal.[224] Rational basis scrutiny of sustainable no-growth controls is not analyzed here because it would be similar to the scrutiny applied in substantive due process challenges.[225] However, the more difficult, strict scrutiny analysis is explored below by considering, in order, instances where strict scrutiny is triggered by (1) identifying a suspect class, or (2) by identifying a fundamental right.

1. Suspect class

Early growth controls—many of which created facially discriminatory classifications—were, as a result, prone to equal protection challenge.[226] In

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[220] MANDELKER, *supra* note 47, § 2.42. Fundamental interests include privacy, right to travel, right to vote, or any explicit constitutional guarantee. HAGMAN & JUERGENSMEYER, *supra* note 14, § 10.4. Fundamental rights are discussed *infra* part VI(B)(2).

[221] MANDELKER, *supra* note 47, § 2.42. Traditionally suspect classes were limited to minorities, as classified by race or national origin, that had been subjected to a history of discrimination. *See, e.g.*, Yick Wo v. Hopkins 118 U.S. 356 (1886) (classifying as suspect administrative discrimination against Asians). Suspect classes are discussed *infra* part VI(B)(1).

[222] MANDELKER, *supra* note 47, § 2.41, at 61.

[223] HAGMAN & JUERGENSMEYER, *supra* note 14, § 10.4, at 300. *But see* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (holding that town's denial of a special use permit for a group home for the mentally handicapped was unconstitutional even under rational basis scrutiny); *see also* MANDELKER, *supra* note 47, § 2.44 (analyzing the *Cleburne* opinion).

[224] *See, e.g.*, Shaw v. Reno, 509 U.S. 630 (1993).

[225] *See* MANDELKER, *supra* note 47, § 2.35. Substantive due process claims are discussed *supra* part VI(A).

[226] *See* Note, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?*, 39 U. CHI. L. REV. 612, 617-18 nn.30-34 (1972). Many states promulgated "durational requirements" which created suspect classifications by treating new residents to the state differently from other residents. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (invalidating several states' one-year residency requirements for welfare assistance); Zobel v. Williams, 457 U.S. 55, 71 (1982) (Brennan, J., concurring) ("it is difficult to escape from the recognition that underlying any scheme of classification on the basis of duration of residence, we shall almost invariably find the unstated premise that "some citizens are more equal than others"); *see also* DANIEL A. FARBER, ET AL., CONSTITUTIONAL LAW: THEMES FOR THE

contrast, suspect classes are rarely found in today's facially neutral no-growth regulations.[227] Despite facial neutrality, it is possible that a growth control will disparately impact a suspect class.[228] Nonetheless, a regulation is likely to survive even a showing of discriminatory effect because this alone is insufficient proof. Instead, a plaintiff must show purposeful intent on the part of the lawmakers to invidiously discriminate against a particular class.[229]

The Supreme Court's holding in *Arlington Heights v. Metropolitan Housing Development Corp.*[230] is helpful in considering whether a sustainable no-growth regulation would pass constitutional muster. A developer requested the rezoning of certain property from single family to multiple family. The proposed development, intended to be racially integrated, provided housing to low and moderate income individuals. After its request to rezone was denied, the developer filed suit claiming, *inter alia*, violations under the Equal Protection Clause. The U.S. Supreme Court held that disproportionate impact "is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination."[231]

The Court suggested that proof of invidious discriminatory purpose entails a close look at several sources. In a rare case intent can be shown if there is "a clear pattern, unexplainable on grounds other than race."[232] The Court explained that in other cases discriminatory purpose might be shown by examining the historical background of the decision, the specific sequence of events leading up to the challenged decision, departures from normal procedure, and the legislative or administrative history.[233]

CONSTITUTION'S THIRD CENTURY 478-79 (1993); Elizabeth G. Patterson, Note, *Municipal Self-Determination: Must Local Control of Growth Yield to Travel Rights?*, 17 ARIZ. L. REV. 145, 169-71 (1975).

[227] HAGMAN & JUERGENSMEYER, *supra* note 14, § 10.4, at 300.

[228] *See* South Burlington County NAACP v. Mt. Laurel, 336 A.2d 713 (N.J.), *cert. denied*, 423 U.S. 808 (1975).

[229] Personnel Administrator v. Feeney, 442 U.S. 256, 278-280 (1979); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 270 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976); *cf.* Shaw v. Reno, 509 U.S. 630 (1993) (holding that a facially race-neutral voting reapportionment plan that created a voting district with "boundary lines of dramatically irregular shape" created a colorable claim under the Equal Protection Clause).

[230] 429 U.S. 252 (1977).

[231] *Id.* at 265 (quoting *Washington v. Davis*, 426 U.S. at 242).

[232] *Id.* at 266 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) and other cases).

[233] *Id.* at 267-68. The language of *Arlington Heights* was further strengthened in *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979): "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279 (citation omitted).

Arlington Heights indicates that good faith sustainable no-growth controls are not seriously threatened by equal protection challenge. For example, even where a sustainable no-growth regulation raised housing prices, thus burdening the poor, it would likely be upheld because wealth-based distinctions are not suspect.[234] The outcome would remain the same even when the disparately impacted poor were also members of a suspect class such as, an ethnic or racial group. This is so because of the Supreme Court's invidious discrimination requirement described above.[235] A court considering a sustainable no-growth ordinance's constitutional validity would turn to the legislative history of the regulation which would, of course, evidence the ordinance's affirmative, rather than invidious, governmental objectives.

Even at the state court level, where equal protection scrutiny tends to be highest,[236] sustainable no-growth ordinances might survive challenge. State courts have expressed special concern over the use of growth controls in situations where dramatic near-term growth is expected in the particular locality. If the regional impact from a municipality's "closing its doors" is expected to be great, the risk of invalidation is high.[237] However, in the case of sustainable no-growth controls, courts would need to balance any near-term societal burdens in the region against the substantial benefits from achieving long-term sustainability within the region. In addition, where a court properly analyzes the population problem, it might acknowledge the real possibility that housing prices would stabilize as the regional population stabilized.

2. Fundamental rights and the right to travel

As with suspect classes, the U.S. Supreme Court has been parsimonious in identifying fundamental rights.[238] For example, in the U.S. Supreme Court case, *Village of Belle Terre v. Boraas*,[239] the village sought to preserve its tranquility by excluding college students—a group known to have created disturbances in the past. To carry out its goal, the village enacted an ordinance that prohibited house-sharing by unrelated "families" of two or more. Justice Marshall, dissenting, argued that the exclusionary ordinance

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[234] *See* James v. Valtierra, 402 U.S. 137 (1971).

[235] *See supra* note 229.

[236] *See supra* note 219 and accompanying text.

[237] *See, e.g.*, South Burlington County NAACP v. Mount Laurel, 336 A.2d 713 (N.J.), *cert. denied* and *appeal dismissed* 423 U.S. 808 (1975); Berenson v. New Castle, 341 N.E.2d 236 (N.Y. 1975); *see also* ANDERSON, *supra* note 47, §§ 8.18-8.19.

[238] For example, the Supreme Court has not found a fundamental right to education, housing, or welfare. *See* Herman, *supra* note 89, at 457-59, 458 n.182; MANDELKER, *supra* note 47, § 2.43, at 62.

[239] 416 U.S. 1 (1974).

burdened a fundamental interest in privacy and association, and opined that the Belle Terre ordinances should be struck down because the governmental interest in restricting unrelated families was less than compelling.[240] The majority, however, disagreed, finding that no fundamental interest was at stake and thus applied the lenient, rational basis scrutiny. Holding that the ordinance was constitutional, the court noted that the village's interest in peaceful streets and pleasant neighborhoods was sufficient to pass this minimal scrutiny.[241]

While *Belle Terre* exemplifies the difficulty of challenging no-growth claims, one right—the right to travel—has been declared to be a fundamental right.[242] Because the scrutiny level may rise where the right is fundamental, and because sustainable no-growth ordinances could conceivably restrict travel, this right requires special attention. The Supreme Court has traditionally treated the right to travel under the Equal Protection Clause.[243] The Court applies either rational basis or strict scrutiny by considering how the regulation impacts the right to travel.[244] If a regulation *directly* burdens the right to travel, by imposing a "penalty" on newcomers, it is more likely to receive strict scrutiny review.[245] If this penalty amounts to a denial of a fundamental right, as for example, the right to vote, the regulation will assuredly receive strict scrutiny and the law will be invalidated unless the state can show a compelling interest.[246] If the denied right is a benefit commonly considered necessary, such as public assistance or medical care, the test is again strict scrutiny.[247] However, where the right is not fundamental, or not a right "necessary" to basic living, it will be subjected to mere rational basis scrutiny.[248]

With respect to land use decisions, right to travel challenges usually fail for reasons of standing.[249] Where standing is surmounted, courts ask first whether

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[240] *Id.* at 15.

[241] *Id.* at 7.

[242] *See* Shapiro v. Thompson, 394 U.S. 618 (1969).

[243] *See, e.g.*, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

[244] *Memorial Hospital*, 415 U.S. at 257.

[245] *Id.* at 258.

[246] Dunn v. Blumstein, 405 U.S. 330 (1972); *see also* Patterson, *supra* note 226, at 159-60.

[247] *See, e.g.*, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Tobe v. City of Santa Ana, 892 P.2d 1145, 1162-63 (Cal. 1995) (en banc); *see also* Patterson, *supra* note 226, at 160-63.

[248] *See, e.g.*, Sosna v. Iowa, 419 U.S. 393 (1975) (upholding a one-year durational residence requirement for divorces).

[249] *See, e.g.*, Construction Industry Association of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975) (holding that appellees—developers, landowners—lacked standing, thus overturning district court's invalidation of growth control plan which was based on a

the land use regulation acts as a direct or indirect burden on travel.[250] Because growth controls have as their purpose the limitation of population growth and density, any burden on travel is seen as an indirect one.[251] The U.S. Supreme Court's decision in *Belle Terre* follows this reasoning. The Court summarily stated that the challenged ordinance was not aimed at transients and hence strict scrutiny was inappropriate.[252]

Holding similarly, the California Supreme Court, in *Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore*, elucidated the right to travel rationale:

> Were a court to . . . hold that an inferred right of any group to live wherever it chooses might not be abridged without some compelling state interest, the law of zoning would be literally turned upside down; presumptions of validity would become presumptions of invalidity and traditional police powers of a state would be severely circumscribed.[253]

Judicial deference is further illustrated in the recent case, *Tobe v. City of Santa Ana*.[254] An ordinance, clearly aimed at the homeless residents who challenged it, prohibited "any person" from camping or storing personal possessions on public streets and other public property.[255] The California Supreme Court, relying on its earlier decision in *Livermore*, reiterated that an indirect burden to the right to travel does not require strict scrutiny.[256] While acknowledging that the ordinance would in fact deter poor from travelling to Santa Ana, the court nonetheless emphasized that an ordinance "is not constitutionally invalid because it may have an incidental impact on the right of some persons to interstate or intrastate travel."[257]

Fourteenth Amendment right to travel violation), *cert. denied*, 424 U.S. 934 (1976).

[250] *See, e.g.*, Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore, 557 P.2d 473, 603-04 (Cal. 1976).

[251] *Id.* at 603; *see also* Karan v. Adams, 807 F.Supp. 900, 906 (D. Conn. 1992); Northern Illinois Home Builders Ass'n, Inc. v. Du Page, 621 N.E.2d 1012, 1022 (Ill. App. 1993), *aff'd in part, rev'd in part*, 649 N.E.2d 384 (Ill. 1995); Leavenworth Properties v. San Francisco, 234 Cal. Rptr. 598, 600 (Cal. Ct. App. 1987), *review denied*. *But see* Associated Home Builders of Greater Eastbay, Inc. v. Livermore, 116 Cal. Rptr. 326 (Cal. App. 1974), *vacated*, 557 P.2d 473 (Cal. 1976) (finding that growth restrictions were so burdensome to newcomers that they constituted a violation of newcomers' right to travel).

[252] Village of Belle Terre v. Boraas, 416 U.S. 1, 7; *see also Livermore*, 557 P.2d at 485 (following *Belle Terre*).

[253] *Livermore*, 557 P.2d at 485.

[254] 892 P.2d 1145 (Cal. 1995) (en banc).

[255] *Id.* at 1164. Some of the homeless challengers had been criminally prosecuted for violating the ordinance in question.

[256] *Id.*

[257] *Id.* at 1164; *see also* Joyce v. City and County of San Francisco 846 F.Supp. 843 (N.D. Cal. 1994).

Treated similarly, it is plausible that a sustainable no-growth ordinance would survive a right to travel challenge because it, too, would only indirectly burden the right to travel.[258] Not only would the burden be indirect, the enacted regulations would arguably serve a higher purpose. Sustainable no-growth controls aim to protect the long-term survival of humans as well as non-humans. This protection is aimed not only at those within the subject community but to those without as well. This is so because the concept of sustainability requires a regional or global perspective.[259] Thus, while a sustainable no-growth control might indirectly burden outsiders, it would also provide them with an indirect benefit. In addition, where a sustainability plan, contributed to the successful stabilization of the regional population, any detrimental impacts would ultimately vanish as migratory trends brought on by population growth subsided.

There remains the possibility that a court might find a sustainable no-growth control to *directly* burden the right to travel. This would trigger strict scrutiny of the sustainable no-growth control. Nonetheless, it is conceivable that the control could survive strict scrutiny. A direct burden on a fundamental right would conceivably be offset by a public benefit that arguably rises to the level of "compelling"—the long-term survival of humans. Once a court conceded the compelling need to stabilize the population in order to insure sustainability, the challenged control would necessarily survive strict scrutiny.

C. Takings

Takings challenges are yet another important constitutional hurdle that sustainable no-growth controls must overcome. The United States Constitution declares that private property shall not be taken for public use, without just compensation.[260] Whether a given governmental activity is a "public use" is no longer a serious issue.[261] However, determining when

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[258] One authority, speaking of growth controls generally, predicted that a right to travel argument is unlikely to ever prevail in litigation after *Petaluma* and *Livermore*. Alexandra D. Dawson, *Management of Residential Growth*, *in* ZONING AND PLANNING LAW, § 10.04, at 151-52.

[259] *See supra* part V.

[260] U.S. CONST. amend. V. The Fifth Amendment guarantees apply to state action as well by implication through the Fourteenth Amendment. Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897).

[261] *See* Berman v. Parker, 348 U.S. 26, 32 (1954) ("when legislature has spoken, the public interest has been declared in terms well-nigh conclusive"); Otto J. Hetzel & Kimberly A. Gough, *Assessing the Impact of* Dolan v. City of Tigard *on Local Government's Land-Use Powers in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 224 (David L. Callies ed., 1996).

"justice and fairness require that economic injuries caused by public action be compensated by the government"[262] continues to be a problematical issue.[263]

Recently, the U.S. Supreme Court has been extremely active in the takings area,[264] and in so doing has substantially redefined traditional taking jurisprudence.[265] Important to the feasibility of sustainable no-growth controls is the Supreme Court's decision of *Lucas v. South Carolina Coastal Council*.[266] Lucas purchased two beach-front lots for $975,000 in South Carolina.[267] Soon thereafter, the South Carolina Legislature enacted a stringent barrier island protection act which effectively prohibited Lucas from erecting any permanent habitable structure on either of his two parcels.[268] Lucas challenged the State regulations, and a state trial court found that the effect of the law rendered Lucas's lots "valueless" thus constituting a taking requiring compensation.[269] On appeal, the South Carolina Supreme Court reversed, holding that "when a regulation respecting the use of property is designed 'to prevent serious public harm,' no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value."[270] The U.S. Supreme Court reversed and took this opportunity to redefine takings law.

Justice Scalia, writing for the majority, first clarified takings law by establishing a new *per se* rule.[271] A regulation that destroys *all* economically beneficial use of an owner's property constitutes a taking requiring compensation.[272] He then went further and rejected the idea that the traditional "nuisance exception" could empower a government to regulate "noxious" uses of property without providing compensation where a taking

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[262] Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (internal quotations omitted).

[263] Hetzel & Gough, *supra* note 261, at 225.

[264] *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

[265] YOUNG, *supra* note 56, § 3A.01.

[266] 505 U.S. 1003 (1992).

[267] *Id.* at 1006-07.

[268] *Id.*

[269] *Id.* at 1007.

[270] *Id.* at 1010 (citations omitted). The South Carolina Supreme Court relied *inter alia* on *Mugler v. Kansas*, 123 U.S. 623 (1887). *Id.* at 1010.

[271] For sources tracing the Supreme Court's takings history and discussing the ramifications of its most recent takings decisions, see, YOUNG, *supra* note 56, ch. 3A; AFTER *LUCAS*: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION (David L. Callies ed., 1993); TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* (David L. Callies ed., 1996).

[272] *Lucas* at 1019. By instituting a categorical rule, *Lucas* dispensed with the Supreme Court's earlier takings inquiry which involved case-by-case analysis. *See, e.g.*, Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

was found.[273] In so doing, Justice Scalia sent a clear message that so-called legislative findings, identifying a public harm to be rectified or prevented, were no longer adequate evidence for establishing whether compensation was due.[274] Such legislative findings were exactly what the South Carolina Supreme Court relied upon in reaching its earlier decision.[275] The South Carolina court reasoned that the State's legislative purposes were a legitimate exercise of the police power to mitigate a potential hazard to the public.[276] By prohibiting coastal development on barrier islands the legislature promoted dune preservation, thus diminishing the risk of harm to the public from offshore storms.[277]

In place of the rejected nuisance exception, Justice Scalia adopted a new, narrower exception.[278] The new exception allows an uncompensated taking only where the government can identify "background principles of nuisance and property law" that would prohibit the same uses as those banned by the challenged regulation.[279] Importantly, these background principles must be found in the common law—not in state legislation.[280]

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[273] *Lucas*, 505 U.S. at 1020-28 (discussing the history of the nuisance-exception).

[274] *Id.* at 1024-25. Justice Scalia, dismissing the substantive worth of legislative findings identifying harm-preventing justifications, stated "[s]ince such . . . justification[s] can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations." *Id.* at 1025 n.12.

[275] *Id.* at 1022.

[276] *Id.*

[277] *Id.* at 1022; *see also id.* at 1038-41 (Blackmun, J., dissenting) (describing the South Carolina's legislative purposes). While the South Carolina legislature appeared to be truly concerned with the public's health and safety, Justice Scalia focused his criticisms on the regulation's other purposes, which included instead public *welfare* concerns such as, enhancing tourism industry revenue, providing habitat for threatened and endangered plants and animals, and providing "a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being." *Id.* at 1025 n.11.

[278] *Id.* at 1027 ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.").

[279] *Id.* at 1031. Joseph Sax believes that Justice Scalia, through his new takings analysis in *Lucas*, seeks to limit the legal foundation for "the emerging view of land as a part of an ecosystem." Sax, *supra* note 181, at 1438. Thus, by limiting uncompensated takings to identification of common law nuisance and property concepts, Justice Scalia avoids "characteriz[ing] property as having inherent public attributes which always "trump" the landowner's rights." *Id.* at 1441.

[280] Tarlock, *supra* note 41, at 594. However, *Lucas* still allows courts to engage in a traditional balancing of conflicting interests by considering, *inter alia*, the degree of harm to public lands and resources, the social value of the claimant's activities, and the relative ease with which the alleged harm can be avoided by the government and the private landowner. *Lucas*, 505 U.S. at 1030-31.

Not only did *Lucas* narrow the uncompensated takings exception, the decision also widened the door for future "partial takings" challenges.[281] Now, a regulation that denies a property owner something less than all economically beneficial use may nonetheless require compensation. This can happen where a court allows a landowner to allege a total taking of one "segment" of the landowner's property.[282] To analyze partial takings, the Court hinted that it might be appropriate to consider the landowner's "investment-backed expectations."[283] The investment-backed expectations approach has been employed by the Supreme Court in earlier takings cases.[284]

The extent to which *Lucas* would impact sustainable no-growth ordinances is unclear. It is possible that *Lucas* will have a minimal effect on the enactment of sustainable no-growth controls. First, it must be remembered that the Takings Clause does not diminish a government's power to regulate for the public benefit; instead, takings jurisprudence merely limits a municipality's ability to regulate without compensation.[285] In addition, municipalities can avoid *per se* takings in most instances by insuring that owners derive some "allowable"[286] beneficial use from the property.[287] Complete deprivations are easily avoided with no-growth controls because

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[281] *Id.*, at 1016 n.7, 1019 n.8; Michael M. Berger, *Property Owners Have Rights; Lower Courts Need to Protect Them in* AFTER *LUCAS*: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION 43-45 (David L. Callies ed., 1993).

[282] *See* Berger, *supra* note 281, at 43-45; *cf.* Penn Central Transp. v. New York, 438 U.S. 104 (1978) (rejecting the partial takings argument and requiring the consideration of the property as a whole).

[283] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

[284] *See* Penn Central Transp. v. New York, 438 U.S. 104 (1978) (employing the "distinct investment-backed expectations" rule).

[285] *See* Hawaii Housing Authority v. Midkiff, 464 U.S. 229 (1984).

[286] What constitutes "all" economically beneficial has not been defined. Berger, *supra* note 281, at 41-43.

[287] Several lower court decisions in the land use area have denied *per se* regulatory takings claims despite analyzing them from the *Lucas* perspective. *See, e.g.*, Hoepker v. City of Madison Plan Commission, 551 N.W.2d 63 *available in* 1996 WL 167619, **9 (Wis. App. 1996) (unpublished opinion) (finding no *per se* taking where city conditioned its preliminary plat approval on reconfiguration of plat to provide an open space corridor); Bauer v. Waste Management of Connecticut, Inc., 662 A.2d 1179 (Conn. 1995) (finding no taking where town zoning regulation restricted landfill height, even assuming owner was deprived of all future use of its landfill); Del Oro Hills v. City of Oceanside, 37 Cal. Rptr.2d 677 (Cal. App.) (finding no taking of developer's property from residential growth control ordinance despite reduction in value and increased illiquidity), *cert. denied*, 116 S. Ct. 86 (1995); *cf.* Bowles v. United States, 31 Fed. Cl. 37 (1994) (finding a taking where denial of permit by Corps of Engineers to construct a septic system resulted in a 91.8 percent diminution in reasonable investment expectations). *See generally* Dwight H. Merriam, *A Planners View of* Dolan *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 206 (David L. Callies ed., 1996) (explaining how planners can usually avoid "triggering" a taking).

most are essentially aimed at limiting density rather than prohibiting density. Thus, if takings requiring compensation occurred infrequently, sustainable no-growth controls could arguably remain within the realm of economic feasibility for a municipality.

Less certain is whether the harms sought to be prevented by sustainable no-growth controls might be identifiable within "background principles" of nuisance or property law. The narrowed nuisance exception appears to be the more restrictive of the two. Justice Scalia indicates that the "background" nuisance exception should be limited only to those nuisances recognized at common law.[288] Sustainable no-growth controls seek to prevent environmental harm and resource loss "today" in order to protect human health and safety "tomorrow."[289] Whether such an anticipatory harm would fall within traditional nuisance law is unclear. However, nuisances which can be shown to substantially threaten the public's health and safety may fall within the background nuisance exception.[290] Thus, where a municipality can persuade a court that sustainable no-growth controls are necessary to prevent substantial harm to the public, a court might allow an uncompensated taking despite *Lucas*.[291]

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[288] Lucas v. South Carolina Coastal Council 505 U.S. 1003, 1029 (1992). *But see id.* at 1035 (Kennedy, J., concurring) ("The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society").

[289] *See supra* part V.

[290] Justice Scalia gives three examples of nuisance-type uses that may be prohibited by the government without compensation even though the prohibition deprives the landowner of all economically beneficial use: (1) A government may "direct[ ] a corporate owner of a nuclear generating plant to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault." *Id.* at 1029-30. (2) A government may deny an owner "the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land." *Id.* at 1029. (3) A government may destruct private property "in cases of actual necessity, to prevent the spreading of a fire or to forestall other grave threats to the lives and property of others." *Id.* (internal parentheses omitted).

[291] Lower court cases have so far failed to crystalize the scope of the new nuisance exception, and have interpreted the exception in inconsistent ways. *Compare* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) (holding that compensation was due because government denial of a dredge and fill permit desired by owner to fill a wetland on owner's property was not a cognizable common-law nuisance) *with* M & J Coal Co. v. United States, 47 F.3d 1148, 1154 (Fed. Cir.) (holding that Surface Mining Control and Reclamation Act, which prohibited mining likely to cause subsidence, prevented a cognizable common law nuisance), *cert. denied*, 116 S. Ct. 53 (1995). *Compare* Powers v. Skagit County, 835 P.2d 230, 236 (Wash. 1992) (noting that common-law principles probably did not recognize the prohibition of residences in a Federal Emergency Management Agency's floodway zone) *with* State, Dep't of Envtl. Protection v. Burgess, 667 So.2d 267 (Fla. 1995) (emphasizing that uses that cause water pollution may be harmful or noxious uses proscribable by State nuisance law). *See* Julie Tappendorf, The *Lucas* Exceptions: What Are "Background Principles of Nuisance and Property Law?" 14-23 (April, 1996) (unpublished manuscript, on

The prohibitions imposed upon landowners by sustainable no-growth controls might also be found in "background principles of property law."[292] Where a background principle was already in existence, this background principle, like the nuisance exception, would allow an uncompensated taking.[293] The public trust doctrine, a common law tradition brought from England,[294] may prove to be a powerful background principle of property law.[295] While the public trust doctrine traditionally protected the public's rights and interests in navigable waters,[296] it has been expanded in recent years to include other waters important to the public at large.[297] Further expansion of the public trust doctrine may incorporate protection of dry lands as well.[298] Importantly, some courts have recognized that the public trust may be used to *prohibit* certain private activities if they would be in derogation to the public.[299] In prohibiting certain activities under the public trust doctrine, courts have recognized the public's interest in the preservation of lands for ecological reasons.[300] In the future, a municipality enacting sustainable no-growth regulations may be able to defend its power to take without compensation based upon public trust rights inhering in a landowner's property.[301]

The threat of partial takings presents a final obstacle for municipalities seeking to enact sustainable no-growth ordinances. Partial takings could be

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file with author) (analyzing the above post-*Lucas* cases, and others).

[292] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992).

[293] *Id.* Lower courts have applied the *Lucas* background property law exception in a variety of ways. *See, e.g.*, Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993), *cert denied*, 510 U.S. 1207 (1994) (finding that the common law doctrine of custom was one of the State's background principles of property law). Justice Scalia, dissenting on the Supreme Court's denial of certiorari in *Stevens*, strenuously objected to the Oregon court's holding. 510 U.S. at 1207. *See also* Hunziker v. State of Iowa, 519 N.W.2d 367, 371 (Iowa 1994) (holding that a state statute prohibiting development that would interfere with human remains inhered in the landowner's title because it was part of the State's property law for at least twelve years prior to the property owner taking title to the land), *cert. denied*, 115 S. Ct. 1313 (1995). *See* Tappendorf, *supra* note 291, at 23-35 (discussing the above cases and others in relation to the background principles of property law exception).

[294] *See* Jack H. Archer & Terrance W. Stone, *The Interaction of the Public Trust and the "Takings" Doctrines: Protecting Wetlands and Critical Coastal Areas*, 20 *Vt. L. Rev.* 81, 82 (1995); Tappendorf, *supra* note 291, at 30.

[295] *See* Archer & Stone, *supra* note 294; Sax, *supra* note 181.

[296] *See* Shively v. Bowlby, 152 U.S. 1 (1894).

[297] *See, e.g.*, Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983) (finding public trust rights in non-navigable streams).

[298] *See* Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980).

[299] *See, e.g.*, Marks v. Whitney, 491 P.2d 374 (Cal. 1971).

[300] *See id.* at 380; *see also* Archer & Stone, *supra* note 294, at 94-100.

[301] Archer & Stone, *supra* note 294, at 111-15.

particularly disruptive to municipalities because plaintiffs can more easily meet the economic diminution requirement as compared to the total taking requirement. The *Lucas* decision indicates that traditional Supreme Court analysis is appropriate in partial takings analysis.[302] Under traditional analysis, a court will inquire whether the governmental regulation frustrates the landowner's "investment-backed expectations."[303] The investment-backed expectations test was employed by the pre-*Lucas* Supreme Court.[304] If the investment-backed expectations test is employed in partial takings claims, it should prove to be less burdensome for municipalities in comparison with the categorical rules employed by *Lucas* for total takings.[305] Importantly, a landowner's investment-backed expectations may be altered when the landowner is put on "notice" because of the prior enactment of a government regulation.[306] For example, where a regulation prohibiting some use of the land was in existence prior to ownership, a court may find that the landowner invested in the property with "knowledge" of the prior-established prohibition. If the notice rule remains viable,[307] it could give municipalities sufficient latitude to effectively enact sustainable no-growth controls—at least with respect to subsequent landowners.[308] However, where a landowner was in

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[302] *See* Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), *cert denied*, 115 S. Ct. 898 (1995) (employing traditional analysis after *Lucas*). The circuit court in *Florida Rock* directed the trial court on remand to balance several factors in determining whether a federal regulation constituted a partial taking. *Id.* at 1571. Factors included: whether the prohibitions upon the land benefit few, or many; whether the alternative permitted uses are realistic; whether the government has regulated in a narrow fashion in its attempt to provide a public benefit. *Id.*; *see also* Richard Hill, *Partial Takings after* Dolan *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 199-201 (David L. Callies ed., 1996) (discussing lower court cases addressing the partial takings issue).

[303] Penn Central Transp. v. New York, 438 U.S. 104 (1978). The traditional balancing test requires looking at several factors, including, the economic impact of the regulation, the extent to which the regulation interferes with distinct investment-backed expectations, and the character of the governmental action. *Id.* at 124.

[304] *See id.*

[305] *See* Daniel Mandelker, *Investment-Backed Expectations in Takings Law, in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 119, 122 (David L. Callies ed., 1996) [hereinafter "Investment-Backed Expectations"].

[306] Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); *cf.* Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987) (casting doubt on the continued availability of the "notice rule"); *see Investment-Backed Expectations, supra* note 305, at 124-26.

[307] *See supra* note 306.

[308] Lower courts have found landowners had "implied" actual knowledge of government regulations based on the owner's actions. *See, e.g.*, Nello L. Teer Co. v. Orange County, 810 F. Supp. 679 (M.D.N.C. 1992), *aff'd & rev'd in part without opinion*, 993 F.2d 1538 (4th Cir. 1993), reported in full, No. 92-2270, 1993 U.S. App. LEXIS 12525 (4th Cir. May 26, 1993); Ciampitti v. United States, 22 Cl. Ct. 310 (1991) (holding that landowner's avoidance of wetlands during development implied knowledge of State's wetlands laws); *see also*

possession *prior* to the enactment of the sustainable no-growth control, compensation would likely be required in the event of a taking.[309]

In conclusion, not only do takings claims present one of the greatest constitutional hurdles for sustainable no-growth controls, they also represent one of the most unsettled areas of land use law. Some lower courts have expressed their frustration with the current state of confusion in takings jurisprudence.[310] Others have shown a genuine reluctance to follow the categorical path created by Justice Scalia in *Lucas*.[311] The Supreme Court itself is in disagreement over the takings issue.[312] In addition, some scholars believe the Court has taken a wrong turn on the takings path.[313] Time will ultimately settle speculation over the takings area. In the meantime, municipalities seeking to control population growth through the enactment of sustainable no-growth ordinances must determine the contours of takings jurisprudence on a case-by-case basis.

VII. CONCLUSION

Still one of the most germane and revealing discussions of population is found in the seminal land use case, *Village of Euclid v. Ambler Realty Co.*,[314] in which United States Supreme Court Justice Sutherland, writing for the majority, eloquently explained the close interrelationship between the problems caused by population growth, and the resultant regulations.[315] In

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Investment-Backed Expectations, *supra* note 305, at 135-36 (providing lower court cases employing the notice rule, and analyzing some of these cases).

[309] *Investment-Backed Expectations*, *supra* note 305, at 135-36.

[310] *See, e.g.*, Bowles v. United States, 31 Fed. Cl. 37 (Ct. Fed. Cl. 1994).

[311] *See* Guimont v. Clarke, 854 P.2d 1, 9 (Wash. 1993) (en banc) (using an initial threshold test that circumvents takings analysis under *Lucas*), *reconsideration denied*, *cert. denied*, Director, Dept. of Community Development v. Guimont, 510 U.S. 1176 (1994), *cert. denied*, Guimont v. Director, Dept. of Community Development, 510 U.S. 1176 (1994); *see also* Powers v. Skagit County, 835 P.2d 230 (Wash. App. 1992) *and* Orion Corp. v. State, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988) (applying similar circumvention tests); WILLIAMS, *supra* note 51, § 5A.22, at 37-50 (Supp. 1996) (analyzing the above cases).

[312] *See, e.g.*, Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003 (1992) (concurring and dissenting opinions). In *Lucas*, four Justices questioned whether a total taking had occurred. YOUNG, *supra* note 56, § 3A.15, at 233.

[313] *See, e.g.*, Sax, *supra* note 181; Tarlock, *supra* note 41.

[314] 272 U.S. 365 (1926).

[315] *Id.* at 386-87. Justice Sutherland explained:

> Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that

Euclid, Justice Sutherland described the elastic relationship between population and law.[316] He invited the lower courts to remember the practical realities that exist in a "changing world":[317] As the number of Americans increases, life becomes more "complex," and the scope of law necessarily "expands."[318] With the expansion of regulation comes a concomitant contraction of rights.[319]

Based upon the above practical realities, and the presented facts, the *Euclid* Court held that property rights should give way to the public rights at issue in the case.[320] Courts today are faced with similar decisions. However, now—seventy years later—the U.S. population is dramatically greater, and, as a result, the conditions of our day are even more complex. Unsurprisingly, the regulatory scope of most laws has concurrently expanded, further limiting individual rights.

Like the land use laws contemplated in *Euclid*, no-growth regulations, once seen as "arbitrary and oppressive,"[321] will take on new meaning as an awakening legal community better understands the purposes they serve. However, while this may be so, a yet more important reason exists for upholding them. Sustainable no-growth regulations, along with other necessary population stabilization measures, can turn the elastic relationship between population and law upside down. Sustainable no-growth controls, along with other affirmative population measures have the potential to reverse the currently expanding population. If they do reverse the trend, the need for more powerful regulations will subside. This contraction of regulation will allow individual rights to expand once again—a notion that every American can appreciate.

Thus, local governments have two choices. By utilizing sustainable no-growth controls, governments have the capacity to define the level of change

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> they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise.

Id.

316 *See supra* note 315.

317 *Id.*

318 *Id.*

319 *Id.*

320 Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

321 *See supra* note 315.

we want in our "changing world."[322] In comparison, by relying only on traditional environmental regulations, local governments can do no more than control symptomatic circumstances, brought on by a world of ever-increasing complexity. The "elastic paradigm" formulated by Justice Sutherland in *Euclid* works in either of the two situations. The people have the ability to determine which outcome of the paradigm is better for our society. If the people choose to allow population growth to continue, they must brace themselves for increasingly restrictive regulations. Alternatively, the people can restrict population growth now, and thus reasonably anticipate a relaxation in regulatory pressure.

Many communities have already expressed their choice through their overwhelming support of no-growth policies. However, because no-growth policies are subject to challenge, the future interpretation of the *Euclidean* paradigm remains largely in the hands of the judiciary. Given the proper justifications, courts may in the future be more charitable towards no-growth controls. To increase the likelihood of success in defending no-growth regulations, municipalities must enlighten courts as to the possible ramifications of unrestricted population growth. In addition, municipalities must incorporate the concepts of sustainable living in their land use plans and legislative goals. By doing so, municipalities may successfully link environmental concerns and human health and safety concerns, thus providing a compelling justification for no-growth controls.

Tom Pierce[323]

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[322] *Id.*

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An Evaluation of the Summary Contempt Power of the Court: Balancing the Attorney's Role as an Advocate and the Court's Need for Order

I. INTRODUCTION

In the courtroom, a trial attorney is faced with conflicting roles as an advocate for his client and as an officer of the court.[1] Specifically, a lawyer must zealously represent his client[2] while maintaining an appropriate level of competency and professionalism to the court.[3] An attorney can be said to overstep the bounds of advocacy when his expression causes an actual obstruction to the administration of justice.[4] However, it is unclear what acts amount to an obstruction of justice.[5] Because of the lack of guidelines governing the standard for contempt, a judge's decision to cite for contempt is ultimately a discretionary one, and as such, the trial judge's personal

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[1] Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power. Part One: The Conflict Between Advocacy and Contempt*, 65 WASH. L. REV. 477, 539 (1990) [hereinafter *Advocacy and Contempt, Part One*].

[2] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1995). Rule 1.3 states that, "[a] lawyer shall act with reasonable diligence and promptness in representing a client." *Id.*

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1995).

[3] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.5 (1995). Rule 3.5 provides as follows:

> A lawyer shall not:
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
> (b) communicate ex parte with such a person except as permitted by law; or
> (c) engage in conduct intended to disrupt a tribunal.

Id. See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. (1995) (explaining that an advocate has a duty of candor to the tribunal); Ronald J. Rychlak, *Direct Criminal Contempt and the Trial Attorney: Constitutional Limitations on the Contempt Power*, 14 AM. J. TRIAL ADVOC. 243, 243 (1990) (explaining that the attorney has a duty of competency and professionalism to the court).

[4] *See Ex parte* Hudgings, 249 U.S. 378, 383 (1919) (holding that there must be an actual obstruction of justice before the summary contempt power can be invoked to replace the protections of ordinary constitutional procedures).

[5] *See* Note, *Criminal Law-Contempt-Conduct of Attorney During Course of Trial*, WIS. L. REV. 329, 343 (1971) [hereinafter *Conduct of Attorney*]; *Attorneys and the Summary Contempt Sanction*, 25 ME. L. REV. 89, 93 (1973) [hereinafter *Summary Contempt Sanction*].

sensibilities may govern his decision.[6] Therefore, clear standards are needed to define the use of the summary contempt power so an attorney may zealously advocate his client's interest knowing when that advocacy hinges on obstruction.

The summary contempt power allows a court to punish an attorney for violating his duty as an officer of the court.[7] It is a powerful tool in that the judge may proceed immediately against the contemnor without violating the contemnor's Fourteenth Amendment due process rights.[8] Because contemnors are sanctioned without due process, it is important that both attorneys and judges know what specific conduct constitutes direct contempt, thereby justifying use of the summary power. However, presently it is unclear when an attorney oversteps his bounds, thereby justifying a contempt charge.[9]

This article focuses on both federal and Hawai'i law regarding the summary contempt power. Part II of this article addresses the conflict between the court's summary contempt power and the attorney's role as an advocate for his client. Part III focuses on federal law, particularly the origins of the summary contempt power, the trend towards narrowing the power, and the

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[6] *See Advocacy and Contempt, Part One, supra* note 1, at 483. Appellate courts "extend great deference to trial court determinations of whether an attorney's conduct is contemptuous." *Id.* Therefore, the "personal sensibilities of trial judges largely govern the substantive scope of the contempt power." *Id.*

[7] *See Summary Contempt Sanction, supra* note 5, at 93. "Criminal contempt may result if the attorney strays too far from his responsibilities." *Id.* An attorney can be punished for inappropriate conduct in two ways. The first is through the contempt power. The second is in the form of disciplinary proceedings for a violation of the Model Rules of Professional Conduct. *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5 (1995). Rule 8.5 provides, in pertinent part:

> (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.

Id. In addition, *see* MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4. "It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another . . . ." *Id.*

[8] *In re* Oliver, 333 U.S. 257, 275 (1948).

> The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent demoralization of the court's authority before the public.

Id.

[9] For example, based on similar facts where an attorney continued to argue even after being ordered by the judge to stop, one court held it to be contempt while another court held it was not. *Cf.* State *ex rel.* Smith v. District Court, 677 P.2d 589 (Mont. 1984) with *In re* Dellinger, 370 F. Supp. 1304 (N.D. Ill. 1973).

current standards used by courts to invoke the contempt power. Part IV considers Hawai'i's application of the summary contempt power as it compares to federal standards.

Part V of this article discusses constitutional issues raised by the summary contempt power, such as the right to a jury trial and the vagueness/overbreadth doctrine as it relates to contempt statutes. Part VI concludes that the summary contempt power should be further narrowed with more precise standards. An objective standard in finding an obstruction and an objective standard of intent by the alleged contemnor should be utilized. Considering the attorney's fundamental due process right and his obligation of advocacy for his client, it is clear that the standards for summary power must be reviewed and clarified.

II. CONFLICT BETWEEN THE SUMMARY CONTEMPT POWER AND ADVOCACY

An attorney faces dual and conflicting obligations in our judicial system. As an officer of the court, he has a duty to refrain from conduct that would prevent the administration of justice.[10] Alternatively, the attorney has a duty to zealously represent his client within the bounds of the law.[11] An attorney must constantly attempt to strike a balance between these competing goals.[12] At the same time, while the courts must have the power to enforce order to achieve justice, an attorney's ability to advocate for his client is critical to the functioning of the judicial system.[13] The attorney's representation of his client largely is the determinative factor of the vitality of the adversarial structure of the judicial system.[14] The adversarial system requires the advocate to do what is necessary to further his client's interests.[15]

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[10] *See* Richard J. Sax, Comment, *Counsel and Contempt: A Suggestion that the Summary Power be Eliminated*, 18 DUQ. L. REV. 289, 299 (1980). "As an officer of the court, [the attorney] must not transcend the bounds of decency and dignity so essential to an orderly administration of justice." *Id. See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.5 (explaining that a lawyer shall not "engage in conduct intended to disrupt a tribunal").

[11] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1995). "A lawyer . . . may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." *Id.*

[12] MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 cmt. (1995). "The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure." *Id.*

[13] *Advocacy and Contempt, Part One*, *supra* note 1, at 482.

[14] *Conduct of Attorney*, *supra* note 5, at 343. *See also Advocacy and Contempt, Part One*, *supra* note 1, at 482. "[I]t is with the vigorous advocacy of adversaries that our judicial system exposes the truth and achieves justice." *Id.*

[15] *Advocacy and Contempt, Part One*, *supra* note 1, at 537. "[A]ttorneys must be vigorous, contentious, argumentative, and above all, persuasive. By design, a trial is a clash of intellects,

Advocacy is valued for its contentious and adversarial nature to help achieve justice in the court.[16] The First Amendment guarantee of freedom of expression, the Sixth Amendment rights of criminal defendants, and the Fifth and Fourteenth Amendment guarantees of due process protect proper advocacy.[17] Because of the importance of advocacy, courts must be careful not to confuse vigorous and acceptable advocacy with contemptuous behavior.[18] One commentator notes that the constitutional protection of advocacy must limit the contempt power at some point.[19]

While there is this constant balancing between competing interests, it is inevitable that there are times when an attorney must ignore his role as an advocate for fear of being sanctioned for contempt in violation of his role as an officer of the court.[20] One commentator suggests that contempt is the largest constraint on advocacy.[21] It follows, therefore, that the summary contempt power may hinder zealous advocacy, especially in situations where the attorney's advocative conduct is completely valid. The critical questions then are: what advocative conduct is completely valid and what advocative conduct is aggressive to the point of crossing the line into violating the attorney's role as an officer of the court? The current bounds of advocacy indicate that when the conduct obstructs the administration of justice, it constitutes contempt and is no longer permissible.[22] As the obstruction standard is what guides the ability to punish summarily, it is important to now focus on the history of the summary contempt power and the problems inherent in the obstruction standard.

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a struggle to influence the minds and hearts of the factfinders; it is a contest for control to frame the issues, to shape the controversy, and to place information before the factfinder." *Id.*

[16] *Id.* at 505. "[T]he heat of advocacy is necessary to catalyze the processes of engendering the just resolution of disputes; the forceful presentation of facts and argument and the crystallization of the issues and the positions of the parties." *Id.*

[17] *Id.* at 482.

[18] Rychlak, *supra* note 3, at 280-81.

[19] Rychlak, *supra* note 3, at 280.

[20] *Advocacy and Contempt, Part One, supra* note 1, at 481-83.

[21] *See id.* It is argued that if an attorney must worry that occasional lapses of decorum and unintentional insults that stem from zealous advocacy will result in punishment for contempt, an attorney will be forced to practice a more hesitant brand of advocacy. *Id.* at 482.

[22] 18 U.S.C. § 401 (1982) (misbehavior that "obstructs the administration of justice"). *See also* Rychlak, *supra* note 3, at 281. Rychlak explains that the constitutional limit to the contempt power comes at the point of obstruction. *Id.* at 274. The power of contempt was designed to preserve the truth by punishing the actual obstruction of proceedings. *Id.*

III. THE SUMMARY CONTEMPT POWER

The summary contempt power is strongly embedded in the American judicial system.[23] The summary contempt power has undergone changes in its application, particularly the trend toward a narrowing of the power.[24] However, there is still a large problem with the standards that define summary contempt. Specifically, it is difficult to articulate what conduct constitutes an obstruction of justice.[25]

A. Origins

Early English common law recognized that the contempt power is an inherent power to keep order in the court and to protect the court's dignity.[26] The power is inherent to allow the court to prevent disturbances of its business and to attain the just resolution of disputes.[27] With such power, judges hastily used the contempt sanction as a license to command any level of decorum an individual judge desired.[28] In some instances, the exercise of the unrestrained power to punish offensive conduct has led to abuse of the broad power.[29]

Contempt is generally defined as an act or omission that substantially disrupts the judicial process.[30] A court has the power to punish an individual

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[23] *See* RONALD L. GOLDFARB, THE CONTEMPT POWER 1 (1963). The common law is replete with references to the contempt power and the contempt power occupies an accepted place in Anglo-American law. *Id.* Cases in the United States which analyze the courts' use of the contempt power all assume that the power is inherent in the very nature of governmental bodies. *Id.* at 2. "The first American federal legislation dealing with the contempt of court power was the Judiciary Act of 1789." *Id.* at 20. *See also*, *Ex parte* Terry, 128 U.S. 289 (1888); United States v. Shipp, 203 U.S. 563 (1906).

[24] *See infra* part III.B.

[25] *See infra* part III.C.

[26] Teresa S. Hanger, *The Modern Status of the Rules Permitting a Judge to Punish Direct Contempt Summarily*, 28 WM. & MARY L. REV. 553, 554 (1987).

[27] *Advocacy and Contempt, Part One*, *supra* note 1, at 486.

[28] *Id.* "From the outset, judges equated disagreement with disrespect, and confused disrespect with obstruction." *Id.*

[29] *Id.* at 487. In 1826, a federal district judge, James H. Peck, summarily imprisoned a lawyer for publishing criticism of the judge's opinion. Public opposition to the judge's action provoked Congress to initiate impeachment proceedings against the judge. *Id.* (citing A. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (1833) [hereinafter STANSBURY REPORT]). The proceedings illustrated passionate opposition to the broad common law contempt powers of judges. *Id.* (citing STANSBURY REPORT).

[30] Dan B. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 185 (1971); *See also* GOLDFARB, *supra* note 23, at 1 (1963). "Contempt can generally be defined as an act of disobedience or disrespect toward a judicial . . . body of government, or interference with its orderly process, for which a summary punishment is usually exacted." *Id.*

for criminal[31] contempt if his act is contrary to the promotion of order and decorum in the courtroom.[32] The need for order is based on the premise that order promotes the search for truth.[33]

The summary contempt power is only used in cases of direct contempt[34] which occur in the presence of the court.[35] *Ex parte Terry*[36] was one of the first United States Supreme Court cases to analyze the summary contempt power. The Court in *Terry* held that the summary power is inherent in all courts.[37] Courts may use the power to cite and punish contempt that obstructs or degrades the administration of justice.[38] The Court rejected the idea that courts must provide the alleged contemnor with notice and an opportunity to be heard in every summary contempt proceeding.[39] The Court stated that although notice is a fundamental right, notice and a hearing are not required in cases of direct contempt because of the concern for an ordered society.[40]

In addition to originating from the inherent power of the courts, the federal contempt power also stems from acts of Congress.[41] The power of the federal

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[31] There are two categories of contempt: criminal and civil. 17 C.J.S. *Contempt* § 5(2) (1963). The major factor in determining whether a behavior is civil or criminal is the purpose for which the power is exercised. *Id.* Criminal contempt is "punitive," while civil contempt is "remedial." *Id. See generally* Rychlak, *supra* note 3, at 245-46. A sanction intended to punish the actor for vindicating court authority is criminal. *Id.* A sanction intended for coercive purposes, such as forcing someone to comply with a court order, is civil. *Id.* This article addresses criminal contempt.

[32] *See Summary Contempt Sanction*, *supra* note 5, at 89 (explaining that an orderly disciplined courtroom is a prerequisite for the administration of justice).

[33] *See* Richard C. Brautigam, *Constitutional Challenges to the Contempt Power*, 60 GEO. L.J. 1512, 1515 (1972). Noise, disruptions, and violence in the court "are inconsistent with the maintenance of that degree of detachment necessary for the proper adjudication of individual rights. . . . [T]he need for order is limited to suppression of disruptive behavior which undermines the search for truth." *Id.*

[34] An act of direct contempt is one committed in the presence of the court while it is in session. 17 C.J.S. *Contempt* §§ 3-4 (1963). In contrast, indirect contempt is an act committed outside the presence of the court. *Id.*

[35] *See In re* Chaplain, 621 F.2d 1272 (4th Cir. 1980). The court explained that "[d]irect contempt justifying summary disposition is confined to exceptional circumstances involving acts 'threatening the judge or disrupting a hearing or obstructing court proceedings.'" *Id.* at 1277 (quoting Harris v. United States, 382 U.S. 162, 164 (1965)). *See also* GOLDFARB, *supra* note 23, at 21. Direct contempt power is defined as "disobedience to process or disrespect in the presence of the courts." *Id.*

[36] 128 U.S. 289 (1888).

[37] *Id.* at 306.

[38] *Id.* at 307. *See also* United States v. Shipp, 203 U.S. 563 (1906).

[39] *Terry*, 128 U.S. at 309.

[40] *Id.* at 307-09.

[41] Hanger, *supra* note 26, at 555.

courts to assess summary criminal contempt is set forth in 18 U.S.C. § 401.[42] In addition, Rule 42(a) of the Federal Rules of Criminal Procedure explains the procedure for the immediate punishment of direct contempt.[43] A Rule 42(a) summary hearing requires no indictment, no information, and no jury, so the summary procedure provides none of the constitutional protections of a typical criminal trial.[44]

B. Narrowing of the Summary Contempt Power

There are two alternative rationales which justify the summary contempt power. The first approach allows a judge to use summary contempt proceedings when the offensive conduct occurs in his presence.[45] Because the judge personally observes the conduct, there is no need for another trial.[46] This approach has been referred to as the efficiency rationale because it

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[42] The section provides as follows:

A court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as —

1. misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
2. misbehavior of any of its officers in their official transactions;
3. disobedience or resistance to its lawful writ, process, order, rule, decree or command.

18 U.S.C. § 401 (1982). *See, e.g.*, United States v. Seale, 461 F.2d 345 (7th Cir. 1972). The court held that four elements are required in order to support a contempt conviction under 18 U.S.C. § 401(1). *Id.* at 366-67. First, the conduct at issue must constitute "misbehavior." *Id.* Second, the misbehavior must rise to the level of an obstruction to the administration of justice. *Id.* Third, the conduct must be in the court's presence or so proximate that it obstructs the administration of justice. *Id.* Fourth, there must be some form of intent to obstruct. *Id.*; *See also*, Hanger, *supra* note 26, at 555 n.15 (explaining that most courts have accepted these four requirements for a § 401(1) criminal contempt conviction).

[43] Rule 42(a) provides the following:

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

FED. R. CRIM. P. 42(a).

[44] Sax, *supra* note 10, at 293. The author set forth a concern regarding the inconsistency between the summary contempt power and the due process requirements embodied by the Fifth and Fourteenth amendments. *Id.* at 294. "Under the power to summarily punish contemptuous conduct, however, several due process notions are nullified: namely, a fair trial, a fair tribunal and the absence of actual bias." *Id.*

[45] Hanger, *supra* note 26, at 557 (citing Sacher v. United States, 343 U.S. 1, 9 (1952)).

[46] *Id.* (explaining that further procedures designed to unveil the truth are superfluous).

promotes efficiency in the judicial process.[47] The second approach allows the use of the summary proceeding when there is a need to assure the smooth administration of justice and to preserve order and decorum in the courtroom.[48] This has been referred to as the necessity rationale.[49]

1. Efficiency theory

The first major test[50] of the summary contempt power under Rule 42(a) came in *Sacher v. United States*.[51] In *Sacher*, the Court justified the summary contempt power based on the need to promote the efficiency of the trial process, rather than the need to maintain court order and decorum.[52] This theory contends that so long as the judge witnesses the contemptuous conduct, no additional factual determination is necessary.[53] Basically, the rationale behind this theory is that there is no need to burden the system with another trial when a judge has witnessed the act.[54] This theory has been referred to as the efficiency theory.[55]

In *Sacher*, the United States Supreme Court held that pursuant to Rule 42, the trial judge could wait until the end of the trial to use the summary contempt power against the defendants, instead of imposing instant punishment during trial.[56] The Court in *Sacher* focused on the trial judge's

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[47] Sacher v. United States, 343 U.S. 1, 10 (1952) (explaining that the "overriding consideration is the integrity and efficiency of the trial process"). *See also* Hanger, *supra* note 26, at 557-58.

[48] Hanger, *supra* note 26, at 558.

[49] *Id.* at 565.

[50] Sax, *supra* note 10, at 295 ("*Sacher v. United States* was the first major judicial test of the summary contempt power provided in Rule 42(a).").

[51] 343 U.S. 1 (1952). The trial judge found defense counsel and one defendant who elected to conduct his own case guilty of criminal contempt. *Id.* at 3. The record reflected that the contemptuous behavior took place in the immediate presence of the trial judge, and the conviction was based upon a course of conduct that continued in spite of warnings by the judge that it was contemptuous. *Id.* at 5.

[52] *Id.* at 10 ("The overriding consideration is the integrity and efficiency of the trial process, and if the judge deems immediate action inexpedient he should be allowed discretion to follow the procedure taken in this case.").

[53] Hanger, *supra* note 26, at 557. "The judge merely applies the law to the facts as he or she sees them. . . ." *Id.*

[54] *See, e.g.*, *Sacher*, 343 U.S. at 9. Rule 42 refers to a "procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial." *Id.* *See also In re* Debs, 158 U.S. 564, 595 (1895) (explaining that submitting the question of disobedience to another tribunal would operate to deprive the proceeding of half its efficiency).

[55] *See, e.g.*, Hanger, *supra* note 26, at 563.

[56] *Sacher*, 343 U.S. at 11.

discretionary power to wait until the conclusion of trial to exercise the summary contempt power.[57] The Court explained that there is no possible prejudice to the contemnor by delaying summary punishment until the end of trial if the circumstances warrant such delay.[58] If the attorney is found guilty of contempt during trial, there is the potential that the jury may become biased and the client prejudiced.[59] The Court further explained that if summary punishment could be imposed only once the event occurs, there is the chance that a judge will make an unfair and hasty judgment, rather than a well-considered one.[60] The Court recognized that the contempt power over counsel is capable of abuse.[61] The Court implied that if a judge makes a poorly reasoned decision, this would meet the very definition of abuse of the contempt power.[62]

2. Necessity theory

Under the necessity theory, a judge is permitted to use summary contempt proceedings in order to "assure the smooth administration of justice and to preserve order and decorum in the courtroom."[63] Because the party is not entitled to procedural due process rights in summary contempt proceedings, a judge "should use such power only when absolutely necessary to prevent obstruction of the judicial process."[64]

The dissents of Justice Black and Frankfurter in *Sacher* relied on the "necessity" rationale rather than the "efficiency" rationale set forth by the majority, based on the fact that the need for summary proceedings is less compelling once the crisis has passed.[65] The dissent reasoned that there should be restrictions on the judge's use of the summary contempt power

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[57] *Id.* at 9-10.

[58] *Id.* at 10. The Court stated that "to summon a lawyer before the bench and pronounce him guilty of contempt is not unlikely to prejudice his client." *Id.* The Court further explained that "if we were to hold that summary punishment can be imposed only instantly upon the event, it would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment." *Id.* at 11.

[59] *Id.* at 10.

[60] *Id.* at 11.

[61] *Id.* at 12. The Court stated that most judges recognize and respect courageous lawyerly conduct, but there are some judges who exhibit "vanity, irascibility, narrowness, arrogance, and other weaknesses." *Id.*

[62] *Id.* at 11.

[63] Hanger, *supra* note 26, at 558.

[64] *Id.*

[65] *Id.* at 563 (explaining that Justices Black and Frankfurter relied on the necessity rationale to encourage the adoption of a narrower view of the contempt power).

where judges have sat on cases in which they have been personally involved.[66] Therefore, a judge can only deprive an individual of due process when there is a compelling necessity, such as the need to maintain order and decorum in the courtroom.[67] Thus, because the trial was over and the danger of obstructing the court had passed, the alleged contemnors deserved due process protections.[68]

The efficiency theory followed by the majority in *Sacher* allows a judge to use the summary contempt power so long as the conduct occurs in his presence.[69] This is a broader exercise of the summary power than that utilized in the necessity theory in that the judge can invoke it even if order in the court room is not being infringed.[70] The judge's broad exercise of the summary contempt power may not be consistent with the idea that courts must utilize their power to impose silence, respect and decorum by the "least possible power adequate to the end proposed."[71] The efficiency theory requires that the conduct occur in the judge's presence.[72] Because the focus is not on the need to maintain order and decorum in the courtroom, the broad exercise of the court's power under the efficiency theory should be narrowed so that the need to maintain decorum in the court is required before the judge can use the contempt power.[73]

3. A movement toward the necessity theory

An examination of the cases following *Sacher* shows that courts tend to favor the view held by Justices Black and Frankfurter in the *Sacher* dissent. The broad exercise of the summary power in *Sacher* was limited by *Offutt v.*

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[66] *Sacher*, 343 U.S. at 29-30 (Frankfurter, J., dissenting). Justice Frankfurter explained that "no judge should sit in a case in which he is personally involved and that no criminal punishment should be meted out except upon notice and due hearing, unless overriding necessity precludes such indispensable safeguards for assuring fairness and affording the feeling that fairness has been done." *Id.*

[67] *See* Hanger, *supra* note 26, at 558.

[68] *Sacher*, 343 U.S. at 21 (Black, J., dissenting). Justice Black explained that there was no longer the need to "try petitioners for their courtroom conduct without benefit of the Bill of Rights procedural safeguards." *Id.*

[69] *Id.* at 9. "The Rule allows summary procedure only as to offenses within the knowledge of the judge because they occurred in his presence." *Id.*

[70] Hanger, *supra* note 26, at 558. Courts that use this approach are "more likely to sustain a broader exercise of the summary power, permitting the use of this power when immediate action is not necessary to maintain order or salvage the proceedings." *Id.*

[71] Anderson v. Dunn, 19 U.S. 204, 231 (1821).

[72] *Sacher*, 343 U.S. at 9.

[73] Hanger, *supra* note 26, at 564.

United States,[74] decided two years later. In *Offutt*, the United States Supreme Court held that a judge should not preside over summary contempt proceedings where the judge's personal feelings are evident against the attorney.[75] The Court explained that a judge might mistakenly allow his personal feelings to govern his decision.[76] In addition, if a judge responds to his personal feelings, justice may be hindered.[77] In order to prevent the possibility of a judge being biased, the Court held that the efficiency rationale alone could no longer justify summary contempt proceedings.[78] The holding in *Offutt* is based on the Court's concern about the fair administration of justice.[79]

Thus, *Offutt* represents a narrowing of the summary contempt power. In cases where it is determined that the judge is personally embroiled in the conflict resulting in his judicial bias, the judge should not preside over the summary contempt proceedings.[80] One commentator notes a paradox in the *Offutt* decision in that an attorney whose behavior does not sufficiently embroil a judge will get less procedural rights than an attorney whose acts are sufficiently embroiling in nature.[81] In the former case, the judge will be

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[74] 348 U.S. 11 (1954). In this case, counsel and the presiding judge did not get along. *Id.* at 12. The personal overtones and expressions between court and counsel did not reflect traditional judicial demeanor. *Id.* "The judge again and again admonished petitioner for what he deemed disregard of rulings and other behavior outside the allowable limits of aggressive advocacy . . . ." *Id.* At the end of the trial, the judge found the petitioner guilty of summary criminal contempt. *Id.*

[75] *Id.* at 14. The Court explained that the extraordinary power to punish for contempt without the formalities required by the Bill of Rights is justified when the "necessities of the administration of justice require such summary dealing with obstructions to it." *Id.* The Court further explained that this power given to a judge is "wholly unrelated to his personal sensibilities." *Id. But see Sacher*, 343 U.S. at 10 (holding that the same judge may sit in on the contempt hearing after trial).

[76] *Offutt*, 348 U.S. at 14. "The power thus entrusted to a judge is wholly unrelated to his personal sensibilities, be they tender or rugged. But judges also are human, and may, in a human way, quite unwittingly identify offense to self with obstruction to law." *Id.*

[77] *Id.* (explaining that a "judge should not give vent to personal spleen or respond to a personal grievance").

[78] *See Summary Contempt Sanction*, *supra* note 5, at 92.

[79] *Offutt*, 348 U.S. at 17. The trial judge and the petitioner continuously wrangled with each other throughout the trial. The judge's behavior "precluded that atmosphere of austerity which should especially dominate a criminal trial and which is indispensable for an appropriate sense of responsibility on the part of the court, counsel and jury." *Id.* On the other hand, the holding in *Sacher* is premised on the efficiency of judicial resources. *Sacher*, 343 U.S. at 10.

[80] *Offutt*, 348 U.S. at 14.

[81] *Conduct of Attorney*, *supra* note 5, at 341. The paradox that exists is that "[t]he attorney whose behavior is insufficiently provocative to embroil the judge in a manner visible on the record will have fewer procedural rights than will the attorney whose conduct is sufficiently provocative to create a record indicating embroilment." *Id.*

allowed to proceed summarily, thereby depriving the contemnor of his due process rights.[82]

Mayberry v. Pennsylvania[83] further eroded the holding in *Sacher* and also rectified the *Offutt* paradox. In *Mayberry*, the trial judge did not become personally involved in the controversy, but was the target of the attorney's conduct.[84] The Court explained that even though the judge was not personally involved, the fact that he was the target of the attorney's conduct was sufficient to show that the judge was personally embroiled.[85] *Mayberry* set forth an objective standard where there is a presumption of embroilment when there are personal attacks between the alleged contemnor and the trial judge.[86] Thus, the *Mayberry* presumption of bias when the judge has been the target of personal attacks by the attorney narrowed the subjective *Offutt* standard, which required a measurement of the judge's personal involvement to determine his bias.[87] The *Mayberry* holding is premised on the importance of a fair trial.[88] Therefore, in contrast to *Sacher*, when a judge has been the subject of personal attacks, there is a presumption of bias and the judge must not preside over the contempt hearing in order to ensure the fair administration of justice.[89]

The *Mayberry* presumption of personal bias by the judge when the judge has been personally attacked has not been extended to include non-personal attacks on the judge.[90] In *Ungar v. Sarafite*, the United States Supreme Court

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[82] *See Offutt*, 348 U.S. at 14.

[83] 400 U.S. 455, 463-64 (1971). The Court ruled that the use of summary power was inappropriate because when the judge waits until the end of trial to use his summary contempt power and when the contemptuous conduct has left a personal sting on the judge, he should ask a fellow judge to take his place. *Id.*

[84] *Id.* at 465. During the trial, the attorney made various personal attacks on the judge. *Id.* The attorney made statements such as "you dirty sonofabitch," that he wouldn't be "railroaded into any life sentence by any dirty, tyrannical old dog like yourself," "keep your mouth shut," and "go to hell." *Id.* at 456-58.

[85] *Id.* at 465. "[A] judge, vilified as was this Pennsylvania judge, necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication." *Id.*

[86] *Summary Contempt Sanction, supra* note 5, at 92 (explaining that even though the judge was not personally involved, he could not help but become embroiled in a bitter controversy).

[87] *See id.* "Where the *Offutt* standard required a threshold evaluation of the degree of personal involvement to determine potential bias in the judge-contemnor relationship, *Mayberry* alleviates such difficulty by presuming bias where unseemly and insulting conduct is apparent." *Id.*

[88] *Mayberry*, 400 U.S. at 465. "Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." *Id.*

[89] *See* Offutt v. United States, 348 U.S. 11, 14 (1954); *Mayberry*, 400 U.S. at 465.

[90] Ungar v. Sarafite, 376 U.S. 575, 584 (1964).

held that an attorney's criticism of the court's ruling[91] was not a personal attack on the judge and, thus, did not require the judge's disqualification from the post-trial contempt hearing.[92] The Court explained that the attorney's conduct was disruptive and disagreeable, but did not constitute a personal attack on the judge.[93] Thus, while a judge is required to disqualify himself from a post-trial contempt hearing in the case of a personal attack,[94] his removal is not required in cases of a non-personal attack on the judge.[95]

C. "Obstruction to the Administration of Justice" Standard

1. Origins

The United States Supreme Court addressed the importance of the attorney's role as a zealous advocate in *In re McConnell*[96] by attempting to define the boundaries of contempt. In *McConnell*, the trial judge erroneously prevented plaintiff's attorney from introducing certain evidence in an antitrust suit.[97] The plaintiff's attorney asked defense counsel to stipulate that the plaintiff would have introduced certain evidence if the judge had allowed him in order to preserve the record for appeal.[98] "Defense counsel refused to stipulate, however, insisting that . . . counsel prepare their record by following Rule 43(c) of the Federal Rules of Civil Procedure, . . . which requires that before an offer of proof is made questions upon which the offer is based must first be asked in the presence of the jury."[99] Plaintiff's counsel attempted to comply with Rule 43(c), but the trial judge forbid counsel from asking further questions.[100] Arguing that he had a right to ask questions pursuant to Rule 43(c), plaintiff's counsel said he would continue asking questions until a bailiff stopped him.[101] The judge charged counsel with contemptuous conduct

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[91] *Id.* at 580. The attorney stated that he was being "coerced and intimidated and badgered" by the trial judge. *Id.*

[92] *Id.* at 583-84.

[93] *Id.* at 584. The Court concluded that the conduct was "disruptive, recalcitrant and disagreeable commentary, but hardly an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification." *Id.*

[94] Mayberry v. Pa., 400 U.S. 455, 465 (1971).

[95] *Ungar*, 376 U.S. at 584.

[96] 370 U.S. 230 (1962).

[97] *Id.* at 231.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 232.

[101] *Id.* at 235.

at the end of the trial, despite the fact that counsel stopped his questioning during trial when asked by the judge.[102]

In determining whether the attorney's conduct was improper, the Court defined contemptuous conduct as the point at which an actual obstruction of justice exists.[103] In *McConnell*, the Court held that there was no actual obstruction because the attorney stopped his questioning at the judge's request.[104] The attorney's statement indicating an intention to continue questioning was not an actual obstruction.[105] The Court reasoned that an attorney should be allowed to make good-faith efforts to present his clients' cases and that an independent bar is essential to our system of justice.[106] While the *McConnell* decision cannot be read as an immunization of all conduct undertaken by an attorney in the good faith representation of his client, it does mandate that an attorney have great latitude in the area of advocacy.[107] The Court also mentioned that the contempt power should be limited to the "least possible power adequate to the end proposed."[108] Thus, criminal contempt is limited to situations in which there is an "actual obstruction of justice."[109] This standard recognizes the importance of advocacy and the need to limit the contempt power.[110] However, *McConnell's* "actual obstruction of justice" standard may still violate due process because the judge ultimately uses his discretion to determine what constitutes an obstruction of justice.[111]

The United States Supreme Court again addressed the importance of zealous advocacy in *In re Little*.[112] In *Little*, the defendant filed a motion for continuance because his retained counsel had another trial scheduled.[113] The

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[102] *Id.* at 232, 235.

[103] *Id.* at 234. The Court explained that "before the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedures there must be an actual obstruction of justice." *Id.*

[104] *Id.* at 235-36.

[105] *Id.* at 236.

[106] *Id.* The Court stated that:

> The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. The petitioner created no such obstacle here.

Id.

[107] *In re* Dellinger, 461 F.2d 389, 398 (7th Cir. 1972).

[108] *McConnell*, 370 U.S. at 234 (citing *In re* Michael, 326 U.S. 224, 227 (1945)).

[109] *Id.*

[110] *Dellinger*, 461 F.2d at 398.

[111] *See* Sax, *supra* note 10, at 301. "[U]nder *McConnell*, the trial judge initially decides what constitutes an 'actual obstruction of justice.'" *Id.*

[112] 404 U.S. 553 (1972).

[113] *Id.* at 554.

trial judge denied his motion, after which the defendant proceeded to represent himself at trial.[114] The defendant was held in contempt after he stated that the court was biased and that the judge had prejudged the case.[115] Even though the petitioner was not an attorney, the Court explained that he was entitled to as much latitude in conducting his defense as is enjoyed by counsel in zealously defending a client's case.[116] The Court set the boundary for the summary contempt power as those acts which constitute an "imminent, not merely a likely, threat to the administration of justice."[117] Because *McConnell* uses the "actual obstruction of justice"[118] standard while *Little* utilizes the "imminent threat to justice"[119] standard, the Court appeared to be applying two distinct standards. However, because both standards arise from the same concern that an attorney is entitled to present his client's case strenuously and persistently, the two standards should be read together.[120] Accordingly, the threat to justice should be "imminent and actual."[121]

A judge must consider the right to effective advocacy in determining whether there is an obstruction of justice.[122] One court held that in determining whether conduct is advocacy or obstruction, doubts should be resolved in favor of advocacy even though the line between the two "defies strict delineation."[123] As a result, contempt should be limited to those instances in which the attorney knows or reasonably should be aware that his conduct would obstruct justice.[124] An attorney must have the ability to be persistent

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[114] *Id.*

[115] *Id.*

[116] *Id.* at 555.

[117] *Id.*

[118] *In re* McConnell, 370 U.S. 230, 234 (1962).

[119] *Little*, 404 U.S. at 555.

[120] *See Advocacy and Contempt, Part One*, *supra* note 1, at 515. This commentator suggests that "because both standards arise from an identical set of concerns, they are in essence the same standard, or at least should be." *Id.*

[121] *See McConnell*, 370 U.S. at 234; *Little*, 404 U.S. at 555.

[122] *In re* Dellinger, 461 F.2d 389, 398 (7th Cir. 1972). Trial judges must not be free to "manipulate the balance between vigorous advocacy and obstructions so as to chill effective advocacy when deciding lawyer contempts." *Id.*

[123] *Id.* (citing RONALD L. GOLDFARB, THE CONTEMPT POWER 172 (1971)). By resolving doubts in favor of advocacy, "an independent and unintimidated bar can be maintained while actual obstruction is dealt with appropriately." *Id.*

[124] *Id.* at 400. The adversary system allows attorneys the "right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client's behalf." *Id.* Thus, the Court explains that the attorney has the requisite intent only if he knows or reasonably should be aware that he is "exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth." *Id.*

on behalf of his client in order to promote a client's interest.[125] Although the courts recognize the importance of advocacy and have set forth the "actual obstruction of justice" standard, the next question that must be addressed is what conduct actually constitutes an obstruction of justice.

2. Problems with the obstruction standard

Conduct will be contemptuous if it is obstructive to the administration of justice.[126] However, the standards defining obstructive conduct are unclear, and there are no definite guidelines to distinguish advocacy from obstruction.[127] The judge's decision to charge for contempt is largely subjective.[128] As a result, "[t]rial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice."[129] Moreover, the lack of clear guidelines as to what conduct constitutes an obstruction may inhibit an attorney from making certain statements for fear of being held in contempt.[130] Thus an attorney might abstain from arguing a valid point, in which case the contempt power itself results in an obstruction of justice.[131]

There is certain conduct that is clearly obstructive in nature. Some examples of such conduct include: insulting the judge,[132] presenting forged affidavits to a judge,[133] lying to a judge,[134] or tampering with a jury.[135] Such

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[125] *Id.* The Court mentions that the adversarial system should allow an attorney to be liberal in his actions in order to promote discovery of the truth and to have a vital bar. *Id.*

[126] *Ex Parte* Hudgings, 249 U.S. 378, 383 (1919).

[127] *See Conduct of Attorney*, *supra* note 5, at 343. "[T]he moment at which zealous advocacy becomes contumacious conduct is no more certain than the point at which deference to the value of order becomes abdication as advocate." *Id.*

[128] *See Summary Contempt Sanction*, *supra* note 5, at 93. "The degree of departure in attorney conduct necessary to invoke the contempt sanction ultimately rests with the trial judge." *Id.* Also, the determination of whether there is an obstruction is done on a case-by-case basis. *Id. See also Advocacy and Contempt, Part One*, *supra* note 1, at 483. "[T]he personal sensibilities of trial judges largely govern the substantive scope of the contempt power; each court is free to enforce its own erratic rules." *Id.*

[129] *See In re* Little, 404 U.S. 553, 555 (1972); Mayberry v. Pennsylvania, 400 U.S. 455, 463 (1971); *In re* Murchison, 349 U.S. 133 (1955); Brown v. United States, 356 U.S. 148, 153 (1958).

[130] *See* Rychlak, *supra* note 3, at 283-84.

[131] *See id.* at 284. "[I]t is not an obstruction of justice to continue arguing a valid point, even after having been instructed to stop, if that point is eventually won. . . . In that case . . . justice is advanced." *Id.* at 283.

[132] *See, e.g.*, *Mayberry*, 400 U.S. 455 (1971); Sacher v. United States, 343 U.S. 1 (1971).

[133] *See, e.g.*, *In re* Paris, 4 F. Supp. 878 (S.D.N.Y. 1933).

[134] *See, e.g.*, United States v. Temple, 349 F.2d 116 (4th Cir. 1965).

[135] *See, e.g.*, United States v. Warlick, 742 F.2d 113 (4th Cir. 1984).

conduct is considered to be flagrantly excessive, and the value of advocacy would not be harmed by calling it an obstruction.[136] One commentator suggests that such behavior is clearly contemptuous because it is "difficult for the other participants in the proceeding to do their jobs while dodging flying objects."[137] Moreover, an attorney cannot argue that such behavior is an inevitable lapse of advocacy.[138]

However, if the behavior is not contemptuous *per se*, then the courts use their discretion to determine whether an action is proper advocacy or obstruction.[139] This is problematic because of unclear standards as to what constitutes an obstruction. For example, courts have shown varying levels of tolerance in cases in which an attorney continues to argue after being told by the trial judge to stop.[140] In cases in which the attorney refused to sit down after repeated orders to do so,[141] and when an attorney persisted in making objections,[142] the contempt convictions were upheld. In contrast, one court held that an attorney's persistent argument did not constitute contempt.[143] Courts have also struggled with defining the line between disrespectful

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[136] *See Advocacy and Contempt, Part One, supra* note 1, at 554. Flagrantly excessive behavior appears to negate the function of the judge because such behavior does not accept the court's authority, nor does it merely seek to "register disagreement or change the judge's mind." *Id.*

[137] *See* Louis S. Raveson, *Advocacy and Contempt - Part Two: Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy*, 65 WASH. L. REV. 743, 759 (1990) [hereinafter *Advocacy and Contempt, Part Two*]. Such behavior represents "gross departures from the ordinary range of courtroom conduct, far beyond the bounds of what any judge would find acceptable." *Id.*

[138] *See id.* "Such behavior is far beyond any permissible process of presenting one's case as to fail to be even arguably advocative." *Id.*

[139] *See id.* at 762 ("[T]rial courts have been even more arbitrary in drawing the line between protected conduct and contempt.").

[140] *See infra* notes 141-46 and accompanying text.

[141] *See, e.g.*, State *ex rel* Smith v. District Court, 677 P.2d 589, 591 (Mont. 1984) (holding that an attorney who continued to argue and refused to be seated despite being warned by the judge constituted contempt).

[142] *See, e.g.*, Paul v. Pleasants, 551 F.2d 575 (4th Cir. 1977) (upholding the contempt conviction of an attorney who persisted in objecting to the voir dire process in jury selection by stating that the court was biased).

[143] *See, e.g.*, *In re* Dellinger, 370 F. Supp. 1304 (7th Cir. 1973) (holding that the attorney's conduct in continuing to criticize trial judge's ruling after repeated orders by the judge to stop did not rise to the level of contempt).

remarks and obstruction.[144] The Supreme Court has been fairly tolerant of an attorney's disrespectful conduct.[145] However, other courts have not.[146]

One commentator has raised a concern that the judge in a summary contempt proceeding has too much discretion.[147] In response, some argue that the appellate process is sufficient to address this concern.[148] However, the appellate process does not provide an adequate remedy.[149]

3. Inadequacy of appellate review

Although the appeal process should remedy any inadequacy at the trial level, the process has not proven to be effective in summary contempt cases.[150] The attorney often will not appeal a contempt finding,[151] and when he does, the review may be unable to remedy any problem because the finding is based on the citation of the trial judge who was the very object of the alleged abusive conduct.[152]

The methods used by appellate courts to review lower court decisions are another possible inadequacy of the appeals process.[153] When an appellate court reviews a lower court's decision under the abuse of discretion standard, it will not reverse the lower court's decision unless it concludes that the judge

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[144] *See Advocacy and Contempt, Part Two, supra* note 137, at 763. "[E]very day trial courts refrain from citing for contempt the very same conduct that is sometimes found to be obstructive." *Id.*

[145] *See, e.g., In re* McConnell, 370 U.S. 230, 236 (1962) (holding that an attorney's statement that he would continue his line of questioning "unless some bailiff stops us," did not rise to the level of obstruction); *In re* Little, 404 U.S. 553, 555 (1972) (holding that the petitioner's statements that the court was biased, had prejudged the case, and that he was a political prisoner did not constitute criminal contempt).

[146] *See, e.g., In re* Osborne, 344 F.2d 611, 615 (9th Cir. 1965) (upholding the contempt conviction of an attorney for his repeated complaints that the court's refusal to grant his numerous requests prevented him from adequately representing his client).

[147] *See Advocacy and Contempt, Part One, supra* note 1, at 483 ("[E]ach court is free to enforce its own erratic rules.").

[148] *See Conduct of Attorney, supra* note 5, at 350 ("[A] safeguard on the possibility of intimidation of zealous advocacy is the existence of appellate review.").

[149] *See* discussion *infra* part III.C.3.

[150] *See Summary Contempt Sanction, supra* note 5, at 97. "The appellate procedure is no more than a real opportunity to perpetuate the initial problems of bias and the denial of constitutional rights which exist in the use of the summary procedure at the trial level." *Id.*

[151] *See Advocacy and Contempt, Part One, supra* note 1, at 482. "The trial court contempt power goes largely unchecked. Most threats of contempt are acceded to and few findings of contempt appealed." *Id.*

[152] *See Summary Contempt Sanction, supra* note 5, at 97. "The appellate judge, in addition to the cold record with which he must work, has only the citation passed on by the trial judge, who . . . has been the very object of the accused's abuse." *Id.*

[153] *See Advocacy and Contempt, Part One, supra* note 1, at 574.

acted outside the scope of his discretion.[154] Accordingly, appellate courts often defer to the lower court's decision.[155]

In *In re Gustafson*,[156] the Ninth Circuit Court of Appeals focused on the great deference that an appellate court must afford a trial judge's determination whether to use summary contempt procedures.[157] The court explained that a trial court is in the best position to determine whether there exists a need to summarily punish for contemptuous conduct.[158] The *Gustafson* decision illustrates the great deference that an appellate court will give to the trial court under the abuse of discretion standard, thus inferring that alleged contemnors will be protected against only the most obvious abuses.[159]

Appellate courts give much deference to trial court decisions, so an arbitrary use of the summary contempt power by the judge may be subject to abuse.[160] An attorney may feel compelled to continue to argue in the interest of his client despite warnings by the judge because of the fear that the appeals process will provide an inadequate remedy.[161] Appellate review may be unavailing, so courts must give heightened consideration to an attorney's advocacy rights.[162] One commentator suggests that a court must have increased "tolerance for an attorney's continued argument or objection in spite of the judge's order for silence."[163] Furthermore, appellate courts must be

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[154] *See id. See also In re* Gustafson, 650 F.2d 1017, 1022 (9th Cir. 1981) (explaining that the trial court's decision will be reviewed for an abuse of discretion).

[155] *See* Sacher v. United States, 343 U.S. 1, 11 (1952). The Court extended deference by upholding the trial court's decision. *Id.* The dissent, however, argued that the basis of review was inadequate because the appellate court failed to scrutinize the entire transcript submitted by the trial judge. *Id.* at 18 (Black, J., dissenting). "Such an 'inadequate' basis of review is to be expected since no hearing was held which could have framed concrete issues and focused attention to evidence relevant to them." *Id.* at 19. *See also* Green v. United States, 356 U.S. 165, 200 (1958) (Black, J., dissenting) (explaining that review is "impotent" because it is based on a "cold record," and that appellate judges are reluctant to overturn contempt convictions imposed by their brethren).

[156] 650 F.2d 1017 (9th Cir. 1981).

[157] *Id.* at 1023. "[W]e give great deference to a trial judge's explicit determination that . . summary procedures are necessary." *Id.*

[158] *Id.*

[159] *See* Comment, *Summary Criminal Contempt: Deference to the Trial Court*, 12 GOLDEN GATE U.L. REV. 109, 114 (1982). The author discusses the implications of the *Gustafson* decision and states that the standard set forth "will safeguard an alleged contemnor from only the most flagrant abuses." *Id.*

[160] *See Advocacy and Contempt, Part One, supra* note 1, at 579.

[161] *See id.* at 571. "[T]he attorney's only hope is to convince the trial judge of her error." *Id.*

[162] *See In re* Dellinger, 461 F.2d 389, 398 (7th Cir. 1972). "Appellate courts must ensure that trial judges . . . are not left free to manipulate the balance between vigorous advocacy and obstructions so as to chill effective advocacy when deciding lawyer contempts." *Id.*

[163] *Advocacy and Contempt, Part One, supra* note 1, at 579.

urged to follow stricter standards in the review process and not to be so quick to uphold the lower court's decision.

As discussed above, courts have narrowed the summary contempt power.[164] However, the standards must be more clearly articulated because the difficulty lies in defining what constitutes an obstruction of justice. Both attorneys and judges are entitled to know when conduct is so excessive that it warrants summary contempt punishment.

IV. HAWAI'I'S APPLICATION OF THE SUMMARY CONTEMPT POWER

This section considers Hawai'i's application of the summary contempt power as it compares with the federal standards. Hawai'i courts have favored a narrowing of the summary contempt power, but not to the extent of the federal courts. This section will also discuss the standard used by Hawai'i courts in interpreting the Hawai'i criminal contempt statute.

Section 710-1077(3)(a)[165] of the Hawai'i Revised Statutes sets forth the standard for summary punishment. The language is similar to Federal Rule 42(a),[166] particularly in its lack of procedural due process protections.[167] An examination of Hawai'i cases reveals that Hawai'i favors a narrowing of the summary contempt power, but only to the extent of the *Offutt* decision.[168] The Hawai'i courts and the *Offutt* Court required an inquiry into the judge's

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[164] *See* discussion *supra* part III.B.

[165] HAW. REV. STAT. § 710-1077(3) (1992). It states the following:

> The court may treat the commission of an offense . . . as a petty misdemeanor, in which case:
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> (a) If the offense was committed in the immediate view and presence of the court, or under such circumstances that the court has knowledge of all of the facts constituting the offense, the court may order summary conviction and disposition; and
>
> (b) If the offense was not committed in the immediate view and presence of the court, nor under such circumstances that the court has knowledge of all of the facts constituting the offense, the court shall order the defendant to appear before it to answer a charge of criminal contempt of court; the trial, if any, upon the charge shall be by the court without a jury; and proof of guilt beyond a reasonable doubt shall be required for conviction.

Id.

[166] *See supra* note 43 for text of FED R. CRIM. P. 42(a).

[167] Gabriel v. Gabriel, 7 Haw. App. 95, 100 n.5, 746 P.2d 574, 577 n.5 (1987). "Procedural due process protections are excepted in summary criminal contempt proceedings since 'instant action is necessary to protect the judicial institution itself.'" *Id.* at 100, 746 P.2d at 577 (quoting Miranda v. Southern Pac. Transp. Co., 710 F.2d 516, 522 (9th Cir. 1983)).

[168] *See supra* notes 74-75 and accompanying text. *See also* Evans v. Takao, 74 Haw. 267, 842 P.2d 255 (1992).

bias.[169] They differed only in regards to the type of bias that the court required.[170] The Court in *Offutt* required actual bias by the judge,[171] while Hawai'i courts require apparent bias.[172]

Evans v. Takao[173] illustrates how Hawai'i's use of the summary contempt power is similar to that of the *Offutt* decision. *Evans*, like *Offutt*, required a reviewing court to assess the judge's personal involvement.[174] In particular, the court looked at the trial judge's response to the alleged contemnor's misbehavior.[175] If the record reflected apparent animosity on both the judge's part and the attorney's part, another judge is required to take his place after trial.[176] Thus, rather than show actual bias, it is sufficient that the record reflects apparent bias.[177]

Schutter v. Soong[178] adopted the test set forth in *Evans*.[179] The Hawai'i Supreme Court ruled that even though the attorney continuously attacked the

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[169] *See Evans*, 74 Haw. at 291, 842 P.2d at 266; Offutt v. United States, 348 U.S. 11, 14 (1954).

[170] *See infra* notes 171-72.

[171] *Offutt*, 348 U.S. at 14.

[172] *See Evans*, 74 Haw. at 291, 842 P.2d at 266; Schutter v. Soong, 76 Haw. 187, 205, 873 P.2d 66, 84 (1994).

[173] 74 Haw. 267, 842 P.2d 255 (1992). In *Evans*, defense counsel continued to question the witness despite the trial judge's sustaining the prosecution's objection, and continued to raise his voice despite being asked to keep quiet. *Id.* at 273-75, 842 P.2d at 258-59. The trial judge thus held defense counsel in direct contempt of the court. *Id.* at 275, 842 P.2d at 259.

[174] *See id.* at 291, 842 P.2d at 266; *Offutt*, 348 U.S. at 14.

[175] *Evans*, 74 Haw. at 291, 842 P.2d at 266. In this case, the attorney, Evans, represented his client in a criminal prosecution. *Id.* at 271, 842 P.2d at 258. On cross-examination of a witness, Evans proceeded with questions pertaining to a physical object that was not produced in discovery. *Id.* at 272, 842 P.2d at 258. The deputy prosecuting attorney's objection was sustained based on the fact that the object should have been produced in discovery. *Id.* Evans continued with questioning despite several sustained objections, after which the judge held Evans in contempt of court. *Id.* at 275, 842 P.2d at 259.

[176] *Id.* at 270, 842 P.2d at 257.

> Where the record reflects marked personal feelings on both sides inflicting personal stings on the judge (i.e., where the case conveys an apparent flavor of animosity on the part of the judge against counsel, such that the citing judge manifestly loses his or her capacity to perform judicial duties without bias or prejudice), another judge should be substituted for the purpose of finally disposing of the charges of direct summary criminal contempt.

Id. The court ultimately ruled that the case did not have to be heard in front of another judge because the record was devoid of any apparent animosity on the judge's part toward counsel. *Id.* at 293, 842 P.2d at 267.

[177] *Id.* at 291, 842 P.2d at 266.

[178] 76 Hawai'i 187, 873 P.2d 66 (1994).

[179] *Id.* at 205, 873 P.2d at 84. In order to establish personal bias, the case must convey an "apparent flavor of animosity on the part of the judge against counsel." (quoting *Evans*, 74 Haw. at 291, 842 P.2d at 266).

judge,[180] the mere fact that the judge did not show personal involvement was enough to allow the judge to rule on the contempt after trial.[181]

Thus, the *Offutt* paradox exists in Hawai'i's case law. In Hawai'i, the judge is allowed to rule on the contempt hearing after trial no matter how insulting an attorney's comments are to a judge, so long as the judge does not show personal involvement.[182] This is inconsistent with due process notions of a fair trial and could be subject to abuse by a judge. In particular, a judge might allow his personal feelings to impact a finding of an obstruction, where in other circumstances a judge would find no obstruction.[183] Therefore, Hawai'i should adopt the objective standard followed by *Mayberry* that once there are personal attacks on a judge in the form of insulting conduct, it is presumed that the judge is personally embroiled and must be restrained from ruling on the contempt after trial.[184]

In regard to the standard for finding contempt, Hawai'i's criminal contempt statute on its face appears to be broader than the federal statute.[185] Unlike the federal statute, the Hawai'i statute does not specifically state that the act must obstruct justice.[186] This language seems to give a judge even more discretion

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[180] *Id.* at 191-94, 873 P.2d at 70-73. The attorney made such remarks as "you're the one whose[sic] behaving like a dictator," "check with your court reporter for God's sakes before you make a fool of yourself any more," and "[w]hen you do a Laurel and Hardy . . . routine on my head with your tap shoes, I'm afraid I'm going to have to respond." *Id.*

[181] *Id.* at 206, 873 P.2d at 85. "[W]e conclude that at all times, Judge Soong conducted himself with the utmost judicial decorum and impartiality, despite Schutter's continuous attacks on the court." *Id.*

[182] *See id.*

[183] *See supra* notes 76-77 and accompanying text.

[184] *See supra* notes 84-86 and accompanying text.

[185] *See supra* note 42 for the text of 18 U.S.C. § 401.

[186] *See* HAW. REV. STAT. § 710-1077 (1992). The section states, in relevant part:

(1) A person commits the offense of criminal contempt of court if:
   (a) The person recklessly engages in disorderly or contemptuous behavior, committed during the sitting of a court in its immediate view and presence, and directly tending to interrupt its proceedings or impair the respect due to its authority;
   (b) The person creates a breach of peace or a disturbance with intent to interrupt a court's proceedings;
   (c) As an attorney, clerk, or other officer of the court, the person knowingly fails to perform or violates a duty of the person's office, or knowingly disobeys a lawful directive or order of a court;
   (d) The person knowingly publishes a false report of a court's proceedings;
   (e) Knowing that the person is not authorized to practice law, the person represents the person's self to be an attorney and acts as such in a court proceeding;
   (f) The person intentionally records or attempts to record the deliberation of a jury;
   (g) The person knowingly disobeys or resists the process, injunction, or other

to find contempt than the federal standard. However, even though the language of the Hawai'i statute differs from that of the federal statute, Hawai'i courts have applied the federal "obstruction of justice" standard in interpreting the Hawai'i statute.[187] Accordingly, the language in section 710-1077 of the Hawai'i Revised Statutes should be changed to reflect the standard for contempt as that which leads to an "obstruction of justice."

Hawai'i's statute includes some form of intent as a factor to consider in finding someone in contempt,[188] unlike the federal statute.[189] The language of the statute requires that "[t]he person creates a breach of peace or a disturbance with intent to interrupt a court's proceedings."[190] Thus, while Hawai'i courts have followed the federal "obstruction of justice" standard, Hawai'i courts have gone a step further by including an intent requirement.[191] Because of this requirement, section 710-1077 (1) is actually more narrow in scope than section 401 of the United States Code.[192] Because section 401 of the United States Code does not mention intent, it gives a judge more power to use a subjective assessment. The language appears to provide a judge with leeway to find someone in contempt who really had no intent to obstruct proceedings. Although the "obstruction" standard itself can be subject to scrutiny, an intent requirement clarifies what conduct constitutes an obstruction, and thus helps to narrow the contempt power. Section VI addresses how the obstruction standard can be made more precise.

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mandate of a court;

(h) The person intentionally refuses to be qualified as a witness in any court or, after being qualified, to answer any proper interrogatory without a privilege to refuse to answer;

(I) Being a juror, the person intentionally, without permission of the court, fails to attend a trial or official proceeding to which the person has been summoned or at which the person has been chosen to serve; or

(j) The person is in violation or disobedience of any injunction or order expressly provided for in part V of chapter 712.

Id.

[187] *See* Evans v. Takao, 74 Haw. 267, 268, 842 P.2d 255, 257 (1992) "In the face of an open, serious threat to orderly procedure in the case or to the orderly administration of justice, a court is statutorily authorized to impose instant and summary punishment and to dispense with due and deliberate procedures." *Id. See also* Edmunds v. Won Bae Chang, 54 Haw. 568, 570, 512 P.2d 3, 5 (1973). "[A] lawyer's presentation of his client's case strenuously and persistently should not be deemed a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge's performance of his duty." *Id.*

[188] The statute sets forth that "[t]he person creates a breach of peace or a disturbance with intent to interrupt a court's proceedings." HAW. REV. STAT. § 710-1077(1)(b) (1993).

[189] 18 U.S.C § 401 (1982).

[190] HAW. REV. STAT. § 710-1077(1)(b) (1993).

[191] *Id.*

[192] *See supra* note 42 for text of 18 U.S.C. § 401.

While the United States Supreme Court has recognized the importance of the right to appeal, Hawai'i does not allow appellate review in cases of summary contempt.[193] Although the Hawai'i statute does permit a special proceeding for review, the appeals process should be allowed to remedy any arbitrary decisions that were made in the court below. Considering that appellate review is granted in non-summary contempt cases in which a person has been afforded his procedural rights, it is only plausible that it should be allowed in cases of summary contempt in which a person is denied due process.

V. CONSTITUTIONAL CONSIDERATIONS

A. Right to a Jury Trial

The Sixth Amendment of the United States Constitution guarantees the right to a jury trial in criminal cases.[194] However, in an early case, *United States v. Barnett*, the Court held that there was "no constitutional right to a jury trial in all contempt cases."[195] The Court reasoned that criminal contempt was not a serious offense requiring the protection of the constitutional guarantee of a right to a jury trial.[196] Similarly, in *Cheff v. Schnackenberg*,[197] the Supreme Court held that a contempt conviction was still classified as petty

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[193] HAW. REV. STAT. § 710-1077(5) (1992). The statute states, in relevant part:

> (5) Whenever any person is convicted of criminal contempt of court or sentenced therefor, the particular circumstances of the offense shall be fully set forth in the judgment and in the order or warrant of commitment. In any proceeding for review of the judgment, sentence, or commitment, no presumption of law shall be made in support of the jurisdiction to render the judgment, pronounce the sentence, or order the commitment. A judgment, sentence, or commitment under subsection (3)(a) shall not be subject to review by appeal, but shall be subject to review in an appropriate proceeding for an extraordinary writ or in a special proceeding for review.

Id.

[194] U.S. CONST. amend. VI.

[195] 376 U.S. 681, 694-95 (1964). The *Barnett* case is the aftermath of efforts of Meredith, an African American, to attend the University of Mississippi. *Id.* at 683. The Court of Appeals entered an injunctive order directing the Board of Trustees and the officials of the University to admit Meredith. *Id.* Governor Barnett, the agent of the Board, was found in criminal contempt for violating the injunctive order. *Id.* at 686.

[196] *Id.* at 694-95.

[197] 384 U.S. 373 (1966). The Federal Trade Commission issued a cease-and-desist order against Holland Furnace Company and its officers prohibiting the continuance of deceptive trade practices. *Id.* at 376. Cheff was an officer of the company. *Id.* The Court of Appeals then issued a *pendente lite* order commanding Holland to comply with the cease-and-desist order. *Id.* The court found Cheff guilty of criminal contempt after he was asked to show cause why he should not be held in criminal contempt. *Id.* at 377.

even though it involved a six-month prison term.[198] Thus, historically, there was no requirement of a jury trial in contempt cases.[199]

However, in *Bloom v. Illinois*,[200] the Court focused on the need for effective safeguards against possible abuse of the summary power by balancing the summary power with the contemnor's due process rights.[201] The Court held that criminal contempt is a crime to which the "jury trial provisions of the Constitution apply."[202] As a result, a jury trial for criminal contempt is guaranteed when the contemnor may be imprisoned for more than six months.[203]

In *Codispoti v. Pennsylvania*,[204] the Supreme Court extended *Bloom* such that when a person is tried for acts of contempt after trial, he is entitled to a jury trial if the aggregate sentence is greater than six months.[205] In *Codispoti*, the trial judge heard the contempt charges against each petitioner at the end of trial and imposed a separate sentence for each charge, to run concurrently.[206] However, *Codispoti*'s holding is applicable only to post-trial adjudications, thus giving the judge the ability to summarily punish someone in an unlimited number of six-month sentences during trial without the protection of a jury trial.[207] Therefore, there is incentive for judges to make contempt decisions that may be arbitrary and biased during trial to avoid the jury trial required in post-trial adjudications.[208] Accordingly, *Codispoti* should

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[198] *Id.* at 379 (citing 18 U.S.C. § 1 (1964)) ("Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months is a petty offense.").

[199] *Id.*

[200] 391 U.S. 194 (1968).

[201] *Id.* at 207.

[202] *Id.* at 201-02.

[203] Sax, *supra* note 10, at 298.

[204] 418 U.S. 506 (1974).

[205] *Id.* at 506. The Court explained:

> In terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial difference between serious contempts and other serious crimes. Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power.

Id. at 516 (quoting Bloom v. Illinois, 391 U.S. 194, 201-02 (1968)).

[206] *Id.*

[207] *Id.* at 518 (Marshall, J., concurring in part). Justice Marshall states that the majority suggests that a trial judge "could impose an unlimited number of separate, consecutive six-month sentences upon a defendant for separate contemptuous acts during trial so long as the judge convicts and punishes summarily upon the occurrence of each contemptuous act." *Id.*

[208] *Id.* at 519.

be extended to provide a jury trial if the aggregate contempt sentence during trial exceeds six months.[209]

B. The Vagueness and Overbreadth of Contempt Statutes

To avoid a challenge that a statute is overbroad or vague, the Due Process Clauses of the Fifth and Fourteenth Amendments require that the language of a statute be specific.[210] Although the trend has been toward a narrowing of the summary contempt power, the language of contempt statutes, particularly § 401 of Title 18 of the United States Code, lacks specificity and is quite broad.[211] Therefore, contempt statutes may be challenged as overbroad or vague. A statute will be invalidated for overbreadth if it is so broad that it "makes unlawful a substantial amount of constitutionally protected activity."[212] A statute may be invalidated if it prohibits conduct protected by the First Amendment.[213] However, the case law is often contradictory. Some cases have found contempt where the attorney criticized the judge's ruling and made insulting remarks to the court.[214] However, there have also been cases in which disrespectful language and conduct and criticism of a trial judge's ruling did not constitute contempt.[215] These contradictory rulings demonstrate

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[209] *Id.* Justice Marshall states that the right to a jury trial should also exist when the summary power is invoked during trial. *Id.* at 519-20. Failing to do so would provide an "incentive for a trial judge to act in the heat of the moment, and thus encourages the very arbitrary action which it is the purpose of the Sixth Amendment to eliminate." *Id.* at 519.

[210] *See* Brautigam, *supra* note 33, at 1527 (explaining that the requirement of specificity in statutes is based upon the due process clauses of the fifth and fourteenth amendments and has developed in two closely related doctrines: void-for-vagueness and void-for-overbreadth).

[211] *See* 18 U.S.C. § 401 (1982). A court has the power to punish for contempt "misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice." *Id.*

[212] *Advocacy and Contempt, Part Two, supra* note 137, at 746.

[213] *See* Brautigam, *supra* note 33, at 1528.

> The void-for-overbreadth doctrine, primarily concerning first amendment cases, is somewhat different because rather than testing the adequacy of the warning, it focuses on the constitutional limits of legislative power. If a statute extends the reach of legislative power into areas constitutionally protected from regulation, it will be invalidated regardless of its specificity.

Id.

[214] *See, e.g.*, Sacher v. United States, 343 U.S. 1, 15 (1952) (Black, J., dissenting) (explaining that the lawyers were held in contempt of court for insolently and persistently criticizing the judge's ruling in open court). *See also* Weiss v. Burr, 484 F.2d 973, 982 (9th Cir. 1973) (holding that prosecutor's insulting remarks and conduct toward the court, although not "actually disruptive, posed significant, imminent threats to the fair administration of justice by the trial court").

[215] *See, e.g.*, United States v. Meyer, 346 F. Supp. 973 (D.D.C. 1972) (holding that counsel's use of insulting and disrespectful language and conduct in addressing the judge with regard to certain motions, as well as his refusal to obey court's directions to be seated, did not constitute

the subjectiveness of the obstruction of justice standard. One commentator argues that the courts have excluded constitutionally protected conduct from the contempt power by limiting its definition to the obstruction of justice.[216]

Moreover, it may be argued that the federal contempt statute is vague, especially in view of the contradictory holdings courts have arrived at based on similar facts. A statute is void due to vagueness if it does not state specifically what conduct is prohibited.[217] Section 401 of the United States Code governs summary contempt and allows for punishment of misbehavior that obstructs the administration of justice.[218] However, the language of § 401 does not provide sufficient guidelines as to what acts can be classified as contempt.[219] The Supreme Court has even acknowledged that the standards for contempt are general and undefined.[220] The trial judge has discretion to decide what constitutes obstruction, so individuals are without notice of what conduct is proscribed as contemptuous.[221] Moreover, there is a danger that a judge may allow his personal feelings to influence his decision regarding whether or not conduct constitutes contempt.[222]

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contempt). *See also In re* Dellinger, 461 F.2d 389, 399 (7th Cir. 1972) (explaining that counsel's conduct in continuing to criticize the trial judge's rulings after repeated orders to stop did not constitute contempt when remarks were not offensive and did not personally insult the judge).

[216] *Advocacy and Contempt, Part Two, supra* note 137, at 747-48. The author explains that if the "allegedly contemptuous conduct falls within the statutory definition and is found to be obstructive, it is not protected by the Constitution." *Id.* "Overbreadth would not pose any problems if the courts could define with specificity the category of behavior constituting an obstruction." *Id.* at 751.

[217] *See* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as its meaning and differ as to its application, violates the first essential of due process." *Id. See also* Brautigam, *supra* note 33, at 1527. "The void-for-vagueness doctrine represents the conviction that one may not be held accountable for violation of a law unless that law was sufficiently specific to adequately warn the defendant of the proscribed behavior." *Id.*

[218] 18 U.S.C. § 401 (1982).

[219] *See supra* note 42 for the text of 18 U.S.C. § 401 (1982).

[220] The contempt power is "based on a common law concept of the most general and undefined nature." Bridges v. California, 314 U.S. 252, 260 (1941) (quoting Cantwell v. Connecticut, 310 U.S. 296, 307-08 (1940).

[221] *See Advocacy and Contempt, Part One, supra* note 1, at 483.

[222] *See* Brown v. United States, 356 U.S. 148, 153 (1958). ("Trial courts no doubt must guard against confusing offenses to their sensibilities with obstruction to the administration of justice."). *See also* Craig v. Harney, 331 U.S. 367, 376 (1947) ("[T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion.").

VI. RECOMMENDATIONS

The use of the contempt power against attorneys has been increasing[223] for several reasons: 1) the trial judge has discretion to determine whether a person's conduct is contemptuous; 2) there are no precise standards to determine what constitutes contempt; and 3) the appeals process is inadequate. In order for an attorney to be an effective advocate for his client without fearing a contempt charge, it is imperative that guidelines defining contempt be in place, especially in summary contempt proceedings in which procedural due process is not required.[224]

Although courts have attempted to follow the obstruction of justice standard in finding contempt,[225] it is not clear what constitutes an obstruction, so more precise standards must be defined. Because the problems relating to the summary contempt power exist in both federal and Hawai'i courts, the following recommendations should be applicable to both federal and Hawai'i cases.

A. Objective Standard

Of primary importance is the subjectivity a trial judge is given in using the summary contempt power.[226] Instead of measuring an obstruction in subjective terms, it should be measured objectively.[227] This will help to prevent judges from mistaking proper advocacy for obstruction.[228] More consistent decisions will be reached through an objective standard. Furthermore, it will place the attorney on notice of the parameters of permissive conduct. All courts should follow a precise objective standard of the degree

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[223] *See Advocacy and Contempt, Part One, supra* note 1, at 593 nn.13-14. The author surveyed public defender's offices and also performed a computer search of criminal contempt cases. His research revealed an increase in the number of contempt cases. *Id.*

[224] *See supra* notes 8, 39-40, 44 and accompanying text.

[225] *See supra* notes 103-21 and accompanying text.

[226] *See Summary Contempt Sanction, supra* note 5, at 93. "The degree of departure in attorney conduct necessary to invoke the contempt sanction ultimately rests with the trial judge." *Id.* Also, the determination of whether there is an obstruction is done on a case-by-case basis. *Id. See also Advocacy and Contempt, Part One, supra* note 1, at 563. If a trial judge is allowed to use his subjective feelings to determine an obstruction, the "independence of the bar would be in grave jeopardy." *Id.*

[227] *See, e.g.*, United States v. Lumumba, 603 F. Supp. 913, 920 (S.D.N.Y. 1985) (explaining that the "objective standard of propriety" should be used in contempt adjudications).

[228] *See Advocacy and Contempt, Part One, supra* note 1, at 563. "There is an inherent tendency for trial judges, in the heat of courtroom debate, to mistake aggressive advocacy, disagreement, and breaches of etiquette for disrespect, and disrespect for interference with the judicial process." *Id.*

of obstruction that is required. A standard that will find contempt if there is merely the possibility of an obstruction cannot suffice. The appropriate standard must be one that requires an "actual obstruction"[229] or "imminent threat of such obstruction,"[230] as set forth in *McConnell* and *Little*, respectively. If a judge may punish someone summarily merely because of the possibility of obstruction, then the problem of the discretionary nature of the judge's contempt decision still exists. What one judge thinks could lead to an obstruction, another judge may not.

B. Intent

Intent is another important factor that courts must consider. Hawai`i has incorporated some degree of intent into its contempt statute by requiring that the actor "recklessly" engage in contemptuous behavior, or that the disturbance be done with an "intent to interrupt a court's proceedings."[231] Although the federal statute does not specifically mention intent,[232] many federal courts have required some form of intent in contempt decisions.[233] However, courts have applied different standards for finding intent.[234] Some courts have followed a subjective standard in that the alleged contemnor must actually have intended to obstruct the proceedings.[235] This approach is flawed because an attorney can always argue that he never intended to obstruct proceedings. An attorney may argue that his actions are necessary to promote his client's interest, and thus, that he did not have the requisite intent. However, in many instances, the attorney's actions may obstruct justice, thereby justifying a contempt sanction. Accordingly, an objective standard of intent would be preferable. The Seventh Circuit, in *United States v. Seale*[236] and *In re Dellinger*,[237] set forth an objective standard which finds that an attorney has the required intent if he reasonably should know that his actions exceed the

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[229] *See, e.g., In re* McConnell, 370 U.S. 230, 234 (1962).

[230] *See, e.g., In re* Little, 404 U.S. 553, 555 (1972).

[231] *See* HAW. REV. STAT. § 710-1077 (1)(a)(b) (1992).

[232] *See* 18 U.S.C. § 401 (1982).

[233] *See, e.g.*, United States v. Seale, 461 F.2d 345, 367 (7th Cir. 1972) (noting that virtually every decision under the federal contempt statute requires some finding of wrongful intent); Hawk v. Cardoza, 575 F.2d 732, 734 (9th Cir. 1978) (noting that due process requires "some showing of intent for conviction of criminal contempt").

[234] *See infra* notes 234-37 and accompanying text.

[235] *See, e.g., In re* Brown, 454 F.2d 999, 1007 (D.C. Cir. 1971) ("Knowledge that one's act is wrongful and a purpose to nevertheless do the act are prerequisites to criminal contempt.").

[236] 461 F.2d 345 (7th Cir. 1972).

[237] 461 F.2d 389 (7th Cir. 1972).

bounds of proper advocacy and obstruct the attainment of justice.[238] This standard is favored over the subjective approach because it considers the right of an attorney to be an advocate, as well as the goal of the court to achieve the truth.

Another requirement that would strengthen the intent requirement is that the individual should be warned before the summary contempt power is used against him.[239] Establishing that an alleged contemnor was warned first will help show that he had the intention to obstruct the proceedings.[240]

Although the rationale for the summary contempt power does not guarantee due process rights, an attorney should be given an opportunity to be heard and to explain his behavior. This is especially so in light of the importance of advocacy in defending a client. This process will aid the appellate judge in making an informed decision in the review process because there will be a written record detailing the actual events of the proceedings.

C. Alternatives to the Contempt Power

The use of the contempt power against an attorney may have a prejudicial effect on the alleged contemnor's client's case, so a judge should consider other alternatives to the contempt power for controlling courtroom behavior.[241] For example, a judge can prevent "boisterous or over-emotional obstructions by resort[ing] to moral authority, warnings, or calling a recess for a cooling-off period."[242] An attorney could also be subject to professional sanctions in the form of professional disciplinary proceedings.[243] Also, the court may declare a mistrial in those cases in which the attorney's conduct is so

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[238] *Id.* at 400 ("[A]n attorney possesses the requisite intent only if he knows or reasonably should be aware in view of all the circumstances, especially the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth."); *see also Seale*, 461 F.2d at 368 ("The minimum requisite intent is better defined as a volitional act done by one who knows or should be reasonably aware that his conduct is wrongful.").

[239] Warnings are generally desirable. *See, e.g.*, Ungar v. Sarafite, 376 U.S. 575 (1964); Fisher v. Pace, 336 U.S. 155 (1949). *But see, e.g.*, United States v. Schiffer, 351 F.2d 91, 95 (6th Cir. 1965) (explaining that warnings are not essential when the conduct was clearly contemptuous).

[240] *See Advocacy and Contempt, Part Two, supra* note 137, at 801 ("When an attorney is on notice that her conduct exceeds the bounds of tolerable expression, an inference of wrongful intent can more readily be drawn."). *See also* Rychlak, *supra* note 3, at 286 (explaining that a warning in each case "would be one way to remove doubt about the defendant's *mens rea*").

[241] *See Advocacy and Contempt, Part One, supra* note 1, at 503; *see also* Brautigam, *supra* note 33, at 1518.

[242] *See Advocacy and Contempt, Part One, supra* note 1, at 503.

[243] *See* Brautigam, *supra* note 33, at 1518-19 (explaining that the threat of professional disciplinary proceedings should be sufficient to control such contumacious behavior).

disruptive that the attorney's client is unlikely to receive a fair trial.[244] The threat of professional sanctions often should be sufficient to halt the contemptuous conduct. The court should consider the contempt sanction only when the threat of ethical sanctions does not quiet the disruptive conduct.

VII. CONCLUSION

As the judicial system stands today, the trial judge has too much discretion in using the summary contempt power, which has led to unclear standards as to what conduct constitutes an obstruction. An attorney is not afforded due process in a summary contempt procedure, so it is only fair that he know exactly when his conduct crosses the line from proper advocacy to obstruction. As recommended in this article, judges must measure conduct in objective, rather than subjective terms. In addition, courts should find intent on the actor's part, particularly an objective measure of intent. If the courts follow such guidelines, there will be a proper balance between an attorney's need to advocate his client's interest and the court's need to maintain order and decorum in the proceedings.

Kimberly Morihara[245]

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[244] *See id.* at 1519 ("Since the prejudicial effect upon the jury in sanctioning a party or attorney is great, a mistrial would seem far superior to immediate imposition of contempt sanctions.").

[245] Class of 1998, William S. Richardson School of Law.

Hawai`i Constitution, Article XI, Section 1: The Conservation, Protection, and Use of Natural Resources

I. INTRODUCTION

Imagine a vast, abundant koa forest owned by the State. Within this forest, several birds, plants, and animals rely on this habitat to survive. One day, a nearby inhabitant realizes that the forest's wood would be perfect to build tables, chairs, and other artifacts for his house.

In deciding whether or not to cut down the trees, that individual will weigh the benefits he will receive from cutting down the trees against any costs or detriments that may arise from this action. So long as his benefits outweigh his costs, that individual will determine that it is in his best interests to cut down the trees.[1] In this analysis, on the positive side is the benefit he receives from the use of the wood for furniture in his house. The cost is the depletion of the forest. However, the negative impact is shared by society as a whole, such that the individual cost of cutting down trees appears minimal to that individual. Since the benefit outweighs the individual cost, that person will go to the forest and chop down whatever trees he needs.

Now, suppose this inhabitant is no longer the only one with an interest in the forest. Slowly, more and more people begin cutting down trees - some for their own use, but some to sell to others. For each individual, the same cost-benefit analysis[2] would favor cutting down the necessary trees. The high benefit to each individual of cutting down the trees would outweigh the individual social cost of depleting the forest, since this social cost is shared among all members of the public.

A significant problem arises when the number of trees being chopped down exceeds the ability of the forest to replenish itself. At this point, the cumulative effect of destroying the forest, with its plants and animals, severely outweighs the individual benefits achieved from the use of the wood. However, no individual will have enough of a personal stake in the preservation of the forest to warrant action to stop its destruction. Each individual will assume that his own contribution to the depletion of the forest is so minimal as to pose no significant effect. Since the detriment is shared throughout society, each individual tree cutter will not recognize the

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[1] This is an example of the cost-benefit analysis. For a detailed explanation of the cost-benefit analysis, *see* STEVEN E. LANDSBURG, PRICE THEORY AND APPLICATIONS 106-13 (1988). The basic premise behind this theory is that an action should be taken so long as the benefits of the action equal or exceed the costs of that action. *Id.* at 112. When dealing with the issue of how much of a good should be produced, the marginal benefit must be weighed against the marginal cost. *Id.* The marginal benefit is the benefit obtained from producing one more of that good, while the marginal cost is the cost of one more of that good. *Id.* at 107-8. So long as the marginal benefit to be gained from one more item exceeds or at least equals the marginal cost of that one more item, that item should be produced. *Id.* at 112.

[2] *Id.*

cumulative repercussions and will continue to cut down the trees for personal gain.

The above situation is an illustration of the tragedy of the commons.[3] Now suppose this forest land is owned by many individuals and is the only habitat of its kind in the world. Assume further that these private landowners contend that they have the right to cut down whatever trees are on their land regardless of the social repercussions. What can be done to stop the complete destruction of this natural resource under private ownership?

The above scenarios illustrate two distinct issues concerning the use of natural resources. First, does the public have a right to utilize State-owned natural resources for their own benefit, and if so, what are the limits of this right? Second, may a private owner utilize resources on his own land even when it threatens the existence of a resource?

Article XI, section 1 of the Hawai'i Constitution[4] addresses these two issues. Pursuant to this section, all public natural resources fall within the public trust doctrine. Under this doctrine, the public has the right to reasonably utilize public natural resources for its own benefit, although not to the extent that the use threatens the existence of that natural resource.[5] In

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[3] The tragedy of the commons is based on the theory that individual users of common natural resources, despite doing the best they can, are prone to produce outcomes that, in the long run, are detrimental to all, such as pollution or natural resource depletion. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 39 (2d ed. 1994).

An example of the development of the tragedy of the commons is as follows. Consider a pasture open for all herdsmen to use. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 34 (1992) (citing Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1243-48 (1968)). Each herdsmen will attempt to keep as many cattle as possible on this pasture. *Id.* This arrangement may work well for centuries, so long as wars and disease keep the amount of man and animals capable of utilizing the pasture below the capacity of the land to replenish itself. *Id.* However, once social stability is finally obtained, tragedy will arise. *Id.* Each individual herdsman, acting rationally, will seek to maximize his profits from the pasture. *Id.* at 35. Since the negative effects of overgrazing the pasture are shared by all the herdsmen, a rational herdsman will conclude that the sensible choice is to add another animal to his herd in order to maximize his own immediate profits. *Id.* However, every herdsman will also come to the same conclusion, resulting in the overuse of the pasture. *Id.* The tragedy is that "[e]ach man is locked into a system that compels him to increase his herd without limit—in a world that is limited. . . . Freedom in a commons brings ruin to all." *Id.*

[4] HAW. CONST. art. XI, § 1 reads:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
>
> All public natural resources are held in trust by the State for the benefit of the people.

Id.

[5] *See infra* notes 124-31 and accompanying text.

regard to privately owned natural resources, the public trust doctrine generally does not apply.[6] Thus, the right to use these natural resources lies almost exclusively with the private owner. However, even when the public trust doctrine is not applicable to a parcel of land, a private owner's use of that land is still subject to limitations.[7] Pursuant to the Hawai'i Constitution, the State has the duty to protect and conserve all natural resources.[8] As such, the State may regulate, under its police power, a private owner's use of natural resources on his land when reasonably necessary to conserve or protect that resource.[9] Therefore, the State's power to regulate to conserve or protect a resource extends over all land, whether public or private.[10]

Part II of this article discusses the public trust doctrine and its application to public natural resources. This section examines the origin of the public trust doctrine, the principles underlying this doctrine, and its evolution in the United States. In addition, it defines the scope of the public trust doctrine in Hawai'i by analyzing article XI, section 1 of the Hawai'i Constitution, and illustrates how the history of Hawai'i as well as the expansion of the public trust doctrine in other states supports this scope.

Part III focuses on the private ownership of natural resources, and the restrictions that a private owner may face in the use of his land. It discusses the application of the public trust doctrine to private ownership, followed by an analysis of the Hawai'i Constitution and why the protection and conservation of privately-owned natural resources does not constitute an unconstitutional taking.

Finally, part IV discusses how Article XI, section 1 should be applied in Hawai'i, and the factors the State should consider in implementing its duties under this constitutional provision.

II. THE PUBLIC TRUST DOCTRINE IN HAWAI'I: ITS APPLICATION TO PUBLIC NATURAL RESOURCES

The scope of the public trust doctrine in Hawai'i is set forth in the Hawai'i Constitution, Article XI, section 1, provision 2, which states that "[a]ll public natural resources are held in trust by the State for the benefit of the people."[11] Before analyzing what exactly the above provision means, it is first necessary to look at the origin of the public trust doctrine, its basic principles and

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[6] To determine when the public trust doctrine applies to private land, *see infra* notes 26-27 and accompanying text.

[7] *See infra* pp. 206-15.

[8] *See supra* note 4.

[9] *See infra* notes 211-15 and accompanying text.

[10] *Id.*

[11] HAW. CONST. art. XI, § 1.

importance, and how it has evolved and expanded throughout the rest of the United States.

A. Origin of the Public Trust Doctrine

The public trust doctrine originated in the Roman Empire in 533 A.D. and was later formally adopted by England as part of its common law.[12] This doctrine recognizes that the public has community rights to certain basic natural resources, such as the air, running water, the sea, and the shores of the sea.[13]

Under the seventeenth and eighteenth century English common law, public trust resources were subject to two different ownership interests.[14] The first is

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[12] *See* David C. Slade, *Public Trust Doctrine - 101, in* THE PUBLIC TRUST DOCTRINE: THE OWNERSHIP AND MANAGEMENT OF LANDS, WATER AND LIVING RESOURCES 55, 58-60 (1991) [hereinafter *Public Trust 101*]. In 528 A.D., Emperor Justinian of the Roman Empire ordered a commission to codify Roman common law. *Id.* at 59. From this commission, two handbooks emerged and were published in 533 A.D., the Digest and the Institutes. *Id.* The Institutes was a handbook dedicated for the use of law students. *Id.* Within the Institutes, a provision emerged recognizing that the public has community rights to certain natural resources. *Id.* (For the text of this provision, see infra note 13). This principle would later evolve into the public trust doctrine as known in both England and the United States. *Id.*

The English formally adopted this Roman civil law following the passage of their Magna Carta. *Id.* at 60. It was this Roman civil law that later was brought by the English colonies to America in the early 1600s. *Id.* Queen Elizabeth I of England adopted this public trust concept for two reasons. First, the public trust doctrine could be used as a means to enlarge England's treasury by claiming prima facie ownership of the shoreline up to the high water mark, even over lands previously granted to private parties. Richard J. Lazarus, *Changing Conception of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 635 (1986). Second, the Queen considered property ownership rights along the shoreline as an impediment to the English naval power and thus national security. *Id.* at 635 n.19.

[13] *Public Trust 101*, *supra* note 12, at 59. The Institutes states the following:

> By the law of nature these things are common to all mankind — the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations.

Id. (footnote omitted). In addition, the Digest recognizes that:

> The right of fishing in the sea from the shore belongs to all men. . . . Everyone has a right to build on the shore, or by piles, upon the sea, and retain the ownership of the construction so long as it lasts, but when it falls into ruins, the soil reverts into its former status as *res communis.*

Id. at 60 (footnote omitted).

[14] JACK H. ARCHER ET AL., THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS 6 (1994) [hereinafter ARCHER]. "[P]ublic trust land is vested with two titles, one dominant and the other subservient, a concept necessary to understand in order to apply the Public Trust Doctrine." *Public Trust 101*, *supra* note 12, at 63.

the private property interest in the land, called the *jus privatum*.[15] The Crown had prima facie title to this.[16] However, this *jus privatum* interest was transferable, and thus the Crown could convey trust land to private ownership.[17] Nonetheless, regardless of whether the land was in the hands of the government or private owners, this *jus privatum* interest was subject to the *jus publicum* interest, which was held by the public.[18] This *jus publicum* interest is "simply described as the bundle of rights of the public to fully use and enjoy trust lands and waters for commerce, navigation, fishing, bathing and other related public purposes."[19]

In English common law, the public trust doctrine applied to all tidal waters and the land beneath them, from the ordinary high water mark waterward.[20] Within these areas, the public had the right to use the lands for the traditional purposes of navigation, commerce, and fishing.[21]

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[15] The *jus privatum* interest is the subservient title in public trust lands and must yield to the dominant title. *Public Trust 101*, *supra* note 12, at 63; ARCHER, *supra* note 14, at 6-7.

[16] The Crown held prima facie title to coastal waters and the land beneath them as a result of its sovereignty. ARCHER, *supra* note 14, at 6.

[17] *Id.* at 6-7.

[18] The *jus publicum* interest is the dominant title in public trust lands. *Public Trust 101*, *supra* note 12, at 63. As such, the *jus privatum* subservient interest must yield to this paramount *jus publicum* dominant interest. ARCHER, *supra* note 14, at 7. Therefore, although the King could grant public trust lands into private ownership,

> his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right, and so far as it assumed to interfere with it, or to confer a right to impede or obstruct navigation, or to make an exclusive appropriation of the use of navigable waters, the grant was void.

Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 458 (1892) (citing People v. New York and Staten Island Ferry Co., 68 N.Y. 71, 76 (N.Y. year unknown)).

[19] *Public Trust 101*, *supra* note 12, at 63.

[20] Shively v. Bowlby, 152 U.S. 1, 11 (1892).

> By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects.

Id.

[21] ARCHER, *supra* note 14, at 7. The public has "the common right to use these public trust lands and resources for certain traditional purposes necessary to individual survival and livelihood, including navigation, commerce, and fishing." *Id.*; *see also Shively*, 152 U.S. at 11.

B. The Basic Principles and Importance of the Public Trust Doctrine

Under the public trust doctrine, the state holds all public trust lands for the benefit of the people.[22] The state has a duty to ensure that these lands are utilized in a manner benefitting the public, and to prevent any use substantially impairing this trust.[23]

This doctrine is a very unique and powerful property management tool for several reasons.[24] First, it gives a state the power to regulate uses on public trust lands as well as to protect its fundamental rights in the property.[25]

Second, if public trust lands are conveyed into private ownership, that private owner will also be subject to the above trust principles.[26] The state will remain obligated to promote the public's interest in the land or at least prevent

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[22] ARCHER, *supra* note 14, at 3. Public trust lands are "subject to a 'public trust' for the benefit of all their citizens with respect to certain rights of usage, particularly uses related to maritime commerce, navigation, and fishing . . . ." *Id.*

[23] *Id.* at 3-4.

[24] *Id.* at 3. "An additional and powerful source of authority that can be used in conjunction with the police power for more effective management of coastal areas is found in the public trust doctrine." *Id.*

[25] *Id.* at 4.

> [B]ecause the public trust doctrine is fundamentally a property - or ownership - based doctrine, a state's authority under the public trust doctrine is not limited to the power to regulate but also includes the power to protect the state's fundamental rights in its property, and the rights of all members of the public to use such property, even when the property has been conveyed into private ownership.

Id.; DAVID C. SLADE, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK: THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE MANAGEMENT OF LAND, WATERS AND LIVING RESOURCES OF THE COASTAL STATES 225 (1990) [hereinafter SLADE].

[26] *See* ARCHER, *supra* note 14, at 4. "[A]ll lawful grants of [public trust] lands by a state to private owners . . . must be used by their private owners so as to promote the public interest and so as not to interfere unduly with the public's several rights under the public trust doctrine." *Id. See also* Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892), where the Court stated:

> The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

Id. at 453; *see also* National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 721 (Cal. 1983). "[P]arties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust." *Id.*; Treuting v. Bridge and Park Comm'n of City of Biloxi, 199 So. 2d 627, 633 (Miss. 1967).

any use of the land that unreasonably interferes with the public's rights under this doctrine.[27]

Third, a state regulation upon public trust land is less likely to be an unconstitutional taking[28] than a similar regulation upon non-trust lands.[29] The reason is that public trust property rights have been held subject to the public trust from the inception of private title.[30] Therefore, a private owner has no distinct investment-backed expectation[31] that he may utilize his private property in a manner inconsistent or harmful to the public's interest in the property.[32] As such, nothing has been taken when the state, as trustee, acts pursuant to public trust rights to regulate a particular use on privately-owned land.[33]

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[27] *See* ARCHER, *supra* note 14, at 4. "[A]ll lawful grants of [public trust] lands by a state to private owners have been made subject to that trust and to the state's obligation to protect the public interest from any use that would substantially impair the trust." *Id.*; *see also Illinois Central*, 146 U.S. at 453-454, which states:

> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. . . . So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.

Id.; *see also Treuting*, 199 So. 2d at 633; Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972).

[28] The takings clause states that private property shall not "be taken for public use, without just compensation." U.S. CONST. amend. V.

[29] ARCHER, *supra* note 14, at 4. The public trust doctrine is "less vulnerable to a challenge by a private property owner based upon the takings clause of the United States Constitution when a state has exercised its rights and obligations as a trustee over public trust land to restrict (or even prohibit) the activities of private landowners." *Id.*

[30] *Id.* at 78.

> A state's assertion or reassertion of the state's public trust property interests, unlike state regulatory action based solely upon the state's traditional police power, should not be vulnerable to takings challenges. Public trust property rights have been held by the government trustee in trust or subject to the trust from the outset and therefore nothing has been taken when the trustee acts pursuant to such rights.

Id.

[31] *See* Penn Cent. Transp. v. New York City, 438 U.S. 104, 124 (1978) (stating that a relevant consideration in deciding whether a taking has occurred is the extent to which the regulation has interfered with the private owner's distinct investment-backed expectations).

[32] ARCHER, *supra* note 14, at 78.

[33] *Id.*

Fourth, the public trust doctrine originated out of common law,[34] and thus possesses the inherent common law capacity to grow and adapt in response to changing social conditions and public needs.[35] A state is thus not forced to continue to favor outdated uses, but instead may develop this doctrine to remain sufficiently flexible to change in response to modern needs.[36]

Finally, the public trust doctrine is based on the notion of a legally enforceable trust,[37] which is analogous to the laws of private and charitable trusts.[38] Because little has been said in the courts defining the precise scope of the public trust doctrine in the United States, the laws of private and charitable trusts may be useful to provide insight in determining the rights a state has and the duties a state must observe as trustee.[39]

C. The Evolution of the Public Trust Doctrine in the United States

The English common law found its way to America as a result of English colonization.[40] The public trust doctrine itself first formally appeared in the United States in the Massachusetts Bay Colony's Ordinances of 1641 and 1647.[41] These ordinances extended shore owners' property lines closer to the

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[34] *Id.* at 4.

[35] Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972). The court stated: "The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet the changing conditions and needs of the public it was intended to benefit." *Id. See also* ARCHER, *supra* note 14, at 4; SLADE, *supra* note 25, at 225.

[36] *See* Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971). "The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another." *Id.*

[37] *Public Trust 101*, *supra* note 12, at 64.

> The [public] "trust" referred to is a real trust in the legal sense of the word. . . . [T]here are trust assets: navigable waters, the lands beneath these waters, the living resources therein, and the public property interests in these trust assets. There is a clear and definite beneficiary: the public. There are trustees: the State legislatures, which often delegate their trust powers and duties to State coastal commissions, land commissions, or similar State agencies. There is a clear purpose for the trust: to preserve and continuously assure the public's ability to fully use and enjoy public trust lands, waters and resources for certain public uses.

Id.

[38] ARCHER, *supra* note 14, at 4-5.

[39] ARCHER, *supra* note 14, at 4-5; *see also* SLADE, *supra* note 25, at 225-226.

[40] ARCHER, *supra* note 14, at 5.

[41] *Id.* "Under these ordinances, the colony granted title extending to the low watermark to owners of land adjoining tidally influenced waters and granted title to the high watermark to owners of land adjoining 'great ponds' over ten acres in size." *Id.*

water.[42] The purpose of these extensions was to stimulate commerce in the area by encouraging private owners to build wharfs.[43] However, the ordinances also expressly reserved a right for the public to use and enter these newly conveyed areas for the purposes of fishing and navigation.[44] Thus, even though these private owners gained more land to build wharfs, the public gained the right to use these wharfs.[45]

Traditionally, the public trust doctrine extended from the ordinary high water mark waterward,[46] with the protected public uses being navigation, commerce and fishing.[47] However, after the American Revolution, American courts were faced with the decision of either rejecting the old English common law or adopting it into their body of case law.[48] The courts and many state legislatures chose the second option.[49] Thus, either by judicial decisions, "common law reception" acts, or constitutional provisions, the states adopted the English common law which had been governing the American colonies prior to the Revolution.[50] As a result, with this adoption of the English common law, the public trust doctrine gained a firm foothold in the American legal system.[51]

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[42] For those private owners of land adjoining "tidally influenced waters," their property line was extended to the low watermark. *Id.* For those private owners of land adjoining ponds over ten acres in size, their property line was extended to the high watermark. *Id.*

[43] *Id.*

[44] *Id.* at 6.

[45] *Id.* at 5-6.

[46] In re Sanborn, 57 Haw. 585, 593, 562 P.2d 771, 776 (1977) ("[L]and below high water mark is held in public trust by the State . . . ."); Treuting v. Bridge and Park Comm'n of City of Biloxi, 199 So. 2d 627, 632 (Miss. 1967) ("At common law the title to all lands under the tidal waters below high water mark belonged to the crown, and were held by the king in trust for the use of his subjects."); Lusardi v. Curtis Point Property Owners Ass'n, 430 A.2d 881, 886 (N.J. 1981) ("The public trust doctrine is premised on the common rights of all the State's citizens to use and enjoy the tidal land seaward of the mean high water mark.").

[47] Shively v. Bowlby, 152 U.S. 1, 11 (1894) (The public trust's "natural and primary uses are public in their nature, for highways of navigation and commerce . . . and for the purpose of fishing . . . ."); City of Berkeley v. Superior Court of Alameda County, 606 P.2d 362, 365 (Cal. 1980) ("[E]arly cases expressed the scope of the public's right in tidelands as encompassing navigation, commerce and fishing . . . ."); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) ("Public trust easements are traditionally defined in terms of navigation, commerce and fisheries."); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 52 (N.J. 1972) ("The original purpose of the doctrine was to preserve for the use of all the public natural water resources for navigation and commerce, waterways being the principle transportation arteries of early days, and for fishing, an important source of food.").

[48] ARCHER, *supra* note 14, at 6.

[49] *Id.*

[50] *Id.*

[51] *Id.*

Since the public trust doctrine is based on common law, it has the capacity to adapt to changing political and social needs.[52] "American courts [thus had] the discretion to emphasize those facets of the doctrine that they favored and the justification to ignore those that they did not."[53] American courts essentially maintained the basic policies and principles underlying the public trust doctrine.[54] However, recognizing the geographical, political, and social differences between England and the United States, the public trust's protected areas and appropriate uses have changed from the traditional English scope.[55]

Geographically, a significant difference between England and the United States is that England has no great inland rivers and water bodies.[56] As such, the United States has logically extended this doctrine to protect these water resources as well, thus bringing the public trust inland beyond the traditional limits that England recognized.[57]

The first expansion of the public trust doctrine beyond its traditional area occurred prior to the American Revolution, when the Massachusetts Bay Colony's Ordinances of 1641 and 1647 extended the trust to cover great ponds over 10 acres in size.[58] Then, following the Revolution, the Northwest Ordinance[59] extended the public trust to the nation's great internal waterways - such as the Mississippi and St. Lawrence Rivers.[60] Both the Massachusetts

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[52] ARCHER, *supra* note 14, at 4; *see also* Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) ("The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs."); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972) ("The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.").

[53] ARCHER, *supra* note 14, at 7.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 19.

[57] *See* Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 435 (1892) (holding that the public trust doctrine extends to the fresh water in the Great Lakes).

The scope of the public trust doctrine has traditionally turned on whether the water is navigable. In England, the existence of tidal waters was considered as being the legal test of whether this navigability requirement was met. *Id.* at 435. As such, limiting the public trust doctrine to only those waters which were subject to the "ebb and flow of the tide" served its purpose in England. *Id.* at 436. However, in the United States, this "tidal water" test is not applicable. *Id.* at 435. For example, "[s]ome of our rivers are navigable for great distances above the flow of the tide" and are still important for our nation's commerce. *Id.* In addition, the Great Lakes are not affected by the tide, but yet extensive commerce is conducted upon these waters. *Id.* Therefore, such lands should be "held by the same right in the one case as in the other, and subject to the same trusts and limitations." *Id.* at 437.

[58] ARCHER, *supra* note 14, at 5.

[59] Northwest Ordinance of 1787, 1 Stat. 50 (1789).

[60] ARCHER, *supra* note 14, at 6.

Bay Colony's Ordinances of 1641 and 1647 and the Northwest Ordinance gave notice of the public trust doctrine's dynamic nature in the United States by significantly expanding it beyond its traditional scope.[61]

Then, in 1892, the United States Supreme Court expanded the public trust doctrine to include all navigable freshwaters in *Illinois Cent. R.R. Co. v. Illinois*.[62] A century later, in *Phillips Petroleum Co. v. Mississippi*, [63] the Supreme Court held that the public trust doctrine applies to all tidal waters, regardless of navigability.[64] Together, these two cases extended the public trust doctrine to all tidal waters[65] as well as those freshwaters which are navigable-in-fact.[66]

Politically, unlike England, the United States government is based on a federal system.[67] Certain powers are delegated to the individual states, while others are delegated to the federal government.[68] One power each state possesses is the ability to create and regulate property rights within its borders.[69] This converts the public trust doctrine into essentially a state doctrine,[70] where each state has the power to define the scope of this public trust within its borders.[71] Under the Equal Footing Doctrine, upon becoming a part of the United States, each state is given the same rights as the original thirteen states which were governed by English common law.[72] Thus, upon entry into the Union, each state's public trust doctrine was limited to the lands

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[61] *Id.*

[62] Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892). The U.S. Supreme Court stated: "[T]here is no reason or principle for the assertion of dominion or sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by freshwaters of these lakes." *Id.* at 435. The public trust doctrine "is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable freshwaters as to waters moved by the tide." *Id.* at 436.

[63] 484 U.S. 469 (1988).

[64] *Id.* at 484. "[O]ur cases firmly establish that the States, upon entering the Union, were given ownership over all lands beneath waters subject to the tide's influence . . . ." *Id.*

[65] *Id.*

[66] *See supra* note 62.

[67] ARCHER, *supra* note 14, at 7.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 14.

[71] *Id.* at 12-13.

[72] *Id.* at 9. The equal footing doctrine originated out of the Northwest Ordinance of 1787. *Id.* "The equal footing doctrine dictates that each new state, upon entering the Union, has the same sovereignty and jurisdiction over all territory within its limits as was enjoyed by the thirteen original states, which in turn had inherited all sovereign rights of the English Crown." *Id.*

influenced by tidal waters.[73] However, once entered into the Union, each individual state has the power to define the limits of the lands that they hold in trust.[74] A state may expand upon, or even restrict, the scope of the public trust doctrine to reflect its present needs.[75] Thus, its precise scope can and does differ from state to state.[76]

The evolution of the public trust doctrine in the United States has resulted in the states no longer limiting the public trust doctrine to protecting only water-related areas and the land beneath them.[77] The public trust doctrine has also been applied to protect sand and gravel located in water beds,[78] marine life,[79] as well as privately owned dry sand beaches.[80]

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[73] Shively v. Bowlby, 152 U.S. 1, 57 (1894).

> At common law, the title and dominion in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the Colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders . . . . The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions.

Id.

[74] Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 475 (1988). "[I]t has long been established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Id.*

[75] ARCHER, *supra* note 14, at 19-20 (recognizing that states have the power to narrow or expand its public trust lands).

[76] *Id.* at 14.

[77] *See, e.g.*, Wade v. Kramer, 459 N.E.2d 1025 (Ill. App. Ct. 1984) (expanding public trust to protect archaeological remains); Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152, 1154 (La. 1984) (stating that the air is protected by the public trust doctrine); Conveyance of 1.2 Acres of Bangor Memorial Park v. Borough of Bangor, 567 A.2d 750 (Pa. Commw. Ct. 1989) (expanding of the public trust to protect a forest reservation).

[78] Warren Sand & Gravel Co. v. Commonwealth Dept. of Envtl. Resources, 341 A.2d 556 (Pa. Commw. Ct. 1975). In this case, Warren Sand & Gravel Co. had been issued permits for several years to dredge sand and gravel from the Allegheny River. *Id.* at 558. However, upon applying for a new permit, the state placed conditions on the amount of sand and gravel that could be dredged. *Id.* The court upheld these new conditions, holding that sand and gravel are natural resources that cannot vest in private ownership, but rather are resources that belong to the public. *Id.* at 560.

[79] New Jersey Dept. of Envtl. Protection v. Jersey Cent. Power & Light Co., 308 A.2d 671 (N.J. Super. Ct. Law Div. 1973). A power plant released cold water into a nearby creek, resulting in the death of 500,000 fish. *Id.* at 672. The court held that marine animals are protected by the public trust doctrine. *Id.* at 673. As such, the State, as trustee over these fish for the benefit of the public, had the power and duty to bring suit against the power company to recover damages for the market value of the destroyed fish. *Id.* at 674.

[80] *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984). The court held: "[T]oday, recognizing the increasing demand for our State's beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary." *Id.* at 365.

In addition, recognizing the public trust doctrine's sufficient flexibility to conform to society's changing needs and demands and the irrationality of limiting such a powerful management tool to only water-related lands, several states have begun expanding this doctrine inland to provide protection to non-water related resources.[81] For example, the public trust doctrine has been applied by several states to protect the following: the air,[82] parks,[83] natural forests,[84] archaeological remains,[85] solid wastes,[86] lava extensions,[87] a historic

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[81] *See* ARCHER, *supra* note 14, at 20-22.

[82] *See* Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152, 1154 (La. 1984) (recognizing that air is protected by the public trust doctrine); *see also* LA. CONST. art. IX, § 1:

> The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.

Id.

[83] Big Sur Properties v. Mott, 132 Cal. Rptr. 835 (Cal. App. Ct. 1976). Private land was dedicated to the State of California to be used as a public park. *Id.* at 102. The court stated that once land is dedicated as a public park, it becomes part of the public trust doctrine and must be utilized in a manner consistent with the public use to which it was dedicated. *Id.* at 104; Conveyance of 1.2 Acres of Bangor Memorial Park to Bangor Area School Dist. v. Borough of Bangor, 567 A.2d 750 (Pa. Commw. Ct. 1989) (holding that 1.2 acres of public parkland is protected by the public trust doctrine, thus prohibiting the use of the land for the construction of a new elementary school).

[84] Gould v. Greylock Reservation Comm'n, 215 N.E.2d 114, 121 (Mass. 1966) (applying the public trust doctrine to protect the Greylock State Reservation from any inconsistent public uses).

[85] Wade v. Kramer, 459 N.E.2d 1025 (Ill. App. Ct. 1984). The court recognized that State-owned archaeological remains are held in trust by the State for the benefit of its citizens. *Id.* at 1027.

[86] *See In re* American Waste and Pollution Control Co., 642 So. 2d 1258 (La. 1994). The court recognized that waste disposal sites are part of the public trust doctrine, as set forth in the Louisiana Constitution ("The natural resources of the state . . . shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people."). *Id.* at 1262 (citing LA. CONST. art. XI, § 1). As such, the Louisiana Department of Environmental Quality (DEQ), as a representative of the State, has a duty under this trust to be "diligent, fair, and faithful to protecting the public interest in the state's resources." *Id.* The court held that DEQ failed in this duty by erroneously issuing a permit for waste disposal by not listing any basic findings and for not properly evaluating the possible environmental risks involved. *Id.* at 1266.

[87] State v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977). The issue in this case was who should gain title of lava extensions - the former owner of the land, the nearby owners, or the public in general. *Id.* at 120, 566 P.2d at 734. The court held that lava extensions should be governed under the principles of the public trust doctrine. *Id.* at 121, 566 P.2d at 735. "Rather than allowing only a few of the many lava victims the windfall of lava extensions, this court believes that equity and sound public policy demand that such land inure to the benefit of all the people of Hawaii, in whose behalf the government acts as trustee." *Id.*

battlefield,[88] public libraries,[89] wildlife,[90] and, most expansively, "all natural resources."[91]

In addition, the uses allowed on public trust lands have also increased significantly beyond just commerce, navigation, and fishing.[92] As society and

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[88] Commonwealth v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 594-595 (Pa. 1973) (recognizing that the State is a trustee over its public natural resources, including, in this case, a historic battlefield).

[89] Save the Welwood Murray Memorial Library Comm. v. City Council of the City of Palm Springs, 263 Cal. Rptr. 896, 904 (Cal. App. Ct. 1989).

> A public trust is created when property is held by a public entity for the benefit of the general public. Here, title to the library property is held by City to be used by City for the benefit of the general public as a public library. Any attempt to divert the use of the property from its dedicated purposes or uses incidental thereto would constitute an ultra vires act.

Id. (citations omitted).

[90] *See* State v. McHugh, 630 So. 2d 1259, 1264 (La. 1994) ("There can be no doubt that the state's interest in safeguarding the wildlife and fisheries for the benefit of the people is compelling."). The "public trust doctrine requir[es] the state to protect, conserve and replenish all natural resources, including the wildlife and fish of the state, for the benefit of its people." *Id.* at 1265; *see also* In re Steuart Transp. Co., 495 F. Supp. 38, 40 (D. Va. 1980). The court allowed both state and federal governments to recover damages from migratory waterfowl killed in oil spill. The court stated: "Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing the people." *See also* Lacoste v. Dep't of Conservation, 263 U.S. 545, 549 (1924) ("The wild animals within its borders are, so far as capable of ownership, owned by the State in its sovereign capacity for the common benefit of all its people. Because of such ownership, and in the exercise of its police power the State may regulate and control the taking, subsequent use and property rights that may be acquired therein."); Owsichek v. State Guide Licensing & Control Bd., 763 P.2d 488, 496 (9th Cir. 1988); Wade v. Kramer, 459 N.E.2d 1025, 1027 (Ill. App. Ct. 1984) (recognizing that wildlife are held by the State in trust for the benefit of its citizens).

[91] *See* Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152, 1154 (La. 1984) (recognizing that the public trust doctrine protects all natural resources in the state); *see also* LA. CONST. art. IX, § 1.

> The natural resources of the state, including air and water, and the healthful, scenic, historic and esthetic quality of the environment should be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.

Id.; *see also* PA. CONST. art. I, § 27.

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Id.

[92] City of Berkeley v. Superior Court of Alameda County, 606 P.2d 362 (Cal. 1980). Although early cases expressed the scope of the public's right in tidelands as

technology have evolved, thereby changing our society's needs and demands, the public's use of trust lands has grown to incorporate these changes.[93] Such expansion has been necessary to ensure the public's continued use and enjoyment of trust resources.[94] This flexibility allows a state to favor whatever use is most beneficial to society at that time, without being burdened with favoring uses that have become outdated.[95] This dynamic nature of the public trust doctrine explains why it has been able to survive for over 1500 years.[96] "Strip away the inherent flexibility of the doctrine, and it would slowly wither."[97]

For example, public recreational uses have recently been protected by this doctrine.[98] The following uses are just a few that have been recognized as

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encompassing navigation, commerce and fishing, the permissible range of public uses is far broader, including the right to hunt, bathe or swim, and the right to preserve the tidelands in their natural state as ecological units for scientific study.

Id. at 365; Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) ("The public uses . . . are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another."); Kootenai Envt'l Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1088 (Idaho 1983) ("More recent cases have held that the trust includes a broader range of public uses than were recognized in earlier cases."); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 55 (N.J. 1972) ("Other states have readily extended the doctrine, beyond the original purposes of navigation and fishing, to cover other public uses . . . .").

[93] ARCHER, *supra* note 14, at 23. "[S]ince the adoption of the public trust doctrine in the United States, many state courts have responded to changing public needs and demands by expanding the list of uses that are protected by the public trust doctrine." *Id.*

[94] *Public Trust 101*, *supra* note 12, at 62. "[T]he public's use of trust lands and waters has necessarily changed. Over the centuries the Public Trust Doctrine has kept pace with the changing times, assuring the public's continued use and enjoyment of these lands and waters." *Id.*

[95] Dist. of Columbia v. Air Florida, Inc., 750 F.2d 1077 (D.C. Cir. 1984); *Marks*, 491 P.2d at 380 ("The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another."); Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1088 (Idaho 1983) ("The trust is a dynamic, rather than static, concept and seems destined to expand with the development and recognition of new public uses.").

[96] *Public Trust 101*, *supra* note 12, at 62.

[97] *Id.*

[98] *See, e.g.*, Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972). "Other states have readily extended the doctrine, beyond the original purposes of navigation and fishing, to cover other public uses, and especially recreational uses." *Id.* at 55. The New Jersey Supreme court further recognized the importance in this day and age to allow the public recreational use of public trust lands. *Id.* at 53.

Remaining tidal resources still in the ownership of the State are becoming very scarce, demands upon them by reason of increased population, industrial development and their popularity for recreational uses and open space are much heavier, and their importance

protected by the public trust doctrine: bathing,[99] swimming,[100] boating,[101] rowing,[102] canoeing,[103] skating,[104] sailing,[105] hunting,[106] waterskiing,[107] pushing

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to the public welfare has become much more apparent. All of these factors mandate more precise attention to the doctrine. *Id.* (citations omitted). We have no difficulty finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities.

Id. at 54; *see also* Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1088. The Idaho court stated that "it is now held that the trust protects varied public recreational uses in navigable waters, such as the right to fish, hunt and swim." *Id.*

[99] Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972) (recognizing bathing as one of the recreational activities protected by the public trust doctrine); Tucci lzhauer, 336 N.Y.S.2d 721, 723 (1972) (the public has the right to utilize the foreshore for bathing); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (the public trust doctrine has been held to include the right to bathe); Muench v. Public Serv. Comm'n, 53 N.W.2d 514, 520 (Wis. 1952).

[100] Kootenai Envtl. Alliance, Inc., 671 P.2d at 1088 ("[I]t is now held that the trust protects varied public recreational uses in navigable waters, such as the right to fish, hunt and *swim*.") (emphasis added); *Borough of Neptune City*, 294 A.2d at 54 (recognizing swimming as one of the recreational activities protected by the public trust doctrine); City of Madison v. Tolzmann, 97 N.W.2d 513, 516 (Wis. 1959) (The court "recognized the rights of both residents and nonresidents to the free use of navigable waters for recreational purposes, such as boating, fishing, *swimming*, skating, and the enjoyment of scenic beauty as being incidents of navigation.") (emphasis added); *Marks*, 491 P.2d at 380; State v. Public Serv. Comm'n, 81 N.W.2d 71, 73 (Wis. 1957).

[101] *See Tucci*, 336 N.Y.S.2d at 723 ("The foreshore . . . is subject to the right of the public . . . to use it for fishing, bathing, *boating* and other lawful purposes . . . .") (emphasis added); *see also Public Serv. Comm'n*, 81 N.W.2d at 73 (stating that boating is a public use that has been recognized as a purpose of the public trust).

[102] *Muench*, 53 N.W.2d at 520 (recognizing that rowing, canoeing, and skating are public purposes to which public trust waters may be utilized).

[103] *Id.*

[104] *Id.*

[105] *Public Serv. Comm'n*, 81 N.W.2d 71 at 73. "Early decisions frequently spoke of navigation, often in a commercial sense, as the purpose of the trust, but all public uses of water have from time to time been recognized, including pleasure boating, *sailing*, fishing, swimming, hunting, skating and enjoyment of scenic beauty." *Id.* (emphasis added). *See also Muench*, 53 N.W.2d at 520 (recognizing sailing as one of the public purposes to which public trust waters may be utilized).

[106] Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (stating that hunting is a right that has been recognized by the public trust); Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc. 671 P.2d 1085, 1088 (Idaho 1983) ("[I]t is now held that the trust protects varied public recreational uses in navigable waters, such as the right to fish, *hunt* and swim.") (emphasis added); *Public Serv. Comm'n*, 81 N.W.2d at 73 (stating that hunting is a public use that has been treated as a purpose of the public trust); *Muench*, 53 N.W.2d at 520 (recognizing hunting as a valid public use).

[107] State v. Village of Lake Delton, 286 N.W.2d 622, 636 (Wis. Ct. App. 1979). An ordinance was enacted restricting a portion of a lake to be used for waterskiing exhibitions. *Id.*

a baby stroller along a public trust beach,[108] tourism,[109] and whatever "is consistent with and necessary for the complete and innocent enjoyment" of trust lands.[110]

In environmental and natural resource protection, a strong potential for the use of the public trust doctrine exists, although such use represents a significant change in the public trust doctrine's original focus.[111] However, given society's increasing interest and need for a management tool to conserve natural resources and protect the environment, it is a logical extension of the doctrine.[112] By using the public trust concept, the state is

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at 625. Petitioners contended that this violates the public trust doctrine, since it forbids other public uses in the restricted area, such as fishing and swimming. *Id.* The court held that waterskiing is a valid public purpose, and thus restricting a portion of the lake only for waterskiing exhibitions does not violate the public trust doctrine. *Id.* at 636. "Some public uses must yield if other public uses are to exist at all. The uses must be balanced and accommodated on a case by case basis." *Id.* at 632. In this case, since waterskiing exhibitions require an exclusive area, such a restriction on other public uses is valid. *Id.* at 633.

[108] Tucci v. Salzhauer, 336 N.Y.S.2d 721, 724 (1972) (stating that the Special Term was incorrect in deciding that a baby stroller has no right of access to public trust beaches because it is a vehicle).

[109] Treuting v. Bridge & Park Comm'n of City of Biloxi, 199 So. 2d 627 (Miss. 1967). This case involves a project enacted to significantly increase the land area of Deer Island. *Id.* at 631. The project entailed building golf courses, beaches, parks, schools, churches, as well as residential, commerce, and resort developments. *Id.* The court held that this development was consistent with the state's duties under the public trust doctrine, due to the various public interests and uses involved. *Id.* at 634. In doing so, the court noted that one of the public purposes that this project would achieve and protect is the accommodation and expansion of tourism in that area. *Id.* at 633.

[110] Tucci, 336 N.Y.S.2d at 724; *see also* Town of Brookhaven v. Smith, 80 N.E. 665, 670 (N.Y. 1907) (stating that the citizens of the community are allowed a right of access to public trust lands to do "whatever is needed for the complete and innocent enjoyment of that right.").

[111] ARCHER, *supra* note 14, at 26 states the following:

> The shift in thinking from permitting certain uses on public trust lands to affirmatively protecting natural resources and uses on public trust property is a significant change in the public trust doctrine's traditional focus. Originally, the doctrine permitted members of the public to use public trust resources or the purposes of navigation and to have access for fishing and fowling. The doctrine opened trust lands for exploitation or use by all members of the public - not just by those who owned the land. Fishing, commerce, and navigation were "protected" because they provided critical necessities of life at the time of the doctrine's inception. There is little evidence that the original purpose of the doctrine was to preserve trust resources, for example, by assuring that there would always be fish in the waters for fishing or that the waters would be kept unpolluted.

Id.

[112] People *ex rel.* Scott v. Chicago Park Dist., 360 N.E.2d 773, 780 (Ill. 1976).

> [T]here has developed a strong, though belated, interest in conserving natural resources and in protecting and improving our physical environment. The public has become increasingly concerned with dangers to health and life from environmental sources and more sensitive to the value and, frequently, the irreplaceability of natural resources.

given the power to accomplish this objective.[113] Several states have already recognized this increasing need and demand for protection by expanding public trust rights to include both the power to restrict environmental harms as well as to preserve trust areas.[114] It has even been used to protect the scenic beauty of public trust lands and waters.[115]

D. The Scope of the Public Trust Doctrine in Hawai'i

What lands and uses are protected by the public trust doctrine differ from state to state,[116] since each individual state has the power to define the scope of the land that they hold in trust.[117] However, the general principle underlying the public trust doctrine is that the state has a duty to ensure that land is dealt with in the best interests of the public for all lands part of the trust.[118] While the traditional limitation to water-related areas may have served the political, geographical, and social needs in 17th and 18th century England, this

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Id.

Since the public trust doctrine has the power to mold itself to meet the changing conditions and needs of the public, this doctrine has the ability to recognize this increasing interest to affirmatively protect the environment and conserve our natural resources. *Id.*

[113] ARCHER, *supra* note 14, at 27. "[T]o the extent courts have integrated the doctrine by requiring states as trustees to protect the natural resources held subject to the public trust, state agencies and coastal managers will be in a position to use the public trust doctrine as a tool in coastal resource protection and management." *Id.*

[114] *See* SLADE, *supra* note 25, at 133; *see also* Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971), where the court states that "[t]here is a growing public recognition that one of the most important public uses . . . is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." *Id.*; *see also* National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 718 (Cal. 1983); People *ex rel.* Scott v. Chicago Park Dist., 360 N.E.2d 773, 780 (Ill. 1976); Bortz Coal Co. v. Commonwealth, 279 A.2d 388, 391 (Pa. Commw. Ct. 1971).

[115] *National Audubon Soc'y*, 658 P.2d at 719; Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1096 (Idaho 1983); State v. Village of Lake Delton, 286 N.W.2d 622, 629 (Wis. Ct. App. 1979); City of Madison v. Tolzmann, 97 N.W.2d 513, 516 (Wis. 1959) (recognizing "the rights of both residents and nonresidents to the free use of navigable waters for recreation purposes, such as boating, fishing, swimming, skating, and the *enjoyment of scenic beauty* as being incidents of navigation.") (emphasis added); City of Madison v. State, 83 N.W.2d 674, 678 (Wis. 1957); State v. Public Service Comm'n, 81 N.W.2d 71, 73 (Wis. 1957) (stating that the enjoyment of scenic beauty is a public use that has been recognized as a purpose of the public trust doctrine).

[116] ARCHER, *supra* note 14, at 14.

[117] *Id.* at 8, 19-20; Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 475 (1988) ("[I]t has long been established that the individual States have the authority to define the limits of the lands held in public trust.").

[118] *See supra* notes 22-23 and accompanying text.

limitation is not practical in Hawai'i.[119] Such a limitation would prevent the doctrine from realizing its full potential.[120] Society's changing needs and demands require the expansion of this doctrine.[121] Instead, all public natural resources should be protected by this doctrine.[122] Today, as the result of many generations of neglect, a property management tool is now required that has the capability to maintain a balance between the right of present generations to benefit from natural resources and the right of these natural resources to be conserved for use by future generations.[123] This tool is the public trust doctrine.

1. Hawai'i Constitution, article XI, section 1, provision 2

Hawai'i has defined the scope of its public trust doctrine in its Constitution. Article XI, section 1, provision 2 of the Hawai'i Constitution states that "*[a]ll public natural resources* are held in trust by the State for the benefit of the people."[124] Thus, in Hawai'i, the public trust doctrine covers all public natural resources.

The first issue to examine is who should benefit from this doctrine. Looking at the language of Article XI, section 1,[125] it is clear that the doctrine's purpose is to benefit the State citizens of both present as well as future generations. This doctrine entails two purposes: to allow the present generation the right

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[119] *See supra* pp. 189-91.

[120] As the public's interest in resources and its associated public uses have expanded over the years, the need to expand the protected public trust areas and uses has correspondingly increased. As such, to limit the doctrine's scope to only its traditional range would not allow the doctrine to fulfill its common law potential to adapt to these changes. Recognizing this increasing need, several states have already expanded this doctrine to protect several non-water related resources. *See supra* notes 81-91 and accompanying text.

[121] *Id.*

[122] The application of the public trust doctrine to all public natural resources has been formally recognized in the Hawai'i Constitution. Article XI, § 1 states that "[a]ll public natural resources are held in trust by the State for the benefit of the people."

[123] This balancing between use and conservation is recognized in the Hawai'i Constitution. It states, in relevant part, that the "State . . . shall promote the development and utilization of [natural] resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State." HAW. CONST. art. XI, § 1.

[124] *Id.* (emphasis added).

[125] It states, in relevant part: "*For the benefit of present and future generations*, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources . . . ." HAW. CONST. art. XI, § 1 (emphasis added).

to enjoy natural resources and to protect and conserve these resources for future generations.[126]

Second, what duties does the State have as trustee? Besides its responsibility to ensure that present generations may use and benefit from public natural resources, the State must also regulate such use to conserve and protect these resources.[127] In enforcing these duties, the State should be aware that if the State grants too much to one interest, the other will suffer. For example, consider the first part of the hypothetical situation presented at the beginning of this paper.[128] If the State allows the public to cut down trees without limitation, the forest would be depleted faster than it could replenish itself.[129] The result would be the total destruction of the forest, leaving nothing for future generations to enjoy.[130] At the other extreme, however, if the State prohibits the cutting down of trees, this would ensure the forest's future survival, but the State would be failing in its duty to allow present generations beneficial use of the resource.[131] Thus, the State must achieve a delicate balance between the two interests of conservation and use so that they can both coexist. In the hypothetical example, the State should allow the present use of the forest, but regulate its use so that the forest will have sufficient time to replenish.

What are "public natural resources?" They consist of all government-owned natural resources.[132] Obvious examples are State parks and forests. However, they also encompass those lands which have formerly been held by the State.[133] Once property is part of the public trust doctrine, the State's trust duties will still exist even when the land is conveyed into private ownership.[134] That private owner will thereby be obligated to recognize the public's

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[126] *Id.* This provision states, in relevant part: "For the benefit of present and future generations, the State and its political subdivisions . . . shall promote the development and utilization of these resources in a manner consistent with their conservation . . . ." *Id.* Therefore, it recognizes the state's duty to allow the present generations use of natural resources, but also recognizes the corresponding duty to ensure that such use allows the resource to be conserved for the benefit of future generations. *See id.*

[127] *See id.*

[128] *See supra* pp. 180-81.

[129] *Id.*

[130] Such a result would violate the State's duty under the Hawai'i Constitution, which states: "For the benefit of future generations, the State . . . shall conserve and protect . . . all natural resources, . . . and shall promote the development and utilization of these resources in a manner consistent with their conservation . . . ." HAW. CONST. art. XI, § 1.

[131] *Id.*

[132] For example, public property has been defined as "[p]roperty belonging to the state or a political subdivision thereof, such as a county, city, town, and the like, used exclusively for a public purpose." BALLENTINE'S LAW DICTIONARY 1023 (3d ed. 1969).

[133] *See supra* notes 26-27 and accompanying text.

[134] *Id.*

continued interest in that land.[135] Thus, the public trust doctrine in Hawai'i encompasses all natural resources which are or have been in the possession of the State. For these areas, the public has the right to utilize these natural resources.[136]

What must next be determined is to what extent may the public utilize public natural resources. Only those uses which are feasible and reasonable for that area and situation should be allowed.[137] For example, in a beach or park area, reasonable recreational uses such as sunbathing, picnicking, and skating should be recognized.[138] In a State-owned cemetery, on the other hand, the above uses would not be appropriate. However, the right to visit the cemetery would be protected, as well as the right to have a well-maintained site to preserve the scenic beauty and serenity of the area.[139] Likewise, in a beach area, such activities as swimming,[140] fishing,[141] and other similar uses[142] should be protected. However, all uses should be subject to reasonable restrictions to ensure that they do not pose a substantial harm to the conservation of natural resources.[143] For example, considering the koa forest

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[135] *Id.*

[136] For a further discussion of how private owners may be affected by the public trust doctrine, *see infra* part III.

[137] Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984) (holding that the public must be given reasonable access and use of privately-owned dry sand areas). In deciding to what extent the public may utilize a particular natural resource, "the particular circumstances must be considered and examined before arriving at a solution that will accommodate the public's right and the private interests involved." *Id.* "The test is whether those means are reasonably satisfactory so that the public's right to use . . . can be satisfied." *Id.* Deciding what uses are reasonable "requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors." Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984).

[138] *See* Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 53 (N.J. 1972) (recognizing the importance of allowing the public recreational use of public trust lands). "Other states have readily extended the doctrine, beyond the original purposes of navigation and fishing, to cover other public uses, and especially recreational uses." *Id.* at 55. *See also* State v. Superior Court of Placer County, 625 P.2d 256, 259 (Cal. 1981) (picnicking is a recreational use that is recognized by the public trust).

[139] State v. Public Serv. Comm'n, 81 N.W.2d 71, 73 (Wis. 1957) (stating that the enjoyment of scenic beauty is a public use that has been recognized as protected by the public trust doctrine).

[140] *See supra* note 100.

[141] Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 55 (N.J. 1972) (stating that one of the original purposes of the public trust doctrine was to protect the right to fish).

[142] *See supra* notes 99, 101-10 and accompanying text.

[143] The public trust doctrine has been used to affirmatively conserve natural resources. *See supra* notes 113-15 and accompanying text. Therefore, although the public has the right to use public natural resources, the State also has the power and duty under the public trust doctrine

hypothetical case,[144] the State may regulate the cutting down of the trees on its lands to ensure that the forests will have time to replenish.

Another consideration is what should the State do when there are competing public interests in the land, all of which are protected by the public trust doctrine? For example, suppose some members of the public want to utilize a lake for waterskiing, and another group for fishing. In such a case, the State has the right to divide the area to allow one activity and exclude the other.[145] For example, the State could prohibit waterskiing altogether in those areas that are known to be prime fishing spots, and in return allow waterskiing in those least favored fishing areas. The basic objective should be to ensure that both public uses are recognized as much as possible given the situation and circumstances.[146] However, what should be done if the competing public trust uses are incompatible, such that one use could not be undertaken without the complete destruction of the other use? For example, suppose one public organization wants to convert a small public tract of land into a park, which another wishes to use for a public library. Both uses are protected by the public trust doctrine.[147] However, neither interest could be recognized without destroying the other public interest in that property. In such a case, the State must balance the competing public interests along with any other interest in deciding which of the two interests should be recognized.[148] In the above hypothetical, for instance, the suitability of a library or a park with the nearby surroundings would be a significant factor. Given an equal public interest in the two, if no other public libraries are nearby, while several parks exist in the vicinity, then the balance should turn on using the tract of land for library use, and vice versa.

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to place reasonable restrictions on such use in order to protect these resources.

In Hawai'i, the Hawai'i Constitution recognizes the State's power to place such reasonable restrictions on the public's use of public trust resources in order to conserve natural resources. It states: "[T]he State . . . shall promote the development and utilization of [all natural] resources in a manner consistent with their conservation . . ." HAW. CONST. art. XI, § 1. Therefore, while recognizing the public's right to use natural resources, it also places a duty upon the State to ensure that such use does not threaten the conservation of any such resource.

[144] *See supra* pp. 180-81

[145] *See* State v. Village of Lake Delton, 286 N.W.2d 622 (Wis. Ct. App. 1979) (upholding an ordinance setting aside a portion of a lake to be used for waterskiing exhibitions, thereby excluding all other public uses, such as fishing in that area). In this case, the court stated: "[N]o single public interest in the use of navigable waters, though afforded the protection of the public trust doctrine, is absolute. Some public uses must yield if other public uses are to exist at all." *Id.* at 632.

[146] *Id.* (recognizing that in determining what public uses are to be allowed in particular public trust areas, the different public "uses must be balanced and accommodated on a case by case basis").

[147] *See supra* notes 83, 89 and accompanying text.

[148] ARCHER, *supra* note 14, at 28.

Overall, in terms of utilizing resources, not only does the public trust doctrine guarantee the public the right to benefit from public natural resources, it also is a strong tool to ensure that resources that have been open to the public will remain so.[149] The strength of this doctrine mainly lies in the duty it places on the State to conserve and protect natural resources.[150] While recognizing the public's right to utilize natural resources, the State also has the power and duty under the public trust doctrine to conserve and protect these resources.[151] The State has an obligation to insure that individuals do not utilize public natural resources in a manner that threatens their conservation.[152] This role is one that the State must undertake diligently, fairly, and faithfully under its trust duties.[153] The State's "role as the representative of the public interest does not permit it to act as an umpire passively calling balls and strikes for adversaries appearing before it; the rights of the public must receive active and affirmative protection at the hands of the [State]."[154]

2. *Hawai'i's unique history supports the application of the public trust doctrine to protect public natural resources*

The history of Hawai'i itself also supports the application of the public trust doctrine to protect and conserve the State's natural resources. While the concept of private ownership has always been central to Western culture, this "concept of private ownership had no place in early Hawaiian thought."[155] Prior to Western contact, Hawai'i had a unique land tenure system.[156] Several separate kingdoms existed, where each island or section of an island was ruled by an ali'i 'ai moku or by a mo'i, the high chief.[157] The basic land division was the ahupua'a, varying in size from 100 to 100,000 acres.[158] Each ahupua'a

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[149] The public trust doctrine ensures that all resources and lands that are a part of this public trust must be utilized in a manner benefitting the public. ARCHER, *supra* note 14, at 3-4. Therefore, the public's right to benefit from public trust resources can never be terminated. *See id.*

[150] *See supra* notes 124-31 and accompanying text.

[151] *Id.*

[152] "[T]he State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation . . . ." HAW. CONST. art. XI, § 1.

[153] Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984).

[154] *Id.*

[155] NATIVE HAWAIIAN RIGHTS HANDBOOK 4 (Melody Kapilialoha MacKenzie ed., 1991) [hereinafter HANDBOOK].

[156] *Id.* at 3.

[157] *Id.*

[158] *Id.*

was an economically self-sufficient unit extending from the mountains to the sea, and was controlled by an ali'i 'ai ahupua'a (ahupua'a chief) or by a konohiki (land agent).[159]

The high chief, or mo'i, acted as a trustee over both the people and all natural resources.[160] The chief did not have any absolute ownership of the land.[161] Although he had control over the land, he held this control subject to the ahupua'a residents' cooperation.[162] In return for their labor on the land to support the chiefs and high priests, the common residents (maka'ainana) were allowed to liberally travel within the ahupua'a to gather whatever natural resources they needed for subsistence purposes.[163] The maka'ainana were thus free to travel to the mountains for fuel, canoe timber, mountain birds and plants, as well as to the sea for fish.[164] In addition, the mo'i also acted as trustee over the land and its resources.[165] The chief was responsible for ensuring the conservation of these natural resources on behalf of the gods.[166] Thus, although the maka'ainana were granted liberal access within the ahupua'a to utilize its natural resources, such use was subject to regulations and rules to ensure the ultimate conservation of these resources.[167]

Similarly, the chiefs of each ahupua'a governed subject to the rights of the maka'ainana.[168] While the ahupua'a chief was responsible for the productivity of his land, such productivity was dependant on having sufficient labor from the maka'ainana.[169] However, if the ahupua'a chief did not allow the maka'ainana sufficient rights, the maka'ainana were free to move to another ahupua'a, leaving the chief with no one to tend his lands.[170] Due to this

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[159] *Id.*

[160] The chief was "regulated by an intricate system of rules designed to conserve natural resources and provide for all ahupua'a residents." *Id.* at 4. As such, the chief was bound to hold these lands as trustee for the benefit of both natural resources and the people. *Id.*

[161] *Id.* (citing HAWAI'I STATE DEPT. OF BUDGET AND FINANCE (HAWAI'I INSTITUTE FOR MANAGEMENT AND ANALYSIS IN GOVERNMENT), LAND AND WATER RESOURCE MANAGEMENT IN HAWAII 148 (1979)).

[162] *Id.*

[163] *Id.* "Within the boundaries of the ahupua'a, the maka'ainana . . . had . . . the right to hunt, gather wild plants and herbs, fish off-shore, and use parcels of land for taro cultivation together with sufficient water for irrigation." *Id.*

[164] In re Boundaries of Pulehunui, 4 Haw. 231 (1879).

[165] "In relation to land and natural resources, [the chief] was analogous to a trustee." *Id.* (citing E.S. HANDY & E.G. HANDY, NATIVE PLANTERS IN OLD HAWAII 53 (1972)).

[166] *Id.* at 4.

[167] Basically, an intricate system of rules were created in order to ensure both that the ahupua'a residents would be provided with adequate natural resources as well as that the natural resources would be conserved. *Id.*

[168] *Id.*

[169] *Id.*

[170] HANDBOOK, *supra* note 155, at 4.

dependence on the labor of the people, the ahupua`a chief was, in effect, required to hold these natural resources, as trustee, for the benefit of the public.[171]

Therefore, in the ancient Hawaiian land tenure system, all lands, from the mountain to the sea, were held subject to two interests: the interest of the public to benefit from natural resources, and the interest in conserving these natural resources for the benefit of future generations. In return for their labor, the people had the right to utilize natural resources within the ahupua`a.[172] In addition, the high chief, mo`i, had the duty to conserve and protect these natural resources on behalf of the gods.[173] Today, these same two duties - to allow the public use of natural resources and to conserve and protect these natural resources - have been explicitly incorporated into the Hawai`i Constitution.[174] The State, as sovereign, has taken over these responsibilities of the ancient high chiefs.

3. *The expansion of the public trust doctrine in other states supports its application to public natural resources in Hawai`i*

The expansion of the public trust doctrine in several other states over the last century supports its application in Hawai`i to protect public natural resources. For example, several states have used the public trust doctrine to protect many types of natural resources, such as air,[175] parklands,[176] archaeological remains,[177] and wildlife.[178] The Louisiana Supreme Court has even extended the public trust doctrine to include all natural resources, whether publicly or privately owned.[179] Support for this holding was found in the Louisiana Constitution.[180] In *Save Ourselves v. Louisiana Envtl. Control*

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[171] The mo`i "was a trustee of all the people within an island (moku) or some other larger district. The konohiki also maintained a similar tentative position . . . ." *Id.* (citing HAWAI`I STATE DEPT. OF BUDGET AND FINANCE (HAWAI`I INSTITUTE FOR MANAGEMENT AND ANALYSIS IN GOVERNMENT), LAND AND WATER RESOURCE MANAGEMENT IN HAWAII 148 (1979)).

[172] *See id.*

[173] *Id.*

[174] HAW. CONST. art. XI, § 1 states, in relevant part: "[T]he state . . . shall conserve and protect . . . all natural resources . . . and shall promote the development and utilization of these resources in a manner consistent with their conservation . . . ."

[175] *See supra* note 82.

[176] *See supra* note 83.

[177] *See supra* note 85.

[178] *See supra* note 90.

[179] *See* Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152, 1154 (La. 1984) (recognizing that the public trust doctrine protects all of the state's natural resources).

[180] LA. CONST. art. VI § 1 (1921) ("The natural resources of the state shall be protected, conserved and replenished"); *see also* LA. CONST. art. IX, § 1 (1974).

Commission,[181] the Louisiana court stated that, under the public trust doctrine, the State and its agencies have an affirmative duty to protect, conserve, and replenish all of its natural resources.[182] This requires them to "act with diligence, fairness and faithfulness to protect this particular public interest in the resources."[183] "[T]he rights of the public must receive active and affirmative protection at the hands of the [State actor]."[184]

In California, the public trust doctrine has been used as a tool to affirmatively protect the environment.[185] For example, the California courts have held that the public trust doctrine includes the preservation of public trust lands and waters in their natural state,[186] the protection of ecology,[187] and the protection of indigenous flora and fauna.[188] It has even been recognized that if this protectionist trend continues, the doctrine could someday apply to all private land.[189]

Therefore, the application of Hawai'i's public trust doctrine to protect all public natural resources is consistent with how it has been expanded in several other states in the United States.

III. THE LIMITATIONS ON A PRIVATE LANDOWNER'S USE OF HIS LAND

A private landowner, by obtaining title to his property, may contend that he has the right to do whatever he wants to the natural resources on his

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> The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.

Id.

[181] 452 So. 2d 1152, 1154 (La. 1984).

[182] *Id.*

[183] *Id.* at 1157.

[184] *Id.*

[185] *See, e.g.*, Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971). The court stated that the public trust doctrine should be used for "the preservation of those lands in their natural state . . . ." *Id.*

[186] California v. Superior Court of Lake County (Lyon), 625 P.2d 239, 250-251 (Cal. 1981) (stating that a permissible public use protected by the public trust doctrine is the right to preserve public trust lands in their natural state); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (stating that "one of the most important uses . . . is the preservation of those lands in their natural state . . . .").

[187] City of Berkeley v. Superior Court of Alameda County, 606 P.2d 362, 364-365 (Cal. 1980) (recognizing the need to protect those areas which can be used as ecological units for scientific study).

[188] Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (recognizing the need to preserve those environments which provide food and habitat for birds and marine life).

[189] DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION 130 (1993).

property, regardless of the repercussions. He may also contend that the public generally does not have the right to enter and utilize the natural resources on his property, as such a right is held only by the private landowner and to whomever else he may convey this right.

While a private landowner's right to utilize his resources and exclude others is recognized, these rights are subject to reasonable limitations. For instance, in Hawai'i, this western concept of exclusivity is not completely applicable.[190] Under *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission*,[191] native Hawaiians have the right to enter non-fully developed land, whether privately owned or not, to exercise their reasonable customary and traditional gathering rights.[192] Therefore, in Hawai'i, a private landowner's right to exclude others is no longer absolute against the reasonable gathering rights of native Hawaiians.

However, in addition to native Hawaiian gathering rights, a private landowner's use of his land is subject to other restrictions.[193] One such restriction arises out of the public trust doctrine, while the other arises from the State's police power enabling it to regulate an owner's use of his land in order to conserve or protect natural resources.[194] Both will be separately discussed in the following sections.

A. The Public Trust Doctrine's Application to Private Landowners

A private landowner will be subject to the public trust doctrine if his land was formerly owned by the State.[195] In Hawai'i, the public trust doctrine applies to all public natural resources.[196] Once land is part of this public trust, the State can never convey away its interest in trust property in such a way that leaves it entirely in the control of a private party.[197] The State may only

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[190] *See* Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 446, 903 P.2d 1246, 1268 (Hawai'i 1995), where the Hawai'i Supreme Court stated: "Our examination of the relevant legal developments in Hawaiian history leads us to the conclusion that the western concept of exclusivity is not universally applicable in Hawai'i."

[191] *Id.*

[192] *Id.* at 451, 903 P.2d at 1272.

[193] *See supra* note 4.

[194] *See id.*

[195] *See supra* note 26-27 and accompanying text.

[196] HAW. CONST. art. XI, § 1 states, in relevant part, "All public natural resources are held in trust by the State for the benefit of the people."

[197] Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453-454 (1892). "The State can no more abdicate its trust over property in which the whole people are interested . . . so as to leave them entirely under the use and control of private parties . . . ." *Id.* at 453. "So with trusts connected with public property . . . they cannot be placed entirely beyond the direction and control of the State." *Id.* at 454.

convey such land to a private party if that conveyance will not impair the public's interest in that land.[198] In addition, if it is later found that the private owner is utilizing his land in a manner that is in derogation of the public trust, then the State may resume control over that land to ensure usage that is consistent with the public's needs.[199]

Several cases support the view that, once land is part of the public trust, a private owner is still bound to utilize the land in a manner consistent with the public's interest in the land. For example, the Mississippi Supreme Court upheld a conveyance of public trust lands to a private corporation only after the court determined that the corporation's use of the land would not hinder the public trust use of navigation, but would actually improve the public trust's uses of navigation, boating, and fishing.[200] It has also been held that any conveyance of public trust land whose purpose and effect was to solely benefit a private interest would be deemed void as violating the state's public trust duties.[201] In addition, recognizing the increasing demand for public beaches and the dynamic nature of the public trust doctrine, the New Jersey Supreme Court held that the public must be allowed reasonable access and use of privately-owned dry sand areas.[202]

Applying the above principles to Hawai'i, once a natural resource is owned by the State, it is part of the public trust doctrine, and therefore must be utilized in a manner consistent with the public's interest in that resource.[203] If

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[198] *See supra* note 26-27 and accompanying text.

[199] *Illinois Cent.*, 146 U.S. at 455. The Court acknowledges that when dealing with public trust lands that have been granted into private ownership, "[a]ny grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time." *Id.* "[T]he power to resume the trust whenever the State judges best is, we think, incontrovertible." *Id.* "[T]here always remains with the State the right to revoke those [private owner's] powers and exercise them in a more direct manner, and one more conformable to [the public's] wishes." *Id.* at 453-454.

[200] Treuting v. Bridge and Park Comm'n of City of Biloxi, 199 So. 2d 627, 632 (Miss. 1967). The State of Mississippi conveyed 12.58 acres of land to the Park Commission for the construction of the Deer Island project. *Id.* at 631. This project would convert 27% of the land area of Deer Island for such public uses as golf courses, beaches, parks, schools, churches, and other similar facilities. *Id.* Another 20% would be converted for utility purposes such as utility easements, sewage plants, fire stations, and water reservoirs. *Id.* The remaining land would be converted to residential, commercial, and resort development. *Id.*

[201] People *ex rel.* Scott v. Chicago Park Dist., 360 N.E.2d 773, 779-80 (Ill. 1976) (stating that none of the previous cases decided by the Illinois Supreme Court has ever upheld "a grant of public trust lands where the primary purpose of the grant was to benefit a private interest."); *see also* State v. Village of Lake Delton, 286 N.W.2d 622, 629 (Wis. Ct. App. 1979) (recognizing that any "[e]fforts to serve or advance purely private interests to the detriment of the public interests protected by the trust are invalid.").

[202] Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984).

[203] *See supra* notes 22-23 and accompanying text.

this land is later conveyed to private ownership, that owner will be subject to the trust principles, and may not utilize the resources in derogation of the public's interest in that land.[204]

For example, if the State conveyed away some of its public beaches to a private owner, that private owner would not be allowed to restrict access to that beach.[205] Instead, the private owner would own that beach subject to the public's interest in that beach such as for swimming,[206] boating,[207] and other public uses.[208] In addition, that private owner would also be subject to restrictions regarding actions occurring on his land, if such use poses a threat to any natural resource.[209] For instance, the State could regulate the private beach owner from any type of construction on the beach that would threaten the beach itself.

B. Hawai'i Constitution, article XI, section 1, provision 1

1. The State's duty to conserve and protect all natural resources

If a private owner's land has not previously been owned by the State, the public trust doctrine will not be applicable.[210] However, a private owner's use of his land is still subject to restrictions. All land, whether private or public, is subject to reasonable regulation to conserve and protect our natural resources under the State's police power.[211] This power is articulated in the Hawai'i Constitution, Article XI, section 1, provision 1. It states the following:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals, and energy sources, and shall

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[204] *See supra* notes 26-27, 195, 197-99 and accompanying text.

[205] *Matthews*, 471 A.2d at 365 (holding that the public must be allowed reasonable access to private beach areas).

[206] *See supra* note 100.

[207] *See supra* note 101.

[208] *See supra* notes 99, 102-10 and accompanying text.

[209] *See supra* notes 113-15 and accompanying text.

[210] *See* discussion part III.A.

[211] ARCHER, *supra* note 14, at 3. A state's basic authority to regulate is derived from the "police power." *Id.* "The police power consists of those prerogatives of sovereignty and legislative power which are necessary for the protection of the health, safety, and welfare of state citizens and which the state did not surrender to the federal government when the United States Constitution was adopted." *Id.* This "police power is a broad and valuable basis for the exercise of state regulatory authority (whether by state or by agency regulations) that will rarely be invalidated (if challenged in the courts) so long as it is rationally related to a legitimate state goal and does not unduly burden interstate commerce." *Id.*

> promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.[212]

While the above language does not create a trust, per se, it clearly creates an affirmative duty upon the State to conserve and protect all natural resources within its jurisdiction.[213] Therefore, a private landowner's use of natural resources on his land may be regulated, and sometimes even prohibited, when such action is needed to protect any natural resource. The mandatory language in the above provision is consistent with the policy slowly emerging in several states that recognizes the increasing need and demand for environmental and natural resource protection.[214] "The public has become increasingly concerned with the dangers to health and life from environmental sources and more sensitive to the value and, frequently, the irreplaceability of natural resources."[215] As the abundance of natural resources diminishes, the need to regulate the use of such resources by private landowners correspondingly increases.

2. *Reasonable regulations to conserve and protect natural resources are not an unconstitutional taking*

If the State does act pursuant to this constitutional provision, a private owner may argue that any such regulation would be an unconstitutional taking of his property in violation of the Fifth Amendment.[216] Nevertheless, a state may regulate, as part of its police power, the use of private natural resources when such regulation is necessary to conserve and protect a natural

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[212] HAW. CONST. art. XI, § 1.

[213] *See id.*

[214] *See* People *ex rel.* Scott v. Chicago Park Dist., 360 N.E.2d 773, 780 (Ill. 1976) (stating that "there has developed a strong, though belated, interest in conserving natural resources and in protecting and improving our physical environment); National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 719 (Cal. 1983) (recognizing the growing public interest in preserving lands in their natural state).

[215] *People ex rel. Scott*, 360 N.E.2d at 780.

[216] U.S. CONST. amend. V. The Fifth Amendment states, in relevant part: "No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." *Id.*

The Fifth Amendment is made applicable to the states through the Fourteenth Amendment. Chicago, Burlington and Quincy R.R. Co. v. Chicago, 166 U.S. 226, 244 (1896). The Fourteenth Amendment states, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV § 1.

resource.[217] Most regulations do not amount to a taking because property may be regulated to a certain extent.[218] However, if the regulation "goes too far it will be recognized as a taking."[219]

In *Goldblatt v. Town of Hempstead*,[220] the United States Supreme Court set forth a two-part test to determine whether there has been a valid exercise of police power, and thus, no unconstitutional taking.[221] First, the State must have a legitimate public interest to impose the regulation.[222] The conservation and protection of natural resources to ensure its availability for future generations is clearly a legitimate interest.[223] For example, in *Agins v. City of Tiburon*,[224] the U.S. Supreme Court stated that open spaces are necessary to conserve and protect natural resources and to prevent harm to the ecology and the environment.[225] In addition, in *Sporhase v. Nebraska ex rel. Douglas*,[226] the Court upheld, under the police power, a regulation which required private landowners to obtain a permit to withdraw ground water from their own well.[227]

The second part of the *Goldblatt* test requires that the means chosen must be reasonably necessary for the accomplishment of the purpose, and must not be unduly oppressive upon individuals.[228] To determine this, one must look at

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[217] *See, e.g., infra* notes 224-27, 247, 249-62 and accompanying text.

[218] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[219] *Id.*

[220] Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (upholding a prohibition on further excavation below the water table as a valid exercise of the police power).

[221] *See id.* at 594-95 (citing Lawton v. Steele, 152 U.S. 133, 137 (1894)).

[222] *Id.*

[223] The duty the Hawai'i Constitution places upon the State to conserve natural resources exemplifies the legitimacy of the interest in conservation. It states, in relevant part, that "the State . . . shall conserve and protect . . . all natural resources, . . . and shall promote the development and utilization of these resources in a manner consistent with their conservation." HAW. CONST. art. XI, § 1.

[224] Agins v. City of Tiburon, 447 U.S. 255 (1980). Appellants acquired five acres of unimproved land for residential development. *Id.* at 257. Thereafter, the city enacted two ordinances, placing appellants' property into a zoning district which allowed only one-family dwellings, accessory buildings, and open space uses. *Id.* As a result, the appellants could only build between one and five single-family residences within their tract of land. *Id.* Appellants brought suit, claiming that this amounted to an unconstitutional taking of their land. *Id.* at 258. The Court held that no such taking occurred. *Id.* at 262-63.

[225] *Id.* at 261 & nn.7-8.

[226] 458 U.S. 941 (1982).

[227] *Id.* at 946. "[T]he statute was justified as a regulatory measure that, on balance, did not amount to a taking of property that required just compensation. . . . [T]he State's interest in preserving its waters was well within its police power." *Id.*

[228] Goldblatt v. Town of Hempstead, 369 U.S. 590, 595 (1962) (citing Lawton v. Steele, 152 U.S. 133, 137 (1894)).

the particular facts of each case.[229] This requirement is met so long as the State, before enacting a regulation, weighs the environmental costs and benefits of the regulation along with any economic, social or other pertinent factors, and comes up with a reasonable solution.[230] The State should attempt to enact a regulation which balances both the private owner's interest in utilizing the resource and the State's interest in protecting that resource.[231] However, the stronger the threat to a natural resource, the stronger the State's power to regulate, or if so needed, to even prohibit an owner's use that harms this resource.[232] "[A]ll property owners must implicitly accept the possibility of substantial governmental restrictions under the states' police powers."[233] This is because "all property is held in subordination to the right of its reasonable regulation by the government clearly necessary to preserve the health, safety or morals of the people."[234]

The primary test courts have used to determine whether a taking has occurred is the extent of diminution in the property's value.[235] If it goes too far, it will be found to be a taking.[236] Specifically, if a regulation deprives an owner of all economically viable use of his land, then it will be a taking.[237] However, so long as the property owner is left with some reasonably

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[229] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). The court stated that the issue of whether there has been a taking depends largely "upon the particular circumstances [in that] case." *Id.* (citing United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958)).

[230] Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152, 1157 (La. 1994) ("This is a rule of reasonableness . . . which requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors.").

[231] *See* HAW. CONST. art. XI, § 1 (recognizing both the right of the people to develop and utilize natural resources along with the duty of the state to ensure that such use is "consistent with their conservation and in furtherance of the self-sufficiency of the State.").

[232] The reason for this is that the stronger the threat to the natural resource, the more the balancing test will correspondingly weigh in favor of more regulation, and even possible restriction, in order to conserve that resource.

[233] ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 457 (1992).

[234] Bortz Coal Co. v. Commonwealth, 279 A.2d 388, 394 (Pa. Commw. Ct. 1971).

[235] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

[236] *Id.* at 415.

[237] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992). The Court stated that "regulations that prohibit all economically beneficial use of land . . . cannot be newly legislated or decreed (without compensation) . . . ." *Id.* In determining this, "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations." Penn Cent. Transp. v. New York City, 438 U.S. 104, 124 (1978).

beneficial use of his land, then it is a valid exercise of police power.[238] Another factor that courts consider is the extent that the regulation interferes with a private owner's distinct investment-backed expectations.[239]

Therefore, so long as the State regulation strikes a balance allowing the State to conserve and protect its natural resources while still permitting the owner reasonable use of the resources, then the regulation will not be an unconstitutional taking. For example, suppose the State places a regulation on the number of koa trees a private owner may cut down in a given year. So long as the private owner may still gain reasonable profit from the trees, no taking would occur. In that case, the owner is left with reasonably beneficial use, and is not thereby deprived of all economically viable use of his property. In fact, by ensuring the koa forest will have time to replenish itself, the private owner's benefits may even be greater over the long term.

However, even if it is found that a regulation would deprive an owner of all economical use of his land, or would interfere with distinct investment-backed expectations, a regulation will still be justified as a proper exercise of police power if it falls within the nuisance exception.[240] Under this exception, a State may regulate, and even completely restrict, a private owner's use of his land if it imposes "sufficiently serious burdens" upon the neighbors or to the public in general.[241] In order to fall within this nuisance exception, however, the injury must be incurred upon the public and not just upon an individual.[242]

For example, in *Keystone Bituminous Coal v. DeBenedictis,*[243] the U.S. Supreme Court upheld an act and regulation which required that 50% of the coal beneath certain structures be kept in place in order to provide surface

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[238] *Penn Cent.*, 438 U.S. at 136, 138. The Grand Central Terminal was designated as a landmark. *Id.* at 115. In order to protect this landmark, the State denied a permit to build an office building on top of this terminal. *Id.* at 116-17. The Supreme Court upheld this regulation against a takings challenge, on the basis that the claimant still had reasonably beneficial use of the property, since the regulation did not interfere with any of the terminal's present uses. *Id.* at 136, 138.

[239] *Id.* at 124.

[240] *See* Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003, 1031-32 (1992) (stating that even if a regulation deprives the owner of all beneficial uses of his land, nothing is taken when a "background principle of nuisance" exists.); *see also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

> The special status of this type of state action can also be understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not "taken" anything when it asserts its power to enjoin the nuisance-like activity.

Id. at 492 n.20.

[241] ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 466 (1992).

[242] *Id.* at 467.

[243] 480 U.S. 470 (1987).

support.[244] The Court held that this was a valid exercise of police power in order to prevent activities that amounted to a nuisance.[245] When an individual uses his land in such a way as to cause a nuisance or harm to others, then the State has not taken anything and has acted well within its police power to enjoin such activity.[246]

In several cases, the courts have found that activities which result in the harm or destruction to a natural resource or the environment meet this nuisance requirement, thereby justifying a State's regulation or restriction on such activities.[247]

Therefore, implicit within private property ownership is the principle that a private owner may not use his land in such a way as to cause injury to the community or the public.[248] An example of a situation in which most of a private owner's economically beneficial use of his property was deprived but was still upheld as a valid exercise of the police power is *Miller v. Schoene*.[249] This case involved a Virginia Act which required the cutting down of all red cedar trees within two miles of any apple orchard where the cedar trees had a disease called cedar rust.[250] The purpose of this act was to protect the apple

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[244] *Id.*

[245] *Id.* at 492.

[246] *Id.* at 492 n 20.

[247] *See, e.g.*, Lawton v. Steele, 152 U.S. 133 (1894). The plaintiffs were fishermen, and the defendant was the state game and fish protector. Pursuant to his power, by statute, to protect and preserve the fish, the defendant seized the plaintiffs' fishing nets and destroyed them. The Court upheld the defendant's actions as being necessary in order to abate a nuisance. *Id.* at 140. The Court stated that since the nets were being used in a manner detrimental to the public's interest in protecting and preserving the fish, "it was within the power of the legislature to declare them to be nuisances, and to authorize the officers of the State to abate them." *Id.* at 139-40.

See also Miotke v. City of Spokane, 678 P.2d 803 (Wash. 1984). The Washington Supreme Court held that the discharge of raw sewage into the Spokane River in violation of a waste discharge permit gives rise to an action for public nuisance, since it affects "the rights of all members of the community living along the shores . . . ." *Id.* at 817. As such, the court awarded these nearby waterfront property owners over $200,000 in damages. *Id.* at 805.

See also Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 456 F. Supp. 1327 (D.P.R. 1978). The court held that a maritime oil spill, causing pollution of the ocean and substantial damage to the flora and fauna in that area, was a nuisance, giving rise to a cause of action for both the abatement of the nuisance and the recovery of damages by the body politic. *Id.* at 1337. The court found that the damages that can be recovered from the defendants just for the replacement cost of the destroyed marine animals alone amounted to over 5 million dollars. *Id.* at 1344.

[248] *See* Mugler v. Kansas, 123 U.S. 623, 665 (1887) (stating that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.").

[249] Miller v. Schoene, 276 U.S. 272 (1928).

[250] *Id.* at 277.

orchards from being completely destroyed.[251] The court upheld this act, noting that the public interest in preserving the apple orchards outweighed an individual's property interest that directly posed a threat to these apple orchards.[252] Similarly, in several other instances, the courts have upheld various state regulations whose purpose was to conserve some valuable natural resource.[253]

In Hawai'i, several cases have also recognized this interest in conserving and protecting natural resources. For example, in *Robinson v. Ariyoshi*,[254] the Hawai'i Supreme court upheld a State regulation of private owners' use of water at Hanapepe River.[255] In upholding the regulation, the court noted the increasing scarcity of the waters at Hanapepe River[256] as well as the State's duty to conserve and protect Hawai'i's natural resources under Article XI, section 1.[257] The court stated that a person's right to the use of water can no longer be treated as though it is an absolute and exclusive right.[258]

In *Maeda v. Amemiya*,[259] the Hawai'i Supreme Court upheld a statute restricting the catching of nehu (tuna) to only those commercial fishermen

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[251] *Id.*

[252] *Id.* at 280.

[253] *See, e.g.*, Puyallup Tribe v. Dept. of Game of Washington, 433 U.S. 165 (1977) (upholding a state's regulation on the amount of steelhead trout an Indian tribe may catch each year as a valid exercise of the police power in the interest of conserving an important natural resource); *see also* Walls v. Midland Carbon Co., 254 U.S. 300 (1920) (upholding a statute effectively prohibiting a company from producing a carbon black ink as a valid exercise of the police power in the interest of conserving and protecting the supply of natural gas in the state); Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 956 (1982) (recognizing that "a State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens . . . is at the core of its police power"); Maeda v. Amemiya, 60 Haw. 662, 594 P.2d 136 (1979) (upholding restrictions on the catching of nehu (tuna) in order to protect and conserve that fish).

[254] 65 Haw. 641, 658 P.2d 287 (1982).

[255] *Id.*

[256] *Id.* at 676, 658 P.2d at 311.

[257] *Id.* at 677 n.34, 658 P.2d at 311 n.34.

[258] *Id.* at 677, 658 P.2d at 311.

However, if an individual's right to use the water is vested, then the State cannot remove this right without paying just compensation. Robinson v. Ariyoshi, 753 F.2d 1468, 1474 (9th Cir. 1985). In 1930, the Supreme Court of the Territory of Hawai'i held that the commmon law of riparian ownership did not apply to Hawai'i. *Id.* at 1473. In reliance to this determination, the private owners proceeded with their development, incurring millions of dollars in expenses. *Id.* at 1473-1474. The Ninth Circuit Court held that these private owners had thereby acquired a vested right to use the water. *Id.* at 1473-1474. Thus, when the Supreme Court of Hawai'i later held that the common law of riparian ownership no longer applied in Hawai'i and that no one had the right to use these waters, this amounted to a taking of these private owners' vested rights in the water. *Id.* at 1474.

[259] 60 Haw. 662, 594 P.2d 136 (1979).

who obtained a license and to noncommercial fishermen who caught nehu for home consumption or for bait purposes using nets no longer than fifty feet.[260] The court upheld this statute due to the State's legitimate interest in the conservation of fish.[261] The "[p]rotection of wildlife of the State is peculiarly within the police power, and the State has great latitude in determining what means are appropriate for its protection."[262]

Therefore, pursuant to the Hawai'i Constitution, article XI, section 1, provision 1, the State has the duty to conserve and protect all of its natural resources.[263] A private owner's use of his land may be regulated as a valid exercise of police power so long as the interest in conservation or protection is legitimate, and as long as the private owner is granted reasonable use of the resource. However, the stronger the threat to a natural resource, the stronger the State's power to regulate an owner's use that harms this resource.[264] Arguably, a private owner's use of the resource may be completely banned if the resource can only be properly conserved or protected for future generations by the complete prohibition of the activity.

IV. HOW ARTICLE XI, SECTION 1 OF THE HAWAI'I CONSTITUTION SHOULD BE APPLIED IN HAWAI'I

Pursuant to the Hawai'i Constitution, Article XI, section 1, provision 2, the public trust doctrine applies to all public natural resources.[265] As such, those natural resources that have formerly or are presently held by the State will be subject to reasonable use by the public.[266] However, the main potential of Article XI, section 1 lies in the affirmative State duty, whether through the public trust doctrine or through its police power, to protect and conserve all natural resources in the State.[267] There are two possible ways this Constitutional provision can be effectively applied in Hawai'i to protect our natural resources.

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[260] *Id.*

[261] *Id.* at 672, 594 P.2d at 142.

[262] *Id.* at 674, 594 P.2d at 144 (quoting Baldwin v. Fish and Game Comm'n of Montana, 436 U.S. 371, 391 (1978)).

[263] HAW. CONST. art. XI, § 1 ("[T]he State . . . shall conserve and protect . . . all natural resources . . . .").

[264] *See supra* note 232 and accompanying text.

[265] "All public natural resources are held in trust by the State for the benefit of the people." HAW. CONST. art. XI, § 1.

[266] *See supra* notes 132-36 and accompanying text.

[267] This duty arises from HAW. CONST. art. XI, § 1, which states, in relevant part: "[T]he State . . . shall conserve and protect . . . all natural resources, . . . and shall promote the development and utilization of these resources in a manner consistent with their conservation . . . ."

A. Conjunction with and Revision of Existing Regulations and Statutes

Article XI, section 1 should be implemented in conjunction with existing regulations and statutes. For one, if a State action regulates the public's use of a public natural resource, such regulation will be consistent with the State's duties under Hawai'i's public trust doctrine to conserve and protect all public natural resources and will thus be less likely to be found a taking.[268] The provision also exemplifies the State's duty and ability under its police power to legitimately protect and conserve all of the natural resources within the State.[269]

In addition, Article XI, section 1 should be used in conjunction with Article XI, section 9,[270] which explicitly grants standing to Hawai'i citizens to bring suit for the protection and conservation of all natural resources.[271] Combined, these two sections provide a substantive and powerful authority under which natural resources may be protected and conserved.

Article XI, section 9 of the Hawai'i Constitution states:

> Each person has a right to a clean and healthful environment, as defined by law relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any other party, public or private, through appropriate legal proceedings, subject to reasonable limitation and regulation as provided by law.[272]

The significance of this constitutional provision is that it is self-executing.[273] Hawai'i is one of only two states that has a self-executing constitutional recognition of public rights with respect to natural resources.[274]

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[268] *See supra* notes 28-33 and accompanying text.

[269] HAW. CONST. art. XI, § 1 states, in relevant part: "[T]he State . . . shall conserve and protect . . . all natural resources . . . ."

[270] HAW. CONST. art. XI, § 9.

[271] ARCHER, *supra* note 14, at 88 ("In Hawaii, citizens' rights are authorized explicitly by the Constitution.").

[272] HAW. CONST. art. XI, § 9.

[273] ARCHER, *supra* note 14, at 88.

[274] *See id.* The other state is Pennsylvania. *Id.* PA. CONST. art. I, § 27 states the following:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Id.

"More commonly, however, the state constitutional recognition of public rights with respect

Self-executing means that no further legislation must be enacted before these rights can be enforced by the courts.[275] As such, this constitutional provision automatically creates a right for citizens to bring suit and also establishes affirmative State duties.[276]

Therefore, under Hawai'i Constitution's self-executing standing provision, citizens of Hawai'i are explicitly granted the standing to bring suit for the protection and conservation of natural resources. Thus, section 9's "citizen suit provision," along with section 1's requirement of the State to affirmatively protect and conserve all natural resources, provides a strong foundation for either the public to bring successful suits or the State to regulate for the protection of all natural resources.

In addition, the use of the above provisions along with existing statutes and regulations would, in effect, convert predominantly procedural environmental statutes into substantive requirements. For example, the Hawai'i Environmental Protection Act (HEPA)[277] is predominantly procedural, where it only requires a State agency or applicant to consider the effect its actions will have on the environment through an environmental assessment;[278] an Environmental Impact Statement (EIS) is only required for those actions that may have a significant effect on the environment.[279] However, courts have generally been unwilling to enforce any mitigation measures set forth in this statement.[280] With the use of Article XI, section 1, any mitigation measures set forth in the EIS should be legally enforceable, when such enforcement is required to conserve and protect the natural resource. Because the State and its agencies have an affirmative duty to conserve and protect the environment and natural resources,[281] they will correspondingly have a duty to enforce such agreements. Also, the Hawai'i Constitution's self-executing citizen enforcement provision allows any citizen to arguably bring suit when the responsible state agency has not implemented these mitigation measures.[282]

In addition, the State, recognizing its duties to affirmatively protect and conserve all natural resources pursuant to Hawai'i Constitution, art. XI, section 1, should revise its existing environmental regulations and statutes to incorporate these principles. By doing so, the State will gain substantial

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to the shore and other natural resources is not self-executing and must be carried into effect by legislation." ARCHER, *supra* note 14, at 88.

[275] *Id.*

[276] *Id.*

[277] HAW. REV. STAT. Ch. 343 (1993).

[278] HAW. REV. STAT. § 343-5.

[279] HAW. REV. STAT. § 343-5(b),(c).

[280] *See supra* note 241, at 634.

[281] This duty arises out of the Hawai'i Constitution. It states that the State "shall conserve and protect . . . all natural resources . . . ." HAW. CONST. art. XI, § 1.

[282] HAW. CONST. art. XI, § 9. For the text of this provision, *see supra* part IV.A.

additional authority to enforce its provisions. Regulatory actions will be less prone to a takings challenge for two reasons. First, when dealing with public natural resources, the statute or regulation will be firmly grounded in public trust principles.[283] Second, for all natural resources, the provisions explicitly recognize the legitimate police power objectives of conserving and protecting natural resources.[284]

B. Comprehensive and Special Management Programs

Finally, the State legislature should implement comprehensive as well as special area management programs in those sections of Hawai'i that need the most protection.

Special area management programs should be implemented in those locations of particular concern, such as the protection of one particular resource.[285] A good example in Hawai'i is the Ala Wai Canal. It has suffered through many years of pollution. A special area management program would be beneficial to focus explicitly on improving the water quality within this canal.

In addition, comprehensive management areas should be implemented for those areas where there is a special interest in preserving the area as a whole, and not just one particular feature.[286] An example is Mauna Kea. It would be inefficient to implement one plan to protect Mauna Kea's endangered species, another for its historic sites, and yet another for its burial areas. Instead, one comprehensive management program would be beneficial, with the goal of conserving all of Mauna Kea for what it has to offer the public.[287]

Through the incorporation of public trust principles, these programs should withstand takings challenges.[288] However, in order to adequately fend off

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[283] *See supra* notes 28-33 and accompanying text.

[284] *See supra* notes 212-15 and accompanying text.

[285] Several states have implemented such special area protection zones for those areas of particular ecological interest. ARCHER, *supra* note 14, at 90. For example, special aquatic preserve areas, state wilderness areas, and conservation and recreation areas have been created. *Id.* In each of these zones, the state directly owns and manages these areas, allowing little or no development in those areas to protect the special interest in that land. *Id.*

[286] The purpose of these comprehensive management areas would be to protect "all characteristics, process, and features of the whole system and not characteriz[ing] individually any one component." *Id.* at 91. It should also be ensured that the "biological, social, economic, and aesthetic values" of the area are protected and that "development occurring within [this area] is compatible with natural characteristics." *Id.*

[287] *See id.* at 125-26. "Rather than regulation to protect one endangered species, reduce the level of a certain pollutant, or champion one particular use, the goal under public trust legislation should be to preserve an entire area for all its inherent values." *Id.*

[288] *See supra* notes 28-33 and accompanying text. *See also supra* part III.B.2.

takings challenges, the management plan should contain certain elements. First, the plan should contain a clear expression of the State's duties and interests set forth in Article XI, section 1. Second, specific findings regarding the uniqueness and environmental significance of the public trust resources within or affected by that area must be set forth.[289] A declaration of policy should also exist to balance the competing interests in order to both enhance and preserve such resources.[290] Finally, the program should provide clear guidelines explaining how the development and implementation of this plan will be achieved.[291]

By implementing such a plan, so long as sufficient guidelines are delineated and so long as the governing body's actions are consistent with these guidelines and its own authority, the courts should defer to the agency's balancing process.[292] As such, the agency's management plan and implementation will likely be upheld against any challenges.[293]

C. Balancing of Factors

1. Public natural resources

Many factors should be considered to determine how public natural resources are to be utilized. The following is a list of some of the factors that the State should consider:

The State's actions should:

1) Favor and protect state-wide interests over local interests.[294]
2) Look at whether the trust resource is being used for a "purpose consistent with the resource's physical characteristics and natural state in the environment."[295]
3) Favor long-term over short-term benefits.[296]
4) Look to what would help conserve and protect Hawai'i's natural beauty and the natural resource itself.[297]

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[289] ARCHER, *supra* note 14, at 127.

[290] *Id.*

[291] *Id.*

[292] *Id.* at 126.

[293] *Id.* at 127.

[294] *See id.* at 95.

[295] *See* Lazarus, *supra* note 12, at 642 n.66.

[296] *See* ARCHER, *supra* note 14, at 95.

[297] This duty arises out of the Hawai'i Constitution, which states, in relevant part, that "the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources . . . ." HAW. CONST. art. XI, § 1.

5) Look at how the resource may be utilized to help further the self-sufficiency of the State.[298]
6) Protect public access to publicly owned areas of the natural resource.[299]
7) Recognize any recreational activities that the resource may offer.[300]
8) Consider what possible adverse impacts the activity will have on the natural resource.[301]
9) Identify the needs and goals of the people who frequently interact with the natural resource in the ecosystem.

By considering the above factors before allowing any use of public natural resources, the State will be fulfilling its duties as trustee.

2. Private natural resources

In regard to private natural resources, the State must weigh its interest in the conservation and protection of all natural resources with the private owner's interest in the use of the resource.[302] The State must find the delicate balance where the two conflicting interests may coexist.

However, if the interest in conservation and the interest in utilization are equal, the State should emphasize conservation. Although the opposite tends to occur in the current western property system, that trend should no longer continue. As stated previously, conservation and use are two conflicting interests. Granting too much protection for conservation will hinder the present use of the resource, while granting too liberal present use of the resource will result in a threat to the resource's conservation and may completely destroy the resource for future generations. However, although present use will be hindered by over-conservation, the resource will still remain in its natural state to be used by future generations. Thus, the danger of accidentally granting too much present use would have permanent and substantially greater repercussions to society than would over-conservation of the resource.

V. CONCLUSION

The concept of public needs and private ownership rights do not coincide. The more public rights are recognized, the more they infringe on private

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[298] This duty also arises out of the Hawai'i Constitution, requiring the State and its political subdivisions to "promote the development and utilization of [natural] resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State." *Id.*

[299] *See* ARCHER, *supra* note 14, at 95.

[300] *See id.*

[301] *See id.*

[302] *See supra* notes 230-32 and accompanying text.

ownership rights; while the more protection private ownership rights receive, the less the public's interest in that land will be recognized. This "clash between public needs and private rights has made clear the need to reevaluate our traditional notions of private property . . . We as a society must change our entire way of thinking if we are to continue to enjoy the resources now available."[303]

Article XI, section 1 of the Hawai'i Constitution recognizes this dilemma. It recognizes the right to reasonably utilize natural resources, while also recognizing that the State must affirmatively take action to ensure that these resources remain available for future generations. As a result of the neglect of our natural resources by past generations, the need for such affirmative action becomes all the more dire.

If such protection is not taken today, there may be no resources to enjoy tomorrow.

Kent D. Morihara[304]

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[303] Sarah E. Wilson, *Private Property and the Public Trust: A Theory for Preserving the Coastal Zone*, 4 U.C.L.A. J. ENVTL. L. & POL'Y, 57 at 58-9 (1984).

[304] Class of 1997, William S. Richardson School of Law.

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Rethinking Race for Strict Scrutiny Purposes: *Yniguez* and the Racialization of English Only

PROLOGUE

Maria-Kelly Yniguez spoke Spanish on the job. As an insurance claims manager for the State of Arizona, she managed medical malpractice claims asserted against the state.[1] A Latina fluent in English and Spanish, Maria often spoke Spanish to Latino claimants to help them understand intricate legal concepts related to their claims.[2] She inquired about the nature of their injuries, explained state policies and drafted documents in both Spanish and English to ensure that limited-English speakers knew the significance of the papers they were signing.[3] For Maria, Spanish was also "part of her cultural heritage."[4] Her bilingualism thus provided Spanish-speakers not only vital information needed to process their claims but a sense of community.

In November 1988, Arizona voters passed Article 28,[5] Arizona's English Only amendment. It proclaimed that the State "shall act in English and no other language."[6] Upon its enactment, Maria stopped speaking Spanish to all clients for fear of employee sanctions,[7] thereby foreclosing communication with a substantial portion of her department's Latino clientele. With the passage of Article 28, bilingual clerks, teachers and state senators, among others, feared they would be unable to advise people who could speak only Spanish or Chinese or Navajo.[8] Limited-English speaking residents could not

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[1] Yniguez v. Arizonans for Official English, 69 F.3d 920, 924 (9th Cir. 1995) (en banc), *vacated*, Arizonans for Official English v. Arizona, 117 S. Ct. 1055 (1997).

[2] Brief For Respondent Maria-Kelly F. Yniguez, 1996 WL 426410, at *1, Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (No. 95-974). Maria-Kelly Yniguez spoke English to English-speaking clients, Spanish to Spanish-speaking clients, and a combination of the two languages to clients who could understand both. *Id.*

[3] Stipulation as to Foundation and Non-Hearsay Nature of Certain Public Records and Reports at 3-5, Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (No. 95-974). Important meanings, feelings and concepts, she thought, were often most clearly and vividly expressed in Spanish. *Id.* at 5.

[4] *Id.* at 3 (citing Plaintiff's Statement of Facts, at para. 7). For Maria, Spanish conveyed a "sense of community and experiences shared by Hispanics." Brief for Petitioners, 1996 WL 272394, at *3-4, Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) (citing Joint Appendix, at 45, 51). She also spoke Spanish on the job "to demonstrate [her] belief that Arizona enjoys a pluralistic society." *Id.* at *4 (quoting Joint Appendix at 45).

[5] ARIZ. CONST. art. XXVIII.

[6] Yniguez v. Arizonans for Official English, 69 F.3d 920, 924 (9th Cir. 1995) (en banc) (citing ARIZ. CONST. art. XXVIII §§ 1(3)(a)(iv) and 3(1)(a)).

[7] *Id.*

[8] *Id.* at 952 (Reinhardt, J., concurring). *See also* Ruiz v. Symington, No. 1 CA-CV 94-0235, 1996 WL 309512 (Ariz. App. Div. 1, June 11, 1996) (related Arizona state court case).

communicate effectively with employees of a state housing office, clerks at the small claims court or legislators inquiring about concerns of their community.[9] Yniguez filed suit against the State of Arizona on the grounds that the provision violated the First Amendment's protection of free speech and the Fourteenth Amendment's guarantee of equal protection against invidious racial classifications.[10] Among her reasons for filing suit was her concern for the Latinos denied governmental services in a language they could understand.[11]

In *Yniguez v. Arizonans for Official English*,[12] the Ninth Circuit struck down Arizona's English Only amendment on First Amendment grounds.[13] Noticeably absent from the court's opinion was a discussion of whether Article 28 is a racial classification for strict scrutiny purposes. In *Arizonans for Official English v. Arizona*,[14] the United States Supreme Court likewise bypassed racial classification analysis, ignoring racial issues entirely. The Court instead vacated the Ninth Circuit's judgment and directed dismissal by the Arizona District Court based on issues of mootness and jurisdiction.[15] In all likelihood, the United States Supreme Court will soon determine the constitutionality of Article 28 on appeal from the Arizona state courts.[16] At that time, the Court may address the appropriate standard of review, including whether Article 28 is a racial classification.

I. INTRODUCTION

Maria-Kelly Yniguez's challenge to Article 28 provides fertile ground for examining the law's approach to defining race. Courts, lawyers and legislatures often mistakenly view race as immutable and biologically-

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The plaintiffs in *Ruiz* include four Arizona state elected officials, five state employees and one private citizen, all of whom are bilingual in Spanish and English. *Id.* at *3. *See infra* note 113 and accompanying text.

[9] *Yniguez*, 69 F.3d at 941.

[10] *Id.* at 925.

[11] Plaintiff's Statement of Facts, at 5, Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

[12] 69 F.3d 920 (9th Cir. 1995) (en banc).

[13] *Id. See infra* Part II.A.

[14] 117 S. Ct. 1055 (1997).

[15] *Id.* at 1060. *See infra* Part II.B.

[16] *See* Arizonans for Official English v. Arizona, 117 S. Ct. at 1075 (referring to Ruiz v. Symington, No. 1 CA-CV 94-0235, 1996 WL 309512 (Ariz. App. Div. 1, June 11, 1996)). *See also* Judy Wiessler, *High Court Sidesteps English-Only Ruling/Another Arizona Case Likely to Resurface*, HOUST. CHRON., Mar. 4, 1997, at 7. *See infra* notes 22-23, 112-13 and accompanying text.

determined[17] rather than socially constructed.[18] Based on this flawed assumption, and often without analysis, courts determine whether a governmental classification is "racial" for purposes of constitutional scrutiny.[19] Yniguez's story and its surrounding racialized[20] rhetoric raise the question of when a facially neutral classification is "racial" in order to invoke strict scrutiny review. Using Yniguez's story, and through analysis of its surrounding discourse, this Comment explores how the law misdefines race. This Comment also offers the beginnings of an alternative theoretical framework for determining whether a particular governmental classification is racial for constitutional scrutiny purposes.

Because the Supreme Court declined to rule on the constitutionality of Article 28 and vacated all lower court *Yniguez* rulings, the question of whether Article 28 is a racial classification remains unanswered. The Supreme Court, however, may determine the legality of Article 28 in the near future.[21] The issue of Article 28's "proper construction" is before the Arizona Supreme Court in *Ruiz v. Symington*,[22] and commentators suggest that the United States Supreme Court will likely review the Arizona high court's ruling.[23] On

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[17] *See infra* Part III discussing "Biological Race."

[18] The "social construction" of race, as I use the term, refers to the ongoing process of creation, shaping and transformation of race by social and political forces. This forming and reforming of race thereby imbues groups, social practices and events with racial meaning. My definition is based upon the theory of "racial formation" developed by critical sociologists, Michael Omi and Howard Winant. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S (2d. ed. 1994). *See infra* notes 176-78 and accompanying text. *See also* Ian Haney-Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 11 (1994) (describing race as socially fabricated by humans rather than created by natural differentiation). *See infra* Part IV describing race as a social construction.

[19] According to the infamous *Carolene Products* footnote four, when determining the existence of racial classifications, courts look to political powerlessness and existence of stereotypes, among other things, to determine whether a group is "discrete and insular." U.S. v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938). Footnote four, which is attentive to history and social conditions, is frequently cited as justification for heightened scrutiny of racial classifications. However, it has not, in following cases, been employed to determine whether a group was a racial minority. Courts instead have assumed a biological "immutable" conception of race. *See infra* Part III.

[20] *See* Michael Omi, *Out of the Melting Pot and Into the Fire: Race Relations Policy, in* THE STATE OF ASIAN AMERICA: POLICY ISSUES TO THE YEAR 2020 203 (1993) (describing notion of "racialization."). *See infra* Part IV for a discussion of "racialization."

[21] *See infra* Part II.B. *See also* Wiessler, *supra* note 16, at 7.

[22] No. 1 CA-CV 94-0235, 1996 WL 309512 (Ariz. App. Div. 1, June 11, 1996).

[23] *See* Howard Fischer, *English-Only Law Bypassed by High Court*, ARIZ. DAILY STAR, Mar. 4, 1997, at 1A; Linda Greenhouse, *'Official' English Lawsuit Rejected But Issue Stays Alive in Arizona*, NEW ORLEANS TIMES-PICAYUNE, Mar. 4, 1997 at A1. *See infra* Part II.B.

review, unless the Court finds grounds for heightened constitutional scrutiny,[24] the facially neutral Article 28 will be subject to rational basis review.[25] The Court applies the rigorous strict scrutiny standard to "suspect" classifications such as race or national origin.[26] In contrast, the rational basis standard applies when there is no suspect or semi-suspect class.[27] Using rational basis review, the Court customarily defers to legislative action; whereas under strict scrutiny the Court almost always invalidates the governmental classification.[28]

It is for this reason that the standard of review is crucial: it will likely determine whether Arizona's English Only amendment and others like it are legitimized. The dissent in *Yniguez* and the trial court in *Ruiz* both found the First Amendment challenge unavailing.[29] Thus, a likely threshold question for the Supreme Court will be whether Article 28 should be treated as a racial classification, invoking strict scrutiny review.[30] The framework selected for addressing this question will likely decide the legality of not only English

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[24] Classifications which are "suspect" or that abridge fundamental rights are subject to strict scrutiny review. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

[25] Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

[26] Loving v. Virginia, 388 U.S. 1 (1967) (race); Hernandez v. Texas, 347 U.S. 475 (1954) (national origin). Under this rigorous standard, the state action in question must serve a compelling state interest and be narrowly tailored to achieve that interest. *Adarand*, 115 S. Ct. 2097; City of Richmond v. Croson, 488 U.S. 469 (1989).

[27] *Railway Express*, 336 U.S. 106. The classification will be upheld if it is merely rationally related to a legitimate governmental purpose. *Id.*

[28] *See* Gerald Gunther, *The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1971) (strict scrutiny standard is "strict in theory, but fatal in fact"). *But see Adarand*, 115 S. Ct. 2097 (attempting to dispel the notion of strict scrutiny as fatal in fact).

[29] *See* Yniguez v. Arizonans for Official English, 69 F.3d 920, 960 (9th Cir. 1995) (en banc) (Kozinski, J., dissenting); Ruiz v. Symington, No. 1 CA-CV 94-0235, 1996 WL 309512, at *3 (Ariz. App. Div. 1, June 11, 1996). *See infra* text accompanying notes 80-82.

[30] Although several articles have addressed the racial character of the English Only movement, only a few have addressed in depth the notion of language restrictions as racial classifications. *See* Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293 (1989) (refuting English Only policy arguments and asserting federal English Only bill's violation of equal protection); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism and Official English*, 77 MINN. L. REV. 269 (1992) (using historical analysis to expose nativist underpinnings and reject constitutionality of Official English laws); Note, *"Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345 (1987) (arguing that language minorities are quasi-suspect classes for equal protection purposes); Andrew Averbach, *Language Classifications and the Equal Protection Clause: When is Language a Pretext for Race or Ethnicity?*, 74 B.U. L. REV. 481 (1994) (suggesting a subjective intent standard for finding connections between race and language for equal protection purposes); Michele Arington, *English-Only Laws and Direct Legislation: The Battle in the States Over Language Minority Rights*, 7 J.L. & POL. 325 (1991). These articles, however, do not articulate a theoretical framework for making that determination.

Only statutes across the country but also facially neutral legislation concerning welfare, immigration and other issues with racial impacts.[31]

This Comment asserts that the appropriate framework for examining racial classifications is not based on biological determinants. Rigid biologically-determined racial categories have little scientific basis[32] and were historically part of a pseudo-scientific effort to justify white superiority.[33] Instead, the appropriate framework is based on "racial formation"[34] theory and the socio-legal concept of the social construction of race.[35] Racial formation is a sociohistorical process by which social and political forces continually create, shape and transform race, thereby imparting racial meaning to groups, social practices and events.[36] Race is thus changeable rather than fixed, political rather than biological and value-laden rather than neutral.[37]

Accordingly, this Comment proposes the following principle: A governmental classification is racial for strict scrutiny purposes if, considering all the circumstances, the classification is substantially racialized. As discussed below, this means focusing not only on legislators' elusive "intent,"[38] but on all of the circumstances giving rise to the framing, adoption and implementation of the classification as well as the classification's racial

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[31] Upholding the statute thus sends a message to other states contemplating enaction of similar restrictive English Only laws that such laws are appropriate. Commentators have also suggested that the revival of Arizona's English Only amendment could further stimulate the backlash against immigrants and non-English speaking minorities. *See* David Savage, *English-Only Appeal Goes to Supreme Court*, L.A. TIMES, Mar. 26, 1996, at 1 (reporting on *Yniguez* case).

[32] *See* Lopez, *supra* note 18, at 11-16. *See also infra* Part III.

[33] *See* Neil Gotanda, *A Critique of "Our Constitution is Colorblind"*, 44 STAN. L. REV. 1, 28 (1991) (observing that the treatment of race as a fixed essence stems from both natural science, originally used to prove Negro inferiority, and physiognomy, suggesting the existence of unalterable biological characteristics). *See infra* Part III.

[34] OMI & WINANT, *supra* note 18, at 55-56. *See infra* Part IV discussing "Racial Formation."

[35] *See infra* Part IV.

[36] OMI & WINANT, *supra* note 18, at 55-56.

[37] *See infra* Part IV.

[38] The doctrine of discriminatory purpose requires a showing that legislators intended to single out a particular racial group for unequal treatment. Washington v. Davis, 426 U.S. 229 (1976). In addition, intent must be "because of," not "in spite of" the unequal treatment. Personal Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979). Professor Charles R. Lawrence, III has suggested a "cultural meaning" test as an alternative to the traditional "intent" test. Charles R. Lawrence, III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987) [hereinafter Lawrence, *Unconscious Racism*]. Lawrence's test uncovers unconscious racism deeply ingrained in the culture and triggers judicial recognition of race-based behavior when there is a finding that the culture attaches racial significance to a governmental action. *Id. See also infra* note 228.

effects.[39] This also means challenging as inadequate the narrow biological definition of race currently employed by the Court, recognizing the social and political construction of race, and inquiring into whether the classification is imbued with racial meaning and impact. Application of this framework reveals the weakness in English Only proponents' arguments that Article 28 is not about race. It illuminates their efforts to cloak in ostensibly "neutral" culture-based assertions[40] their implicit arguments for allocating resources and opportunity along racial lines.[41] This framework, attentive to context and history, is developed in preliminary fashion and is meant to serve as a starting point with which to examine the connection between law and racial dynamics. Because the Supreme Court set aside *Yniguez*, the framework has larger relevance for analyzing possible future suits based on Article 28 or other cases involving arguably racialized governmental classifications.

This Comment is divided into five Parts. Part II describes *Yniguez* and Arizona's English Only amendment in the context of increasing U.S. backlash against immigration. Part III identifies the current legal notion of race as immutable and biological rather than as malleable and culturally and politically constructed, and describes its limitations and inaccuracies. Part IV introduces racial formation both as a relevant theoretical framework and a critique of the notion of race as biological and immutable. Finally, Part V sets forth an alternative legal principle for determining whether a racial classification exists for strict scrutiny purposes and illustrates its application through an analysis of the facially neutral Arizona English Only amendment, the *Yniguez* case and surrounding debates.

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[39] *See infra* Part V setting forth the proposed framework.

[40] *See infra* Part V.B.2. *See also* Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CALIF. L. REV. 863, 874 (1993) (examining and rejecting both race-based and culture-based immigration restriction arguments).

[41] *See* Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997) [hereinafter Yamamoto, *Critical Race Praxis*] (observing that many in power positions use cultural difference to justify exclusion of racialized groups from the polity).

II. THE *YNIGUEZ* CASE IN SOCIAL CONTEXT

The *Yniguez* case arises at a time of nationwide anti-immigrant backlash.[42] Rapidly increasing Asian and Latino immigrant populations,[43] perceived as threats to white racial and cultural homogeneity,[44] are increasingly subject to restrictive laws.[45] Anti-immigrant supporters rally to deny welfare to illegal and legal immigrants,[46] abolish affirmative action[47] and deny health care and education to illegal immigrants.[48] Border security has become a national rallying cry.[49] As Professor Bill Ong Hing argues, underlying these anti-immigrant debates is a fear that "immigrants will leave their nonwhite mark on the American landscape."[50]

Within this anti-immigrant movement, a burgeoning English Only movement has resurfaced.[51] The United States House of Representatives in August 1996 passed a national English Only bill.[52] Presidential candidate Bob

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[42] *See generally* Kevin R. Johnson, *Fear of an "Alien Nation": Race, Immigration, and Immigrants*, 7 STAN. L. & POL'Y REV. 111 (1996) (describing hostility and nativist sentiment of recent immigration debates); Frank Wu, *Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL'Y REV. 35 (1996) (examining current immigration law debates); Hing, *supra* note 40.

[43] Between 1970 and 1990 the Latino population increased by 141 percent, and the Asian population grew by 384.9 percent. Hing, *supra* note 40, at 865 (utilizing these statistics to illustrate reasons for increasing anti-immigrant backlash). By the year 2000, Latinos will be the largest minority group in the United States. Tim Chavez, *For Hispanic People, Big GOP Tent is Big Lie*, GANNETT NEWS SERVICE, Aug. 8, 1996, *available in* WESTLAW, GANNETTNS File. By the middle of the 21st century only half of the United States population is expected to be non-Hispanic whites. Steven Holmes, *Census Sees a Profound Ethnic Shift in U.S.*, N.Y. TIMES, Mar. 14, 1996, at A8 (reporting on census study). Hispanics are expected to make up 24.5 percent of the population, an increase from today's 10.2 percent, and Asians will comprise 8.2 percent, up from the current 3.3 percent. *Id.*

[44] *See* Daina Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CALIF. L. REV. 1053, 1078 (1994).

[45] *See generally* Johnson, *supra* note 42, at 111-13.

[46] *See Clinton Will Sign Welfare Overhaul*, S.F. EXAMINER, Aug. 1, 1996, at A1.

[47] *See* Dave Lesher, *Battle Over Prop. 209 Moves to the Courts*, L.A. TIMES, Nov. 7, 1996, at A-1.

[48] *See* Paul Feldman, *Major Portions of Prop. 187 Thrown Out By Federal Judge*, L.A. TIMES, Nov. 21, 1995, at 1.

[49] *See* Johnson, *supra* note 42, at 111-13.

[50] Hing, *supra* note 40, at 875.

[51] Califa, *supra* note 30, at 295.

[52] *See House Passes Bill Making English Federal Government's Official Language*, U.S. NEWSWIRE, Aug. 1, 1996, available in WESTLAW, ALLNEWSPLUS file (reporting that English Only bills have been introduced in every Congress since 1983). The recently-passed House English Only bill declared English the "official language of the Government of the United States" in order to preserve national unity and to "prevent division along linguistic lines." H.R. 123, 104th Cong., 2d sess. (1995). Under the bill, the Federal Government must

Dole called for English Only to protect threats to "national unity."[53] Twenty-two states have passed laws establishing English as their official language, nineteen of which were passed in the 1980s and 1990s.[54] U.S. English, an English Only advocacy group, boasts a membership of close to one million.[55] Like anti-immigrant proponents, English Only supporters cloak underlying racial debates about who belongs to the polity in "neutral" terms of "American" culture.[56] English Only laws, enacted in part to counteract the perceived threat to mainstream culture, operate in practice to exclude undesirable nonwhite groups from the polity.[57] It is within this context that Arizona's electorate passed Article 28. And it is against this backdrop that the Ninth Circuit in *Yniguez* struck down Arizona's English Only amendment as

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conduct all of its official business in English. Catalina Camia, *House Passes Controversial English Bill*, DALLAS MORNING NEWS, Aug. 2, 1996, at A1. The bill purports to promote assimilation, efficiency and fairness. H.R. 123, 104th Cong., 2d sess. (1995). *See also* Marc Lacey, *Translating the English Only Bill*, L.A. TIMES, Aug. 9, 1996, at A3 (exploring possible effects of a federal English Only bill).

[53] Jan Crawford Greenburg, *High Court will Hear 'Official English' Case*, CHIC. TRIB., Mar. 26, 1996, at 6.

[54] Joseph Torres, *Language is Poised to Become a Defining Election Issue*, IDAHO STATESMAN, May 7, 1996, at 1. Hawai'i recognizes both English and Hawaiian as official languages. HAW. CONST. art. XV § 4. *See also* Steven Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027 (1996) (noting the difference between "English Only" laws which prohibit the government from speaking languages other than English and "Official English" laws which make English the "official" language of the state).

[55] David Savage, *English-Only Law Stands, Court Says*, L.A. TIMES, Mar. 4, 1997, at A3. U.S. English was founded by John Tanton and S.I. Hayakawa in 1983 and is the oldest organization dedicated to making English the nation's official language. Stephen Green, *House Votes to Make English the Official Federal Language*, SAN DIEGO UNION-TRIB., Aug. 2, 1996, at A1. FAIR, the Federation for American Immigration Reform, an anti-immigrant lobbying group was also founded by Tanton. Patrick McDonnell, *Activists See Dire Immigration Threat*, L.A. TIMES, Aug. 11, 1996, at A3.

[56] *See infra* Part V.B. Commentators have recognized that English Only arguments are often directly connected to those made by anti-immigrant groups. *See, e.g.*, Brief of Puerto Rican Legal Defense and Educational Fund; National Asian Pacific American Legal Consortium; Legal Aid Society of San Francisco, et al., Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) (noting connection between anti-immigrant and English Only groups).

[57] *See* Perea, *supra* note 30, at 281. *See also* Mari J. Matsuda, *Voices of America: Accent Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1360-67, 1397-98 (1991) (asserting that accent discrimination is a mechanism for distribution of power, and observing bias against "low-status" accents that depart from the norm "American" accent).

a "prohibited means of promoting the English language"[58] and facially overbroad.[59]

Article 28 passed by ballot initiative by a one percent margin in 1988,[60] the result of a petition drive by Arizonans for Official English to amend Arizona's constitution.[61] The Article mandates that "[t]he English language is the official language of the State of Arizona"[62] and that the State and "all political subdivisions . . . [including] all government officials and employees during the performance of government business . . . shall act in English and no other language."[63] The Article's sweeping prohibition of non-English languages compels the use of English for all governmental agencies, organizations, municipalities, ordinances, rules, and programs including "every entity, person, action or item."[64] Under the amendment, English is "the language of the ballot, the public schools and all government functions and actions."[65] Its enforcement provision allows any person residing in or doing business in the state to bring suit to enforce the Article.[66] Immediately after Article 28's enactment, many limited-English speakers could not communicate effectively with the Arizona government in a language other than English, thereby giving rise to Yniguez's suit.[67]

A. The Ninth Circuit Opinion

In *Yniguez v. Arizonans for Official English*, Maria-Kelly Yniguez sought an injunction against state enforcement of Article 28 and a declaration that it

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[58] Yniguez v. Arizonans for Official English, 69 F.3d 920, 947 (9th Cir. 1995) (en banc), *vacated*, Arizonans for Official English v. Arizona, 117 S. Ct. 1055 (1997).

[59] *Id.* at 949.

[60] *Id.* at 924. Article 28 passed by a slim margin of 50.5%, 569,993 to 580,830. *Id. See also* Recent Development, *Ninth Circuit Invalidates Arizona Constitution's Official English Requirement*, 109 HARV. L. REV. 1827 (1996) (reporting on and analyzing the *Yniguez* case).

[61] *Yniguez*, 69 F.3d at 924. Arizonans for Official English is a citizens' group which was the primary proponent of Article 28. *Id.* The Article 28 petition drive was funded by U.S. English. James Crawford, *U.S. English — Agendas Hidden Between the Lines*, HOUST. CHRON., Oct. 30, 1988, at 4.

[62] ARIZ. CONST. art. XXVIII § 1(1).

[63] *Yniguez*, 69 F.3d at 924 (citing ARIZ. CONST. art. XXVIII §§ 1(3)(a)(iv) and 3(1)(a)).

[64] ARIZ. CONST. art. XXVIII § 1(3)(b).

[65] *Id.* at § 1(2).

[66] *Id.* at § 4. After passage of the Article, Arizona Attorney General Robert Corbin stated "If I were to try to speak my limited Spanish on duty and someone filed suit, I would imagine the court would issue a restraining order." Stipulation as to Foundation and Non-Hearsay Nature of Certain Public Records and Reports at 9-10, Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

[67] *See* Plaintiff's Statement of Facts, at 5, *Yniquez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

violated the First and Fourteenth Amendments.[68] The district court held that Arizona's amendment was facially overbroad and infringed upon First Amendment protected speech.[69] After Arizona's governor refused to appeal, Arizonans for Official English intervened.[70] The group argued that Article 28 encouraged unity, political stability, a common language and public confidence.[71] On appeal, the Ninth Circuit unanimously affirmed the district court's holding that Arizona's amendment was facially overbroad and violated the First Amendment.[72] The Ninth Circuit subsequently granted a rehearing en banc.[73] Writing for the majority, Judge Reinhardt rejected Arizonans for Official English's arguments,[74] declaring that there is a "critical difference between encouraging the use of English and repressing the use of other languages."[75] The en banc majority ultimately struck down Article 28 as an invalid regulation of public employee speech and unconstitutionally overbroad.[76] Article 28, the court held, violated the First Amendment rights of Yniguez, public employees and their listeners, and government employees in the executive, legislative and judicial branches.[77] The court also noted that "the adverse impact of Article 28's over-breadth is especially egregious because it is not uniformly spread over the population, but falls almost entirely upon Hispanics and other national origin minorities."[78] As such, the court reasoned, it is an unconstitutional compulsion of the use of the English language.[79]

Judge Kozinski, in dissent, argued vigorously against First Amendment protection of Yniguez's speech.[80] He declared that state employees cannot "arrest the gears of government by refusing to say or do what the state chooses to have said or done."[81] Yniguez's speech, he contended, was in effect the government's speech and could therefore be constitutionally regulated by the state.[82]

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[68] Yniguez v. Arizonans for Official English, 69 F.3d 920, 925 (9th Cir. 1995) (en banc).

[69] Yniguez v. Mofford, 730 F. Supp. 309, 317 (D. Ariz. 1990).

[70] Yniguez v. Arizona, 939 F.2d 727 (9th Cir. 1991).

[71] *Yniguez*, 69 F.3d at 944.

[72] *Id.* at 924.

[73] Yniguez v. Arizonans for Official English, 53 F.3d 1084 (9th Cir. May 12, 1995).

[74] *Yniguez*, 69 F.3d at 944-46.

[75] *Id.* at 923, 946-47 (English "cannot be coerced by methods which conflict with the Constitution.").

[76] *Id.* at 947.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 948.

[80] *See id.* at 960-63 (Kozinski, J., dissenting).

[81] *Id.* at 960 (Kozinski, J., dissenting).

[82] *Id.* at 962 (Kozinski, J., dissenting).

Judge Reinhardt responded to Kozinski's dissent in a rare and impassioned special concurrence to his own majority opinion.[83] Reinhardt explicitly denounced the racialized, nativist fears expressed by Kozinski.[84] He condemned Judge Kozinski's "absolutist, authoritarian" world in which government clerks would be unable to help Chinese, Spanish or Navajo persons apply for food stamps, driver's licenses, aid for their children or disability benefits.[85] In Kozinski's world, Judge Reinhardt continued, "[g]overnment employees could be compelled to parrot racist and sexist slogans [and] to hurl hateful invective at non-English speaking people asking for assistance."[86] His would be "an Orwellian world in which Big Brother could compel its minions to say War is Peace and Peace is War . . . ."[87] According to Judge Reinhardt, Article 28 was a nativist measure that deprived Spanish, Chinese and Navajo from all government assistance and severely penalized non-English speakers.[88]

Noticeably absent from the Ninth Circuit en banc majority opinion was discussion of whether Article 28 is a racial classification for strict scrutiny purposes. Judge Reinhardt's majority opinion pointed to underlying racial motivations and potential effects on particular racial groups, but confined discussion to First Amendment issues.[89] On the one hand, the majority may have deemed it unnecessary to engage in racial classification analysis in light of its First Amendment conclusion.[90] On the other hand, the majority's absence of racial discussion might be attributable to unstated legal constraints: the court's unacknowledged reliance on an earlier Ninth Circuit case,[91] and the court's embrace of the jurisprudential formulation of race as an immutable, biological trait.

The *Yniguez* court may have relied on the Ninth Circuit's decision in *Olagues v. Russonielo*[92] and decided implicitly that Article 28 was not a racial classification. In *Olagues*, the Ninth Circuit established an objective test for determining whether language classifications discriminate on the basis of race or national origin.[93] An en banc majority held that a U.S. Attorney's secret investigation into possible voter fraud targeting Spanish-speaking and

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[83] *Id.* at 952 (Reinhardt, J., concurring).

[84] *Id.* at 952-54 (Reinhardt, J., concurring).

[85] *Id.* at 952-53 (Reinhardt, J., concurring).

[86] *Id.* at 954 (Reinhardt, J., concurring).

[87] *Id.* at 953 (Reinhardt, J., concurring).

[88] *Id.*

[89] *Id.* at 948-49.

[90] *See id.* at 924.

[91] *See infra* notes 92-98 and accompanying text.

[92] 797 F.2d 1511 (9th Cir. 1986) (en banc), *vacated as moot*, 484 U.S. 806 (1987).

[93] *Id.* at 1521. *See also* Averbach, *supra* note 30, at 484 (suggesting a subjective intent standard for establishing a nexus between race and language for equal protection purposes).

Chinese-speaking immigrants involved a suspect classification based on race and national origin.[94] The court distinguished "general" classifications that apply to both English and non-English speakers from "specific" classifications that apply to specific language groups.[95] Under the test, a classification specifically targeting certain language groups would be subject to strict scrutiny. On the other hand, a broad, "general" classification merely imposing a disproportionate impact on a particular racial group would be deemed racially harmless because it applies to all groups, and as such would not invoke strict scrutiny.[96] As the dissent in *Olagues* pointed out, however, there is no logical distinction between a general and specific classification; a general classification may have as racially significant an impact as a specific one.[97] More importantly, the *Olagues* majority's "objective" test assumes a fixed, biological understanding of what race is and thus assumes easy determination of whether a classification specifically targets a racial group.[98]

As mentioned earlier, the Ninth Circuit in *Yniguez* bypassed racial classification analysis entirely. It may have done so because it found sufficient grounds in the First Amendment. It may also have relied on *Olagues* and its shaky "objective" test — Article 28 targets the Arizona population in general rather than specific language groups. Or, the Ninth Circuit may have recognized, as the dissent in *Olagues* and commentators did, that the foundation of the objective test is outdated; it is grounded in an idea increasingly subject to challenge — the traditional notion of race as immutable and biological rather than socially constructed.

B. The Supreme Court Opinion

The United States Supreme Court heard oral argument in *Arizonans for Official English v. Arizona* on December 4, 1996.[99] The Court limited its hour-long questioning to issues of standing, mootness and jurisdiction.[100] Specifically, the Justices focused their interrogation on whether the case had become moot when Yniguez left her government job,[101] whether Arizonans for Official English had standing as a private organization to defend the English

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[94] *Olagues*, 797 F.2d at 1521.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 1527 (Wallace, J., dissenting).

[98] *Id.*

[99] *See* United States Supreme Court Official Transcript, Arizonans for Official English v. Arizona (U.S. Dec. 4, 1996) (No. 95-974).

[100] *See id.*

[101] *Id.* at 30-33.

Only provision[102] and whether there was a case or controversy in the first place.[103] Chief Justice Rehnquist made it clear early on that the Justices' questions would be limited to standing issues rather than the constitutional merits of Arizona's English Only Amendment.[104]

In *Arizonans for Official English v. Arizona*,[105] the United States Supreme Court "expresse[d] no view on the correct interpretation of Article XXVIII or on the measure's constitutionality."[106] Instead, it decided the case on procedural grounds.[107] Holding that the case was moot and should not have been decided on the merits,[108] the Court vacated the Ninth Circuit's judgment and remanded the case with directions that it be dismissed by the Arizona District Court.[109] In the opinion authored by Justice Ginsburg, the Court announced that the case had become moot when Yniguez resigned from her job with the state.[110] In addition, the Court indicated that the Ninth Circuit should have obtained a controlling construction of Article 28 from the Arizona Supreme Court before hearing the case.[111] Referring to a related case currently before the Arizona Supreme Court,[112] the Court stated that "[o]nce [the Arizona Supreme Court] has spoken, adjudication of any remaining federal constitutional question may indeed become greatly simplified."[113]

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[102] *Id.* at 8-12.

[103] *Id.* at 50-51. *See also* David Savage, *High Court's 'English Only' Case Boils Down to Legalese*, L.A. TIMES, Dec. 5, 1996, at A30 [hereinafter Savage, *Boils Down to Legalese*] (reporting on the oral argument and possible implications).

[104] Steve Lash, *First Amendment English Only Case Becomes High Court Debate on Standing*, WEST'S LEGAL NEWS, Dec. 5, 1996, *available in* WESTLAW, WLN file.

[105] 117 S. Ct. 1055 (1997).

[106] *Id.* at 1060.

[107] *See id.* at 1072.

[108] *Id.*

[109] *Id.* at 1075.

[110] *Id.* at 1072.

[111] *Id.* at 1075.

[112] Ruiz v. Symington, No. 1 CA-CV 94-0235, 1996 WL 309512 (Ariz. App. Div. 1, June 11, 1996).

[113] Arizonans for Official English v. Arizona, 117 S. Ct. at 1075. In *Ruiz v. Symington*, Arizona legislators and employees challenged the constitutionality of Article 28 on First, Fourteenth and Ninth Amendment grounds in Arizona State Superior Court. *See Ruiz*, 1996 WL 309512, at *3. The trial court held that Article 28 is content-neutral and as such does not violate the First Amendment of the United States Constitution. *Id.* In addition, according to the trial court, Article 28 does not violate the Equal Protection Clause of the Fourteenth Amendment or the Ninth Amendment. *Id.* The Arizona Court of Appeals reversed. *Id.* at *4. The appellate court adopted the analysis of the Ninth Circuit in *Yniguez*, and declared Article 28 unconstitutional on First Amendment grounds. *See id.* The Arizona Supreme Court is currently reviewing *Ruiz* to determine the "proper" interpretation of Article 28's language. *See* Arizonans for Official English v. Arizona, 117 S. Ct. at 1075.

Markedly absent from the Court's opinion and from oral argument was discussion of whether Article 28 is a racial classification for strict scrutiny purposes. Because the Supreme Court "expresse[d] no view . . . on the measure's constitutionality," the issue remains unresolved whether Article 28 violates the Fourteenth Amendment's guarantee of equal protection against invidious racial classifications.[114] It also leaves undecided whether English Only provisions of other states are racial classifications. As mentioned, the United States Supreme Court may soon review the future Arizona Supreme Court ruling.[115] Moreover, Article 28 or English Only provisions of other states may be subject to further constitutional challenges. It is for these reasons that a workable legal principle for determining whether a classification is "racial" is needed.

III. THE DOMINANT PARADIGM: BIOLOGICAL RACE

In determining whether a governmental classification is racial, courts look to so-called "immutable characteristics" such as race or gender.[116] This dominant paradigm narrowly conceives of race as a fixed biological category.[117] Rooted in Eighteenth Century pseudo-science,[118] race is defined genetically and is reflected physically in skin color,[119] facial features[120] and

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[114] *See* Savage, *Boils Down to Legalese*, *supra* note 103, at A30. *See supra* notes 21-23 and accompanying text.

[115] *See* Wiessler, *supra* note 16, at 7.

[116] *See infra* notes 126-31. This notion of race as an immutable trait underlies the Supreme Court's current "colorblind" jurisprudence. *See, e.g.*, Adarand Constructors, Inc. v Pena, 115 S. Ct. 2097 (1995); City of Richmond v. Croson, 488 U.S. 469 (1989); Shaw v. Reno, 509 U.S. 630 (1993); Shaw v. Hunt, 116 S. Ct. 1894 (1996); Bush v. Vera, 116 S. Ct. 1941 (1996).

[117] Gotanda, *supra* note 33, at 28 (observing that the treatment of race as a fixed essence stems from both natural science, originally used to prove Negro inferiority, and physiognomy, suggesting the existence of unalterable biological characteristics); Lopez, *supra* note 18, at 11. *See also* OMI & WINANT, *supra* note 18, at 54; DAVID THEO GOLDBERG, RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING 11 (1993).

[118] *See* Lopez, *supra* note 18, at 14.

[119] Courts determined who was "white," and therefore entitled to citizenship. *See, e.g.*, Gong Lum v. Rice, 275 U.S. 78 (1927) (Chinese); Ozawa v. United States, 260 U.S. 178 (1922) (Japanese); United States v. Bhagat Singh Thind, 261 U.S. 204 (1923) (Asian Indians); In re Halladjian, 174 F. 834 (C.C.D. Mass. 1909) (Armenians).

[120] *See, e.g.*, Hudgins v. Wright, 11 Va. (1 Hen. & M.) 134 (Sup. Ct. App. 1806) (using racial test of skin color, "flat nose and wooly head of hair" to determine whether a person is black or Indian). *See also* Lopez, *supra* note 18, at 2 (utilizing the case to illustrate fallacies of the common legal notion of race).

hair texture,[121] and is unconnected to culture, history or social context.[122] Historically, racial categories based on "biology" were assumed to reflect the innate inferiority of nonwhites and used as justification for differential treatment of various racialized groups.[123] Eighteenth and Nineteenth century categorization of races into "Mongoloid," "Negroid" and "Caucasoid" was in fact part of an effort to justify white domination.[124]

The United States Supreme Court has historically embraced, and in recent cases continues to embrace, the notion of race as a fixed, biological essence.[125] For example, in *Regents of the University of California v. Bakke*,[126] Justice Brennan pronounced that "race, like gender and illegitimacy is an immutable characteristic which its possessors are powerless to escape or set aside."[127] The majority in *Frontiero v. Richardson*[128] maintained that "sex, like race and national origin is an immutable characteristic determined solely by the accident of birth . . . ."[129] Finally, Justice Stewart, dissenting in *Fullilove v. Klutznick*,[130] declared that "[t]he color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, [or] moral culpability . . . ."[131] This seemingly "objective" connection of race to biology, skin color and "accident of birth" and disconnection to history and contemporary social context gives the appearance that race is immutable.[132]

Professor Neil Gotanda terms this disconnected notion of race, "formal race,"[133] and suggests that the Supreme Court embraces formal race when

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[121] *See Hudgins*, 11 Va. (1 Hen. & M.) 134. *See also* Lopez, *supra* note 18, at 14. In addition, many Nineteenth Century "scientists" attempted to determine race using cranial capacity, brain mass, jaw size and body lice. *Id.*

[122] Gotanda, *supra* note 33, at 38.

[123] *Id.* at 28. Slavery, for example, was justified by the assumption that Blacks were inherently inferior. *Id.* According to the rule of hypodescent, anyone with one drop of "negro" blood was racially inferior and legitimately subject to discriminatory laws. *Id.* at 27.

[124] Lopez, *supra* note 18, at 13-14. *See also* Cheryl Harris, *Whiteness As Property*, 106 HARV. L. REV. 1709, 1739 (1993); Gotanda, *supra* note 33, at 28-29 (arguing that these categories are "embedded in popular notions of race.").

[125] *See* Gotanda, *supra* note 33, at 29-32.

[126] 438 U.S. 265 (1978).

[127] *Id.* at 360 (Brennan, J., concurring/dissenting).

[128] 411 U.S. 677 (1973).

[129] *Id.* at 686.

[130] 448 U.S. 448 (1980).

[131] *Id.* at 524 (Stewart, J., dissenting). *See also* Gotanda, *supra* note 33, at 31-32 (describing examples of the Court's reliance on immutable, biological race).

[132] Gotanda, *supra* note 33, at 30-31.

[133] *Id.* at 4. Gotanda defines four types of race to analyze how legal ideology, particularly colorblind constitutionalism, sanctions racial inequality: "Formal race," "status race," "historical race," and "culture race." *Id.* at 4-5.

analyzing racial classifications.[134] Formal race reflects only skin color or country of national origin and is unconnected to social context, history, culture, ability, disadvantage, wealth or language.[135] The category "Black," for example, is seen as detached from subordinate social status and historical experience[136] of slavery, Jim Crow laws and government-supported discrimination.[137]

Many race scholars assert that the dominant paradigm of unalterable, biological race is inaccurate and limited in several respects.[138] First, it is based on false biological assumptions that have no scientific basis.[139] Second, and related, it views race as neutral and without social content,[140] failing to take into account the ways that race and racial categories are socially constructed.[141] In doing so, the paradigm does not recognize the dominant society's ability to racialize groups — to treat people as members of a racial group regardless of personal choice — and thereby perpetuate racial inequalities.[142] By viewing race formally — neutrally and without content — the dominant paradigm allows society to blame racial groups for their own oppression by pointing to their inferior culture while ignoring institutional forces.[143] Third, due to the way race is conceptualized in legal discourse, lawyers, law scholars and students working within this paradigm are compelled to respond with a similar narrow doctrinal frame of analysis that ignores the socio-historical construction of race. Finally, and specific to this

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[134] *Id.* at 40. Gotanda suggests that recent Supreme Court jurisprudence uses formal race in its "color-blind" application of strict scrutiny to any and all racial classifications without regard to historical or social context. *Id.* According to the formal race approach, consideration is not given to past segregation or America's history of oppression. *Id.* at 42. Formal-race, according to Gotanda, perpetuates advantages for whites. *Id.* at 50.

[135] *Id.* at 4.

[136] *Id.* at 38.

[137] *See* DERRICK BELL, RACE, RACISM AND AMERICAN LAW 6-44 (1992) (chronicle and commentary on America's legal treatment of race).

[138] *See generally* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, Kendall Thomas, eds., 1995); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado, ed., 1995).

[139] *See infra* text accompanying notes 146-47.

[140] Gotanda, *supra* note 33, at 32. *See also* Yamamoto, *Critical Race Praxis*, *supra* note 41, at 847.

[141] *See infra* Part IV discussing the social construction of race.

[142] Lopez, *supra* note 18, at 28.

[143] *See* OMI & WINANT, *supra* note 18, at 20. *See also* Charles R. Lawrence, III, *Forward: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819 (1995) [hereinafter Lawrence, *Jurisprudence of Transformation*] (citing John Powell, *Who Thought of Dropping Racial Categories, and Why?*, POVERTY & RACE, Jan./Feb. 1995, at 12-13) (asserting that the use of purported genetic differences among races is used to justify subordination and exclusion).

discussion, the use of the traditional race-as-immutable framework makes it difficult to find a racial element in debates that are racially coded in purportedly "neutral" economic and cultural terms.[144]

Contrary to long-standing views, race can no longer be viewed as a concrete, biological characteristic.[145] Studies show that racial categories do not reflect fundamental genetic differences, and many scientists wholly reject race as biologically-determined.[146] In fact, studies reveal that there are greater genetic differences within a "racial" group than between two "racial" groups.[147]

In addition to inaccuracy, a primary problem with treating race as biological is that it falsely assumes the neutrality and objectivity of racial classifications.[148] As a result of the law's reliance on physiognomy and ancestry to define race as evidenced by skin color, facial features, hair texture, and blood,[149] racial classification has "lost its connection to social reality."[150] Professor Gotanda argues that linking racial categories to science erroneously

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[144] *See infra* text accompanying notes 253-56. *See also* Lawrence, *Unconscious Racism*, *supra* note 38, at 322; Johnson, *supra* note 42, at 113 (observing the difficulty in uncovering racist goals achieved through facially neutral means). *See also* Matsuda, *supra* note 57, at 1394 (recognizing the false neutrality of accent discrimination). Professor Angela Harris also observes that race is "deeply embedded" in language, perceptions and culture, and is "inscribed in the most innocent and neutral-seeming concepts." Angela P. Harris, *Forward: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 743 (1994) [hereinafter, Harris, *Jurisprudence of Reconstruction*]. She explains that critical race theorists question law's objectivity and neutrality by "arguing that what looks like race-neutrality on the surface has a deeper structure that reflects white privilege." *Id.* at 754.

[145] OMI & WINANT, *supra* note 18, at 55; *See also* Lopez, *supra* note 18, at 6 ("Biological races like Negroid and Caucasoid simply do not exist."); Gotanda, *supra* note 33, at 6; GOLDBERG, *supra* note 117, at 69.

[146] *See, e.g.*, Alice Littlefield, Leonard Lieberman & Larry T. Reynolds, *Redefining Race: The Potential Demise of a Concept in Physical Anthropology*, 23 CURRENT ANTHROPOLOGY 641 (1982) (citing study that 70% of cultural anthropologists and 50% of physical anthropologists reject race as biologically-determined).

[147] *See* Lopez, *supra* note 18, at 11-14 (citing Richard Lewontin, *The Apportionment of Human Diversity*, 6 EVOLUTIONARY BIOLOGY 381, 397 (1972); Masayoshi Nei & Arun Roychoudhury, *Genetic Relationship and Evolution of Human Races*, 14 EVOLUTIONARY BIOLOGY 1, 38 (1982)).

[148] *See* Gotanda, *supra* note 33, at 32.

[149] People with one drop of African blood were racially inferior and therefore legitimately subject to Jim Crow laws. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896). Hawaiians' eligibility to receive Homelands parcels were also determined by blood quantum. (fifty percent or more were "native Hawaiians" and less than fifty percent were "Hawaiians."). Hawaiian Homes Commission Act, 1920, ch. 42 Stat. 108, *reprinted in* 1 HAW. REV. STAT. 167-205. (Supp. 1989).

[150] Gotanda, *supra* note 33, at 40 (objective "links between racial categorization and skin color, physiognomy, and ancestry reinforce the belief that race is immutable."). *Id.* at 30-31.

suggests that race is a neutral, apolitical term, divorced from social content.[151] This unconnectedness limits the concept of racism to simple personal prejudice, discounts historical and continuing systemic racial subordination[152] and presupposes a level present-day racial playing field.[153]

The Supreme Court's recent jurisprudence reveals this dissociation. In *Metro Broadcasting v. FCC*,[154] the Court upheld a federal race-based preference program for minority media ownership. Justice Scalia, during oral argument attacked Congress' preference policy as a matter of "blood, not background and environment."[155] Scalia's reference to blood suggests that race is linked to biology and divorced from "background and environment." For Justice Scalia, blood, and therefore race, is neutral and devoid of social meaning.[156]

In *Saint Francis College v. Al-Khazraji*,[157] the Supreme Court held that an Arab American college professor could be protected from discrimination under 42 U.S.C. §1981.[158] Justice White's majority opinion seemingly acknowledged the notion of socially-constructed race when it stated that "racial classifications are for the most part sociopolitical, rather than biological, in nature."[159] The Court, however, ultimately based its decision on biological race — the "fact" that an individual is "genetically part of an ethnically and physiognomically distinctive subgrouping of homo sapiens."[160] The Court's reference to physiognomy indicates its reluctance to abandon the notion of immutable, biological race.

Finally, in *Fullilove v. Klutznick*,[161] the Court upheld a federal statute requiring minority business set-asides. In dissent, Justice Stewart invoked the "fact" of biological race when he declared that "[u]nder our Constitution, the government may never act to the detriment of a person solely because of that person's race. The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, [or] moral

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[151] *Id.* at 32.

[152] *Id.* at 43.

[153] Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1344-45 (1988) (rejecting neoconservative colorblindness arguments for their failure to recognize continuing societal racial oppression).

[154] 497 U.S. 547 (1990).

[155] Gotanda, *supra* note 33, at 32 (quoting Scalia).

[156] *See id.*

[157] 481 U.S. 604 (1987).

[158] *Id.* at 613.

[159] *Id.* at 610 n.5 (noting that traits that have been used to characterize races have been found to have little biological significance).

[160] *Id.* at 613. *See also* Gotanda, *supra* note 33, at 31-32.

[161] 448 U.S. 448 (1980).

culpability . . . ."[162] Stewart's reference to an "objective" fact such as skin color is "transferred to the racial category to assert [its] immutability"[163] resulting in a racial category that looks like a fact.[164] As these examples suggest, and as Gotanda asserts, "objective" links between racial categorization and skin color, physiognomy, and ancestry are social and legal assertions, not scientific facts.[165]

The *Yniguez* English Only debate illustrates how lawyers operating within this dominant paradigm are sharply restricted in their legal analysis of racial classifications.[166] Arguments made by amicus groups in *Yniguez* narrowly defined race by assuming its immutability while failing to recognize the dynamic, changeable characteristics of race as a social construction.[167] Within this restricted legal paradigm, many briefs struggled in their attempts to identify the racial character of Arizona's English Only statute and the English Only movement.[168] Relying on the same cases, attorneys assumed that race is fixed and biological and yet, with unacknowledged dissonance, argued the apparent cultural connection between language, race and national origin for equal protection purposes.[169] For example, some amicus groups relied on

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[162] *Id.* at 524 (Stewart, J., dissenting).

[163] Gotanda, *supra* note 33, at 31.

[164] *Id.*

[165] *Id.* at 32. Thus when Justice Powell in Fullilove declared, "the time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin," he likewise connected skin color to race and falsely invoked the notion of race as biological fact. *Fullilove*, 448 U.S. at 516.

[166] My experience with the *Yniguez* case comes from my participation in the writing of the amicus brief of the Hawai'i Civil Rights Commission, Na Loio No Na Kanaka, Native Hawaiian Legal Corporation and Native Hawaiian Advisory Council in *Yniguez v. Arizonans for Official English* in the summer of 1996.

[167] My comments here are not meant to disparage the significant arguments made by amicus groups and are meant only as a critique of the limited legal paradigm itself.

[168] *See, e.g.*, Brief of Puerto Rican Legal Defense and Educational Fund, et al., Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (No. 95-974); Brief of the State of New Mexico as Amicus Curiae in Support of Respondents Maria-Kelly F. Yniguez and Arizonans Against Constitutional Tampering, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974); Brief of the Navajo Nation as Amicus Curiae in Support of Respondents Yniguez and Arizonans Against Constitutional Tampering, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

[169] The Supreme Court has previously recognized the connection between language use and national origin for equal protection purposes. *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (declaring that a Nebraska law outlawing the teaching of non-English languages affects only citizens of foreign ancestry); Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926) (holding that a law requiring business books to be kept in English or Spanish discriminated against Chinese); Lau v. Nichols, 414 U.S. 563 (1974) (concluding that the San Francisco school system's failure to provide English language instruction to children of Chinese ancestry is racial or national origin discrimination); Hernandez v. New York, 500 U.S. 352 (1991); Hernandez v. Texas, 347 U.S.

cases embracing the biological notion of race to assert that Latinos and other racial minorities are "discrete and insular minorities" affected by Article 28 and are therefore a suspect class for equal protection purposes.[170] They argued that Article 28, although facially neutral, invidiously discriminates against Latinos and other groups on the basis of immutable traits.[171] Others argued that language-based distinctions are a proxy for national origin classifications.[172] None challenged the assumption, embedded in Supreme Court cases, that race is solely biological.

As revealed by these arguments, the biological-race paradigm often leaves hidden the racial element of English Only by overlooking the social construction of race. By expanding inquiry into a realm largely ignored by the courts, the following discussion endeavors to illustrate how race is instead an historically contingent social construction, inextricably connected to culture and history.

IV. SHIFTING THE PARADIGM: RACIALIZATION AND THE SOCIAL CONSTRUCTION OF RACE

Rather than an unalterable, biological characteristic, race is a social construction[173] which plays an essential part in structuring and representing

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475 (1954). *See also* Garcia v. Spun Steak, 998 F.2d 1480, 1486 (9th Cir. 1993) (declaring that workplace English Only rules may disproportionately affect Hispanics); NAACP v. City of Richmond, 743 F.2d 1346 (9th Cir. 1984); Fragante v. City and County of Honolulu, 888 F.2d 591, 595 (9th Cir. 1989) (stating that national origin discrimination includes discrimination "because an individual has the . . . linguistic characteristics of a national origin group."); Asian American Business Group v. City of Pomona, 716 F. Supp. 1328, 1330 (C.D. Cal. 1989); Gutierrez v. Municipal Court, 838 F.2d 1031, 1039 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989).

[170] *See, e.g.*, Brief of Puerto Rican Legal Defense and Educational Fund, et al., Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (No. 95-974). *See also* Note, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164 (1985).

[171] *See* Brief of Puerto Rican Legal Defense and Educational Fund, et al., *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

[172] *See* Brief of the Navajo Nation as Amicus Curiae in Support of Respondents Yniguez and Arizonans Against Constitutional Tampering, Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

[173] Lopez, *supra* note 18, at 7 (describing race as "plastic and inconstant," fabricated by humans rather than created by natural differentiation). Whereas Lopez focuses more on constructed racial identity, this Comment addresses how both racial identity and current issues, events or debates, such as the English Only debate can also be implicitly racialized. *See also* MARY WATERS, ETHNIC OPTIONS: CHOOSING IDENTITIES IN AMERICA (1990). By recognizing that race is a social construction is not to say that it does not exist. On the contrary, according to Omi and Winant, race should be thought of as an "element of social structure rather than an irregularity within it . . . [and] a dimension of human representation rather than an illusion." OMI & WINANT, *supra* note 18, at 55. *See also* Kimberlé Crenshaw, *Mapping the Margins:*

the social world.[174] According to critical sociologists Michael Omi and Howard Winant, race is understood as an "unstable and 'decentered' complex of social meanings constantly being transformed by political struggle."[175] This notion of race provides the basis for Omi and Winant's theory of "racial formation."[176] Racial formation is a sociohistorical process by which race is created, shaped and transformed by social and political forces which in turn creates racial and cultural meaning.[177] As races are continually formed and

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Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241 (1991) (observing that socially constructed categories have political significance and are tied to the distribution of power); Lawrence, *Jurisprudence of Transformation*, *supra* note 143, at 847 n.71 (asserting that the recognition of race as a social construction does not make it any less real); Harris, *Jurisprudence of Reconstruction*, *supra* note 144, at 772 (suggesting that race as a social construction does not make it "unreal [or] eradicable . . .").

[174] OMI & WINANT, *supra* note 18, at 55.

[175] *Id.* *See also* John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160 (1992) [hereinafter Calmore, *Multicultural World*] (defining race in similar fashion).

[176] OMI & WINANT, *supra* note 18, at 55. The authors posit that racial formation "emphasizes the social nature of race, the absence of any essential racial characteristics, the historical flexibility of racial meanings and categories, the conflictual character of race at both the 'micro-' and 'macro-social' levels, and the irreducible political aspect of racial dynamics." *Id.* at 4. This pathbreaking theory has been increasingly recognized in legal spheres to explain various dimensions of race in American society. *See* Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 UCLA AS. PAC. AM. L.J. 33 (1996) [hereinafter Yamamoto, *Rethinking Alliances*] (addressing conflict among nonwhite racial groups and developing the notion of differential racialization and constrained racial group agency as part of a framework for interracial justice); John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing A Stone of Hope from a Mountain of Despair"*, 143 U. PA. L. REV. 1233 (1995) [hereinafter Calmore, *Racialized Space*] (recognizing the racialization of housing segregation and offering a conception of social justice); Margaret Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 ASIAN PAC. AM. L.J. 4 (1995) (exploring Asian American racial formation in the United States); Cynthia Kwei Yung Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 HASTINGS WOMEN'S L.J. 165 (1995); Jennifer Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 HASTINGS L.J. 1353 (1995); Luis Angel Toro, *"A People Distinct From Others": Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 TEX. TECH L. REV. 1219 (1995); John Powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889 (1995); Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 STAN. L. REV. 747 (1994). *See also* GOLDBERG, *supra* note 117, at 80.

[177] OMI & WINANT, *supra* note 18, at 55-56. The authors define racial formation as "the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed." *Id.* at 55. They describe racial formation as "a process of historically situated projects in which human bodies and social structures are represented and organized." *Id.* at 55-56. Additionally, racial formation is connected to the "evolution of hegemony, the way in which society is organized and ruled." *Id.* at 56. Based on racial formation theory, Professor Ian Haney-Lopez offers a theory of "racial fabrication" to emphasize the human element of

reformed they are imbued with social meaning — the process of racialization. Racialization thus "signifies the extension of racial meaning to a previously racially unclassified relationship, social practice, or group."[178]

An example of both racial formation and racialization involves the creation of "Asian American" as a racial category.[179] The category formed as a political label for the first time in the 1960s.[180] Until then, each ethnic group such as Chinese Americans, Japanese Americans and Korean Americans were recognized separately — each with small numbers and little political clout.[181] In the 1960s these groups coalesced politically into a singular "Asian American" racial category that became recognized legally by the federal census, courts and legislatures.[182] For the first time these groups shared a common legally-recognized racial identity and, in some respects, despite continuing internal dissonance, gained political clout as Asian Americans.[183]

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racialization. Lopez, *supra* note 18, at 28. Professor Charles Lawrence, III's theory of unconscious racial motivation suggests that racialization can occur on an unconscious level. *See* Lawrence, *Unconscious Racism*, *supra* note 38. His "cultural meaning" test "posits the connection between unconscious racism and the existence of cultural symbols that have racial meaning." *Id.* at 324. *See infra* note 228. *See also* Linda Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

[178] Omi, *supra* note 20, at 203. *See also* Calmore, *Racialized Space*, *supra* note 176, at 1235 (describing racialization as a "dialectical process of signification"). Professor Eric Yamamoto extends racialization theory to include "differential racialization." Yamamoto, *Rethinking Alliances*, *supra* note 176, at 61-64. Differential racialization "acknowledges that historical and contemporary influences racialize different racial groups differently." *Id.* at 61. Class divisions, length of residence in the United States, urban/rural differences, and gender, for example, contribute to the differential racialization of racial groups. *Id.* at 61-63. Differential racialization between and within racial groups creates differing racial meanings for members of those racial groups, and those meanings in turn impact "individual identity, collective consciousness and political organization." Omi, *supra* note 20, at 207. Differential racialization thus contributes to differing status and power among racial groups. Yamamoto, *Rethinking Alliances*, *supra* at 36.

[179] OMI & WINANT, *supra* note 18, at 89. *See also* YEN ESPIRITU, ASIAN AMERICAN PAN-ETHNICITY (1992).

[180] OMI & WINANT, *supra* note 18, at 89.

[181] WILLIAM WEI, THE ASIAN AMERICAN MOVEMENT 26 (1993).

[182] *Id.*

[183] *See* OMI & WINANT, *supra* note 18, at 89. Native Hawaiians were racialized when the distinction between "Hawaiian" and "Native Hawaiian" was constructed. Pressured by sugar plantations to limit the amount of benefits Hawaiians would receive, Congress defined "Native Hawaiian" as "those people with 50 percent or more native blood." Hawaiian Homes Commission Act, 1920, Ch. 42 Stat. 108, *reprinted in* 1 HAW. REV. STAT. 167-205 (Supp. 1989). This definition of Native Hawaiian designated two classes of people of Hawaiian ancestry by distinguishing between people of Hawaiian ancestry who have less than 50 percent native blood and those who have more. Those who have less than 50 percent native blood are "Hawaiian" and are defined as "any descendent of the aboriginal peoples inhabiting the

As the formation of "Asian American" illustrates, race is socially constructed.[184] According to Omi and Winant, race as a social construction has two components: cultural representation and social structure.[185] "Racial projects" are the social mechanisms through which representational and structural changes lead to changes in racial identity and meaning.[186] A racial project is "simultaneously an interpretation, representation, or explanation of racial dynamic[s], and an effort to reorganize and redistribute resources along particular racial lines."[187] The political struggles to gain recognition of "Asian American" as a racial category are examples of racial projects. Webs of racial projects combine to create cultural and racial meaning.[188]

Professor Eric Yamamoto observes that courts are "sites and generators of cultural performances."[189] From this view, courts transform legal disputes

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Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778." Hawaiian Homes Commission Act, 1920, Ch. 42 Stat. 108, *reprinted in* 1 HAW. REV. STAT. 167-205 (Supp. 1989). Another example of racialization involves the definition of Native Hawaiian as a "political" rather than "racial" category. While recognizing that in some instances, Native Hawaiian is a racial group, the Hawai'i Supreme Court has likened Hawaiians to Native Americans and deemed Hawaiians a political group. *See* Rice v. Cayetano, 941 F. Supp. 1529 (1996). *See also* Morton v. Mancari, 417 U.S. 535 (1974) (holding that because Native Americans have a special relationship to the U.S. government they are a political category rather than a racial one).

[184] Another example of the racialization of groups is revealed by the ever-changing U.S. Census racial classification system. The 1890 Census included White, Black, Mulatto, Quadroon, Octoroon, Chinese, Japanese and Indian. Lopez, *supra* note 18, at 36. Over time, racial categories have been created, eliminated and altered. The 1990 Census included Black, White, Indian, Eskimo, Aleut, several choices under "Asian or Pacific Islander," "Hispanic," and "Other race." Toro, *supra* note 176, at 1232. Multiracial groups, in addition, have launched a drive for a "multiracial" category on the 2000 Census. *See* Alethea Yip, *One or the Other*, ASIANWEEK, Jan. 3, 1997, at 14.

[185] OMI & WINANT, *supra* note 18, at 56.

[186] *Id.* For Omi and Winant, racial projects connect representation and structure, linking "what race means in a particular discursive practice and the ways in which both social structures and everyday experiences are racially organized, based upon that meaning." *Id.*

[187] *Id.* The authors emphasize that racial projects exist in an historical context, "descending from previous conflicts." *Id.* at 58.

[188] *Id.* at 60.

[189] Eric K. Yamamoto, Moses Haia and Donna Kalama, *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 6 (1994) [hereinafter Yamamoto, *Cultural Performance*]. From this view, courts serve as forums for processing complex, conflicting social-cultural narratives with historical foundations. *Id.* at 8. Law is "an integral part of political-cultural processes that generate 'structures of meaning that radiate throughout social life and serve as part of the material people use to negotiate their understanding of everyday events and relationships.'" Yamamoto, *Critical Race Praxis*, *supra* note 41, at 842 (quoting David M. Trubek, *The Handmaiden's Revenge: On Reading and Using the Newer Sociology of Civil Procedure*, 51 LAW AND CONTEMP. PROBS. 111, 124 (1988)).

into public messages or socio-legal narratives about groups, institutions, and relationships.[190] Law functions as a "cultural system that structures relationships throughout society, not just those that come before courts."[191] Cultural representations, or stories about a racialized group's subordinate status thus become inscribed in legal text[192] and imprinted into social structure, thereby sanctioning a racial hierarchy.[193] In this manner, law and cultural representations unite to create and perpetuate racial meaning[194] — law becomes a racialization mechanism and functions to perpetuate a racialized social structure.[195]

Arizona's English Only legislation and its exclusion of racialized groups is an example of racialization. As discussed in Part V, cultural representations by proponents of the English Only movement attempt to define who is "American" by demarcating who belongs and who does not belong to the U.S. polity largely along racial lines.[196] In this fashion, English Only legislation creates and shapes racial meaning and functions to perpetuate a racialized social structure.[197]

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[190] A prevailing cultural narrative can be sustained or contested through the sculpting and retelling of stories through court process. Yamamoto, *Cultural Performance*, *supra* note 189, at 21. Courts serve as locations to illuminate institutional power arrangements, tell dominant stories and counter-stories to refute dominant narratives. *Id.* at 27. *See also* Gerald Torres and Kathryn Milun, *Translating* Yonnondio *by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625 (1990); Richard Delgado, *Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1988).

[191] Yamamoto, *Critical Race Praxis*, *supra* note 41, at 844 (quoting Guyora Binder, *Beyond Criticism*, 55 U. CHI. L. REV. 888, 889 (1988)).

[192] *See* ARNOLD KRUPAT, ETHNO-CRITICISM: ETHNOGRAPHY, HISTORY & LITERATURE 133 (1992).

[193] *See* Yamamoto, *Critical Race Praxis*, *supra* note 41, at 843-44 (arguing that dominant socio-legal narratives legitimize systemic oppression of racialized minorities); Amicus Curiae Brief of Hawai'i Civil Rights Commission, Native Hawaiian Legal Corporation, Na Loio No Na Kanaka and Native Hawaiian Advisory Council in Support of Affirming the Judgment at 3, Yniguez v Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) (asserting that Arizona's English Only amendment "is designed to achieve a false sense of unity through an apparently homogenous polity by rendering invisible those who do not look and talk like 'Americans.'"). *See also* OMI & WINANT, *supra* note 18, at 84.

[194] *See* Yamamoto, *Critical Race Praxis*, *supra* note 41, at 842.

[195] *Id.* at 844.

[196] *See* Amicus Curiae Brief of Hawai'i Civil Rights Commission, et al., in Support of Affirming the Judgment at 3, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) (arguing that Article 28 defines along racial lines who can participate in the polity). *See infra* Part V.B.2.

[197] *See* Amicus Curiae Brief of Hawai'i Civil Rights Commission, et al., in Support of Affirming the Judgment at 22, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) *See also* OMI & WINANT, *supra* note 18, at 55. While representational and structural factors are intertwined and occur simultaneously, this Comment separates the two in order to carefully dissect the English Only debates, defended in cultural terms, but racially coded. *See infra* Part V.B.

A. Cultural Representation

Cultural representations of groups are central to the process of racialization. Culture is a "system of inherited conceptions expressed in symbolic forms by means of which [people] communicate, perpetuate, and develop their knowledge about attitudes toward life."[198] These conceptions in turn "serve as part of the material people use to negotiate their understanding of everyday events and relationships."[199] Cultural representation involves the attachment of cultural images to generally recognized racial groups, thereby interpreting events and intergroup dynamics and imbuing those events and groups with racial meaning.[200] At one level, cultural representations can be blatantly racialized. These include representations of the black crack dealer,[201] the sinister Chinese,[202] the lazy Mexican[203] or the white man who can't jump.[204] These widely held racial stereotypes provide people with "common sense" explanations of our everyday experiences and perceptions.[205] Organizations and institutions at the same time draw upon "common" racial meanings to support these stereotypes — hiring Asian Americans as midlevel managers, for example, because they follow orders and don't make waves.[206]

On a deeper level, cultural representations can involve seemingly neutral cultural depictions that impart non-neutral racial meanings. In this sense, externally neutral debates couched in cultural terms can be racially coded.[207] Culture-based arguments that avoid race and ethnicity have implications that

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[198] Calmore, *Multicultural World*, *supra* note 175, at 2182 (quoting CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 89 (1973)).

[199] Yamamoto, *Critical Race Praxis*, *supra* note 41, at 884-85 (quoting David M. Trubek, *The Handmaiden's Revenge: On Reading and Using the Newer Sociology of Civil Procedure*, 51 LAW AND CONTEMP. PROBS. 111, 124 (1988)). Dominant culture, according to Yamamoto, "informs how dominant groups think about and act upon race." ERIC K. YAMAMOTO, RACE, CULTURE AND RESPONSIBILITY: INTERRACIAL JUSTICE IN POST-CIVIL RIGHTS AMERICA [hereinafter YAMAMOTO, INTERRACIAL JUSTICE] (forthcoming 1997) (manuscript on file with author).

[200] OMI & WINANT, *supra* note 18, at 60.

[201] *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 85-88 (1991).

[202] WEI, *supra* note 181, at 48 (exploring evolution of Asian American stereotypes in America).

[203] RONALD TAKAKI, A DIFFERENT MIRROR (1993).

[204] OMI & WINANT, *supra* note 18, at 59.

[205] *Id.* at 54. *See also* Calmore, *Racialized Space*, *supra* note 176, at 1242. Linda Krieger asserts that racial stereotypes, as unconscious forms of bias, affect intergroup judgment and decisionmaking. Krieger, *supra* note 177, at 1194.

[206] *See generally* Yamamoto, *Critical Race Praxis*, *supra* note 41.

[207] *See* GOLDBERG, *supra* note 117, at 73; Hing, *supra* note 40, at 874.

are distinctly race-based.[208] In the context of the English Only debate, for example, racially-coded cultural representations include the notions of "linguistic ghettos,"[209] "cultural apartheid"[210] "ethnic separatism"[211] or the American "melting pot."[212] As discussed below, these statements, although outwardly "cultural" are ideologically racial — they implicitly call for allocation of resources along racial lines.[213] In this manner, "culture [is] a surrogate for race."[214] Racial formation theory thus reveals that race and culture are dependent and connected. Racial formation also illustrates how racialized groups are harmed through negative cultural images, even while proponents of those images proclaim, "I'm not racist, I'm talking about culture."[215]

Cultural representation occurs on both levels within the English Only debate. At the "cultural" level, supporters of the Arizona English Only statute professedly talk about "American" culture, not race. They argue that in order to be "American" one must speak only English.[216] On another level, blatant, disparaging cultural representations of Latinos reveal the ill-will of some English Only supporters.[217] As Professor Hing observes, both arguments share the same philosophical race-based core.[218]

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[208] Hing, *supra* note 40, at 874.

[209] *See* Teri Bailey, *High Court Begins Debate on 'English Only' Issue*, HOUST. CHRON., Dec. 5, 1996, at 1.

[210] Brief of FLA-187 Committee, et al., as Amici Curiae in Support of Petitioners at 3, Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

[211] *See* Brief Amicus Curiae of Arizona Civil Liberties Union, Los Abogados Hispanic Bar Assn., League of United Latin American Citizens, et al., in Support of Appellants' Appeal at 30, Ruiz v. Arizonans for Official English, (No. 1 CA-CV 94-235) (Maricopa County Superior Court No. CV 92-19603) (quoting Arizona Publicity Pamphlet at 26).

[212] Brief of FLA-187 Committee, et al., as Amici Curiae in Support of Petitioners at 12, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

[213] Yamamoto, *Critical Race Praxis*, *supra* note 41, at 848.

[214] YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 199, at 67. Professor Angela Harris also observes that "the exploration of race as culture examines how racial 'others' are created in society and how the meanings of 'race' change over time." Harris, *Jurisprudence of Reconstruction*, *supra* note 144, at 770.

[215] *See* Yamamoto, *Critical Race Praxis*, *supra* note 41, at 847-88 (asserting that antidiscrimination law prohibits discrimination based on skin color, but allows culture discrimination).

[216] *See* Brief of FLA-187 Committee, et al., as Amici Curiae in Support of Petitioners, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) (calling for linguistic unity to counteract non-assimilation and balkanization); Brief of the Washington Legal Foundation, et al., Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) (invoking images of traditional America and threats to national unity in order to advocate a common culture and language).

[217] *See infra* Part V.B.1.

[218] Hing, *supra* note 40, at 875.

B. Social Structure

The racialization process also affects social structure. Social structure involves the standardization and routinization of race, and the reorganization and redistribution of resources along racial lines.[219] In a racial formation context, institutional structures of society serve to clarify racial representations and create racial hierarchies within an historical context.[220] Social situations give rise to structures of inequality that sustain certain notions of race.[221] Outlawing non-English languages from everyday governmental and political activities determines along racial lines who is allowed or not allowed to participate in the American polity[222] — for example, excluding many of Yniguez's Latino clientele from challenging medical malpractice. As Omi and Winant suggest, "[t]hrough policies which are explicitly or implicitly racial, state institutions organize and enforce the racial politics of everyday life."[223] In this sense, "[t]he racial order is equilibrated by the state — encoded in law, organized through policy-making, and enforced by a repressive apparatus."[224] English Only legislation, for example, effectively bars racial, ethnic and language minorities from access to governmental assistance and political participation.[225] Article 28, likewise, would prevent many government employees from speaking Spanish to clients, thereby denying many Latinos governmental services in a language they could understand.

Social structures and everyday experiences are racially organized, based upon cultural representations. This, in turn, creates racial meaning. Drawing upon this notion, the following Section offers a workable legal principle for determining whether a classification is racial for strict scrutiny purposes.

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[219] OMI & WINANT, *supra* note 18, at 56.

[220] *Id.*

[221] Calmore, *Racialized Space*, *supra* note 176, at 1242.

[222] *See* Matsuda, *supra* note 57, at 1367 (observing the existence of a "status hierarchy of accents.").

[223] OMI & WINANT, *supra* note 18, at 83-84.

[224] *Id.* at 84.

[225] *See, e.g.*, Jeff Shain, *With 'Official English' Law, Some May Be Officially Out of Luck*, S.F. CHRON, Dec. 1996, at A1 (reporting that many Latinos in Arizona would be deprived of services in Spanish at medical clinics, state-assistance offices and schools).

V. SUBSTANTIAL RACIALIZATION: A PROPOSAL

A. A Definition

Based on the foregoing discussion of *Yniguez* and the social construction of race, and in light of the inadequacy of the current biological notion of race relied on by courts and lawyers, this Comment proposes an alternative principle for determining whether a particular governmental classification is racial for strict scrutiny purposes: A governmental classification is "racial" for strict scrutiny purposes if, considering all the circumstances, the classification is substantially racialized. This principle entails acknowledgment of the social construction of race and racial formation analysis.[226] It requires focusing not only on legislators' elusive "intent," but on all of the circumstances giving rise to the framing, adoption and implementation of the classification, including the text of the classification, its official history, the surrounding political rhetoric, the tenor of judicial pronouncements, and the classification's overall cultural and social structural effects.[227] In short, this means inquiring into whether the classification is imbued with racial meaning and impact.[228] The substantial racialization

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[226] *See* OMI & WINANT, *supra* note 18 (racial formation).

[227] In some ways, the Seattle-Hunter test, recently applied by U.S. District Court Chief Judge Thelton Henderson in *Coalition for Economic Equity v. Pete Wilson*, is similar to the "substantial racialization" test. *See* Coalition for Economic Equity v. Pete Wilson, 1996 WL 734682 (N.D. Cal. 1996) (No. C 96-4024 TEH) (preliminarily enjoining enforcement of California's Proposition 209). The Seattle-Hunter doctrine states that "if an initiative removes the authority to address a racial problem — and only a racial problem — from the existing decisionmaking body, in such a way as to burden minority interests, it must be examined for equal protection purposes as if it were a racial classification." *Id.* at 17. This requires the court to apply a two-pronged test: first, whether there is a "racial focus," in that the initiative singles out for special treatment issues that are associated with racial minority interests; and second, whether that initiative with a "racial focus" restructures the political process to the detriment of minorities. *Id.* at 17-22. According to the first prong of the test as Henderson applied it, the court must find a "racial focus" by examining the characterization of the measure (by analyzing, for example, the ballot pamphlets), the election results, the response by government officials after passage of the measure, the effect of the measure and its impact on the political process. *Id.* This test is limited to instances in which an initiative restructures the political process. *Id.* Even while the "racial focus" test implicitly draws upon racialization theory, it does not set forth a theoretical framework for determining whether a classification is imbued with racial meaning. In contrast to the racial focus test, the "substantial racialization" test suggested by this Comment is broader and makes explicit that racialization is the underlying theory. It identifies the existence of racial meaning in neutral classifications, thereby triggering strict scrutiny.

[228] This proposed principle draws upon Professor Charles Lawrence, III's "cultural meaning" test which addresses unconscious wrongdoing to "trigger[] judicial recognition of race-based behavior." *See* Lawrence, *Unconscious Racism*, *supra* note 38, at 324. According to Lawrence, a large part of the behavior that produces racial discrimination is influenced by

principle thus requires assessment of explicit racial representations, implicit racial representations coded in the ostensibly neutral terms of "culture," and social structural effects along racial group lines.

Central to the principle is the concept of racialization — the "extension of racial meaning to a previously racially unclassified relationship, social practice, or group."[229] As described earlier, the racialization process is essential to racial formation theory. According to racial formation theory, race is created, shaped and transformed by social and political forces which in turn creates racial and cultural meaning.[230] As races are continually formed and reformed they are imbued with social meaning. The substantial racialization framework draws upon this process in its scrutiny of the circumstances surrounding a governmental classification. Interrogation of all of the circumstances giving rise to the framing, adoption and implementation of a classification is thus for the purpose of ascertaining the classification's "substantial" racial meaning and effects.

The substantial racialization principle is a preliminary approach meant to provide a starting point rather than conclusive solutions. When applied, it illuminates the underlying racialized character of Article 28, *Yniguez*, and the surrounding English Only rhetoric by revealing the ways in which English Only laws determine along racial lines which groups can participate in the United States polity.

B. Application

This Section elaborates on the substantial racialization principle by applying it to the *Yniguez* case and its surrounding English Only rhetoric.

"unconscious racial motivation." *Id.* at 322. He posits that

> beliefs [transmitted by the culture] . . . are so much a part of the culture that . . . they seem part of the individual's rational ordering of her perceptions of the world. The individual is unaware, for example, that the ubiquitous presence of a cultural stereotype has influenced her perception that blacks are lazy or unintelligent. Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings . . . .

Id. at 323. The cultural meaning test requires evaluation of a governmental classification "to determine whether it conveys a symbolic message to which the culture attaches racial significance." *Id.* at 324. As such, it requires the consideration of the historical and social context in which the decision was made and carried out. *Id.* at 356. A finding that the culture thinks of a governmental action in racial terms would be a determination that the governmental actors acted because they were influenced by racial considerations, even though they were not aware of their racial beliefs. *Id.* The Court would then apply strict scrutiny. *Id.* Lawrence asserts that the cultural meaning test "focus[es] our attention on the correct question: Have societal attitudes about race influenced the governmental actor's decision?" *Id.* at 328. *See also* Yamamoto, *Rethinking Alliances*, *supra* note 176, at 61-64 (differential racialization).

[229] Omi, *supra* note 20, at 203.

[230] OMI & WINANT, *supra* note 18, at 55-56.

This Comment concludes that Article 28 is substantially racialized and should therefore be subject to strict scrutiny review. To illustrate the application of the framework in determining whether a classification is racial for strict scrutiny purposes, three aspects of the *Yniguez* case and surrounding English Only debates will be analyzed. These aspects are: clear instances of racial representations, racialized meanings embedded in "cultural" discourse, and social structural effects. Analysis of these aspects collectively reveals the "substantial racialization" of the Article 28 classification.

1. Clear Cases of Racialized Discourse

An essential part of determining whether a classification is substantially racialized involves an examination of clear instances of racialized discourse. This means examining the overtly racial political rhetoric surrounding the English Only movement and Article 28. Because of the restrictive "discriminatory intent" test[231] and increasing sophistication among supporters of English Only, supporters refrain from speaking in explicitly racial terms even when what they say has racial meaning.[232] It is thus difficult to find explicitly racial statements in support of English Only.[233] Nevertheless, some presidential hopefuls, anti-immigrant proponents and writers frame the debate in blatantly racial terms.[234] Some express a fear of a nation overrun by brown-skinned non-English speaking Asian and Latino immigrants.[235] Others link non-English languages to unwanted immigrant groups and argue for elimination of those languages.[236] Still others assert that Latinos deliberately

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[231] *See* Washington v. Davis, 426 U.S. 229 (1976); Personal Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979).

[232] *See* Matsuda, *supra* note 57, at 1397 (asserting that "[t]he angry insistence the 'they' should speak English serves as a proxy for a whole range of fears displaced by the social opprobrium directed at explicit racism."). *See also* Lawrence, *Unconscious Racism*, *supra* note 38, at 324; Krieger, *supra* note 177.

[233] Authors have identified explicit racial representations of both English Only and anti-immigrant debates. *See, e.g.*, Johnson, *supra* note 42, 114; Wu, *supra* note 42, at 38; Hing, *supra* note 40, at 863-64; Califa, *supra* note 30, at 326-27.

[234] *See, e.g.*, PETER BRIMELOW, ALIEN NATION (1995).

[235] *Id.*

[236] *See* Califa, *supra* note 30, at 328 (arguing that language is a proxy for unwanted racial groups). *See also* Matsuda, *supra* note 57, at 1354-56. A passage quoted in the Amicus Brief of the Arizona Civil Liberties Union also illustrates a similar argument.

> [D]ark skin color and Spanish when spoken by Mexicans went together in the minds of Anglos and so the very language itself became a badge of inferiority. Inversely, whiteness, English and superior attributes went hand in hand. Thus, when Mexicans were rejected on racial grounds, so was the language.

See Brief Amicus Curiae of Arizona Civil Liberties Union, et al., in Support of Appellants' Appeal at 30, Ruiz v. Arizonans for Official English, (No. 1 CA-CV 94-235) (Maricopa County

refuse to learn English as part of a political plan of de-assimilation.[237] Latinos are often represented as "illiterate, impoverished, dirty, backward, criminally inclined, . . . dark-complexioned, and now pushing cocaine and marijuana north for all they are worth."[238] These widely held racial stereotypes provide "common sense" explanations to explain everyday experiences and perceptions.[239] And proponents of English Only draw upon these "common" racial meanings to support these stereotypes — fashioning English Only laws in part to combat the perceived racial threat to the English language and "American" culture.

John Tanton, founder of U.S. English,[240] the advocacy group responsible for financing the Article 28 campaign, warned in 1986 of a "Latin onslaught."[241] In a highly controversial memo, he announced the white majority's refusal to peaceably give up its political power to a brown-skinned group "that is simply more fertile."[242] This rampant fertility of Latinos, he feared, would cause "those with their pants up [to] get caught by those with their pants down."[243] Echoing the sentiments of several English Only proponents, Tanton's blatantly racist statements revealed both his belief that the only legitimate culture is white, and his fear that Latinos pose a threat to white dominance.[244] He connected language to immigrant groups, maintaining that "the question of bilingualism grows out of U.S. immigration policy" because the drastically increasing Latino population has overwhelmed "the assimilative capacity of the country."[245] Tanton drew parallels between South Africa and Southern California's increasing minority population, suggesting that powerful, wealthy whites and Asians speaking a common language would have to coexist with the multitudes of poor, non-English speaking, uneducated Latinos and Blacks.[246] These images of apartheid suggest a racialized social structure in

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Superior Court No. CV 92-19603) (quoting F. ARTURO ROSALES, "HABLAR EN CRISTIANO": THE SPANISH LANGUAGE AND MEXICANS IN THE UNITED STATES, 1848-1950 30 (1990)).

[237] *See The Balkans, U.S.A.*, NATIONAL REVIEW, Mar. 5, 1990, at 19.

[238] Califa, *supra* note 30, at 328 n.227 (quoting McArthur, *Worried About Something Else*, 60 INT'L J. SOC. LANG., 87, 91 (1986)). McArthur notes that even though these fears are not rational, "it can help to make fears tidy and manageable if one talks in an apparently rational manner about the Constitution and safeguarding the nation's language—English." *Id.* (quoting McArthur at 91).

[239] OMI & WINANT, *supra* note 18, at 59. *See also* Calmore, *Racialized Space*, *supra* note 176, at 1242.

[240] Crawford, *supra* note 61, at 4.

[241] *Id.* (quoting John Tanton, memo to WITAN IV at 2).

[242] *Id.*

[243] *Id.*

[244] Califa, *supra* note 30, at 326.

[245] Crawford, *supra* note 61, at 4 (quoting Tanton).

[246] *See* Califa, *supra* note 30, at 27 n.222 (quoting Tanton).

which a Latino and African American underclass, while vastly outnumbering whites, will remain economically, politically and socially subordinate. Finally, he asked, "As Whites see their power and control over their lives declining, will they simply go quietly into the night?"[247] Easily characterized as "racialized," statements such as these place race as the centerpiece of the English Only discourse.

Other English Only proponents blatantly frame the debate in racial terms. Terry Robbins, head of Dade Americans United to Protect the English Language and former spokesperson for U.S. English, implied that Latinos were encroaching upon America's homogeneous core white culture.

> If Hispanics get their way, perhaps someday Spanish could replace English here entirely. . . . [I]t's precisely because of the large numbers of Hispanics who have come here, that we ought to remind them, and better still educate them to the fact that the United States is not a mongrel nation. We have a common language, it's English and we're damn proud of it.[248]

"Mongrel" clearly conjures images of the menacing savage Indian, the sinister ponytailed Chinese or the barbarous brown-skinned Hawaiian, and echoes early fears of diminishing white racial purity.[249]

By reintroducing this vision of American as racially white, anti-immigrant[250] and anti-racial minority, and by demonizing immigrants and cultivating perceptions of an American culture overrun by hordes of non-white immigrants unable or unwilling to learn English, English Only proponents use Article 28 as a vehicle to determine along racial lines who belongs in American society and who does not. As these examples suggest, blatant racial representations and interpretations of racial dynamics extend racial meaning to Article 28. More difficult to detect are those racialized agendas cloaked in seemingly benign cultural assertions. In those situations, supporters ideologically mean race, but speak in the rhetoric of "culture."

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[247] Crawford, *supra* note 61, at 4 (quoting Tanton).

[248] Califa, *supra* note 30, at 321 n.183 (quoting presentation by Terry Robbins, Florida Int'l Univ. (Oct. 8, 1987)).

[249] *See* RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE 16 (1989). [hereinafter TAKAKI, STRANGERS].

[250] Patrick Buchanan, conservative republican candidate in the 1992 presidential election, proclaimed

> I think God made all people good, but if we had to take a million immigrants in, say Zulus, next year, or Englishmen, and put them in Virginia, what group would be easier to assimilate and would cause less problems for the people of Virginia?

Hing, *supra* note 40, at 863-64 (quoting *In Buchanan's Words*, WASH. POST., Feb. 29, 1992, at A2).

2. *Culture as Surrogate for Race*[251]

In contrast to the easily identifiable racialized discourse in the previous Section, racialized meanings embedded in "cultural" representations are more difficult to detect. This subtle cultural racialization of the English Only debate allows moderates to argue in favor of English Only legislation without invoking overtly racial images. While explicit racial remarks of the far right can simply be dismissed by some as extreme, conservative, and racist,[252] cultural representations with racial undertones are more difficult to unpack and therefore more difficult to address. At this deeper level, "mainstream" English Only supporters couch the debate about who belongs and who can participate in economic and cultural terms, claiming to speak of "American" culture, not race. They argue that in order to be "American" one must speak English and only English.[253]

Warning of "rampant bilingualism," "linguistic ghettos" and "language rivals," English Only advocates thus argue explicitly for reservation of American culture[254] while racializing the issue by rhetorical sleight of hand: "ghetto" refers to inner city African Americans; "rivals" implicates Black, Latino and Asian gangs; and "rampant" conjures images of hordes of Mexicans crossing the Southwest border. In these situations, culture is a surrogate for race, and more particularly for racial exclusion.[255] As Professor Hing aptly observes, "[g]iven the huge numbers of immigrants who enter this country from Asian and Latin American countries whose citizens are not white and who in most cases do not speak English, criticism of the inability

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[251] YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 199, at 25.

[252] *See supra* text accompanying notes 233-50. John Crawford observes that the English Only campaign is not an extreme fringe movement, but one with a broad following. Crawford, *supra* note 61, at 4.

[253] *See* Brief of FLA-187 Committee, et al., as Amici Curiae in Support of Petitioners, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974); Brief of the Washington Legal Foundation, et al., *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

[254] According to Professor Juan Perea, the "American" culture they seek to protect is largely white, English-speaking and Anglo-Saxon. *See* Perea, *supra* note 30, at 276 (arguing that the English language is a key component of America's core white culture); TAKAKI, STRANGERS, *supra* note 249, at 7 (noting that "American" is often equated with "white."). To many English Only supporters, a threat to mainstream American culture by racialized outsiders means, at bottom, a threat to the white race. Perea, *supra* note 30, at 276.

[255] *See* GOLDBERG, *supra* note 117, at 73 (describing notion of cultural race). Speaking in terms of culture legitimates the negation and exclusion of racialized non-English speaking groups. For similar arguments *see* Amicus Curiae Brief of Hawai'i Civil Rights Commission, et al., in Support of Affirming the Judgment at 3, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) (recognizing Article 28's negation of nonwhite racial and cultural groups).

to speak English coincides neatly with race."[256] Interrogation of the English Only movement's culture-cloaked racialized discourse is thus an essential part of substantial racialization analysis.

The official Arizona Publicity Pamphlet, prepared and distributed by the Arizona Secretary of State, urged the Arizona electorate to vote for Proposition 106, the proposed English Only amendment.[257] The pamphlet was the only official means to familiarize Arizona voters with the ballot proposition.[258] The pamphlet's racialized political rhetoric urged voters in cultural terms to "stop [the] erosion of our common bond . . . threatened by language conflicts and ethnic separatism."[259] "Our common bond" refers to a mainstream, homogenous American culture, and "language conflicts" implies hostility toward those who do not speak or act like "Americans." "Ethnic separatism" suggests that Latinos and other non-English speaking groups deliberately choose to "colonize" themselves, demanding "Official Spanish" and "official bilingualism" rather than learn English.[260] By arguing for protection of common "American" customs and values in externally neutral language, Proposition 106 supporters implicitly called for allocation of resources along racial lines.

The Arizona Legislative Council's argument in favor of Proposition 106 likewise pushed for the preservation of a homogenous polity by excluding those who do not speak or act like "Americans."

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[256] Hing, *supra* note 40, at 874. Amicus briefs likewise recognized the "thinly disguised" racial character of Article 28. *See, e.g.*, Brief Amicus Curiae of Arizona Civil Liberties Union, Los Abogados Hispanic Bar Assn., League of United Latin American Citizens, et al., in Support of Appellants' Appeal, Ruiz v. Arizonans for Official English, (No. 1 CA-CV 94-235) (Maricopa County Superior Court No. CV 92-19603); Brief of Puerto Rican Legal Defense and Educational Fund, et al., Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

[257] *See* Brief of Amici Curiae Mexican American Legal Defense and Education Fund; American Civil Liberties Union of Northern California, Inc. and Legal Aid Society of San Francisco, Employment Law Center, Ruiz v. Arizonans for Official English, (No. 1 CA-CV 94-235) (Maricopa County Superior Court No. CV 92-19603). The pamphlet included the official title, text and legislative analysis of Proposition 106 and arguments for and against Proposition 106 by the Legislative Council and private persons and groups. *Id.*

[258] *Id.*

[259] *See* Brief Amicus Curiae of Arizona Civil Liberties Union, et al., in Support of Appellants' Appeal at 30, Ruiz v. Arizonans for Official English, (No. 1 CA-CV 94-235) (Maricopa County Superior Court No. CV 92-19603) (quoting Arizona Publicity Pamphlet at 26). In *Yniguez*, similar arguments were advanced by Arizonans for Official English to promote Article 28. *See* Yniguez v. Arizonans for Official English, 69 F.3d 920, 944 (9th Cir. 1995) (en banc).

[260] *See The Balkans, U.S.A.*, NATIONAL REVIEW, Mar. 5, 1990 at 19. *See also Groups Want to Stop Ads in Spanish*, SAN JOSE MERC. NEWS, Dec. 23, 1985, at 14D (quoting Terry Robbins, spokesperson for U.S. English as saying, "Why does poor Juan and Maria have a problem ordering a Whopper? . . . It isn't that they aren't able to, they don't want to.").

> The State of Arizona is at a crossroads. It can move towards the fears and tensions of language rivalries and ethnic distrust, or it can reverse this trend and strengthen our common bond, the English language.[261]

By warning of the "fears and tensions of language rivalries and ethnic distrust," the Legislative Council's cultural arguments impart non-neutral racial meanings which contribute to the substantial racialization of Article 28. "Fears," "tensions," "rivalries" and "ethnic distrust" are in fact value-laden words about culture that denigrate racial groups: "rivalries" suggests Latino inner city gangs and "ethnic distrust" invokes images of the sinister Asian or illegal Latino. The Council's use of "common bond," like the Arizona Publicity Pamphlet, implies a homogenous polity that excludes those who do not speak or act like "Americans." Linking language and exclusion, supporters of Arizona's English Only legislation characterized non-English speaking minorities as social threats to the American landscape[262] and creators of societal conflict. In this fashion, English Only supporters attached cultural images to generally recognized racial groups, thereby imbuing Article 28 with racial meaning.[263]

Ninth Circuit Judge Fernandez, in his *Yniguez* dissent also justified his support for English Only in terms of culture. In seemingly neutral terms with racialized underpinnings, Fernandez in effect advocated sustaining a "unified" white America. To illustrate his view that "diversity limits unity,"[264] he quoted a passage from *Guadalupe Organization, Inc. v. Tempe Elementary School District*,[265] a case in which the Ninth Circuit held that a school district had no constitutional duty under the Equal Protection Clause to provide bilingual-bicultural education to non-English speaking Mexican-American and Yaqui Indian students.[266]

> Linguistic and cultural diversity within the nation-state, whatever may be its advantages from time to time, can restrict the scope of the fundamental compact. Diversity limits unity.[267]

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[261] *See* Brief of Puerto Rican Legal Defense and Education Fund, et al., as Amici Curiae in Support of Respondents at 10-11, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) (quoting Arizona Publicity Pamphlet at 26).

[262] *See id.* at 11 (exposing racist arguments such as these).

[263] OMI & WINANT, *supra* note 18, at 60.

[264] Yniguez v. Arizonans for Official English, 69 F.3d 920, 959 (9th Cir. 1995) (en banc) (Fernandez, J., dissenting).

[265] 587 F.2d 1022 (1978).

[266] *Id.* at 1027.

[267] *Yniguez*, 69 F.3d at 959 (Fernandez, J., dissenting) (quoting Guadalupe Organization, Inc. v. Tempe Elementary School District, 587 F.2d at 1027).

The passage suggests that in order to create unity, diversity must be eliminated. It implies what Tanton and others have explicitly declared: the only legitimate culture is white. And in order to preserve a "common constellation" of customs and values, we must eliminate the culturally different. Judge Fernandez's quoted reference to 18th century America supports this conclusion.

> In the language of eighteenth century philosophy, the century in which our Constitution was written, the social compact depends on the force of benevolence which springs naturally from the hearts of all men but which attenuates as it crosses linguistic lines. Multiple linguistic and cultural centers impede both the egress of each center's own and the ingress of all others. Benevolence, moreover, spends much of its force within each center and, to reinforce affection toward insiders, hostility toward outsiders develops.[268]

Benevolence, as the passage implies, attenuates as it crosses linguistic lines from the core culture to racialized non-English speaking groups, and legitimate hostility toward outsider groups increases. The *Guadalupe* passage thus implies that culture is a surrogate for race — American culture is "unified" only if it excludes and eliminates culturally different racialized minorities.[269] Interrogation of Article 28's "cultural" discourse illustrates clearly that representations about culture are not neutral; rather they are value-laden, deeply political, and they extend racial meaning to Article 28.[270]

Subtle yet potent racialization of Article 28 is also found in the amicus briefs for Arizonans for Official English. Like many other English Only proponents, amicus groups cloaked ideologically race-based agendas in "neutral" culture-based assertions and argued implicitly for allocation of resources along racial lines.[271] The FLA-187 Committee[272] in its brief asserted that there is a growing tension between "cultural pluralism" and efforts to maintain assimilation.[273] The failure of non-English speaking groups to assimilate into the "American" cultural mainstream, it argued, foreshadows "linguistic and cultural isolation" which in turn causes separatism and balkanization, giving non-white groups political leverage.[274] Warning of the

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[268] *Id.*

[269] *See id.*

[270] *See* OMI & WINANT, *supra* note 18, at 60.

[271] *See* Yamamoto, *Critical Race Praxis*, *supra* note 41, at 848 (observing that many in power positions use cultural difference to justify exclusion of racialized groups from the polity).

[272] Brief of FLA-187 Committee, et al., as Amicus Curiae in Support of Petitioners, Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1996) (No. 95-974). The FLA-187 Committee is a group committed to protecting states' Official English laws. *Id.* at 1.

[273] *Id.* at 3.

[274] *Id.* at 14. Immigration restrictionists, Gary Rubin and Frank Sherry in a recent memorandum likewise argued that those advocating bilingualism "want to do away with the

dangers of "cultural apartheid" and "cultural and linguistic welfare,"[275] the Committee implicitly invoked images of race. "Apartheid" implies a racialized hierarchical structure, and "welfare" conjures images of the urban black "welfare queen" whose poverty flows from her own cultural deficiencies rather than from structural inequality.[276] The FLA-187 Committee maintained that the widely varying views of the "traditional American melting pot" are causing concern over the United States' ability to remain a cohesive political unit. For the Committee, the hallowed place the melting pot idea has held has been undermined[277] — weakened by increasing nonwhite populations in seeming conflict with the dominant core culture.

The conservative Washington Legal Foundation's[278] brief also used externally neutral cultural representations to impart non-neutral racial meanings. The Foundation maintained that the principles upon which this country was founded are accessible "to all men in all times," provided individuals speak only English.[279] It asserted as evidence the cornerstones of the "American" experience: the Mayflower Compact, The Declaration of Independence, The Federalist Papers, the Constitution, the Gettysburg Address and two hundred years of jurisprudence[280] — documents that historically sanctioned a white "American" culture and mandated exclusion of racialized others.[281] The Foundation in effect argued for exclusion of racialized minority groups: "[u]nity comes from a common language and core public culture of certain shared values, beliefs and customs which make us

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English language and everything European." Hing, *supra* note 40, at 875 (quoting Memorandum from Gary Rubin and Frank Sherry, National Immigration Refugee and Citizenship Forum, Apr. 1, 1992).

> America has a language, a history and a culture. It does not want or need to import others. For two hundred years immigrants have come to our shores looking for something better than what they were leaving behind . . . . They neither expect nor want America to turn itself into a banana republic so they can feel more at home.

Hing, *supra* note 40, at 875 (quoting Memorandum from Gary Rubin and Frank Sherry, National Immigration Refugee and Citizenship forum, Apr. 1, 1992).

[275] Brief of FLA-187 Committee, et al., as Amicus Curiae in Support of Petitioners at 3, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

[276] *See* Calmore, *Racialized Space*, *supra* note 176, at 1247-48.

[277] Brief of FLA-187 Committee, et al. as Amicus Curiae in Support of Petitioners at 12, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

[278] Amicus Brief of the Washington Legal Foundation, The Claremont Institute for the Study of Statesmanship and Political Philosophy, 34 Members of Congress, and the State of Nebraska as Amici Curiae in Support of Petitioners, Yniguez v. Arizonans for Official English 69 F.3d 920 (9th Cir. 1995) (No. 95-974). The Washington Legal Foundation is a group committed to opposing intrusions by the federal government upon the states. *Id.* at 1.

[279] *Id.*

[280] *Id.* at 24.

[281] *See* BELL, *supra* note 137, at 6-44; TAKAKI, STRANGERS, *supra* note 249, at 14.

distinctly 'Americans.'"[282] It warned of a new "cult of ethnicity . . . [that] denounce[s] the idea of a melting pot, . . . challenge[s] the concept of 'one people,' and . . . perpetuate[s] separate ethnic and racial communities."[283] This "cult," it claimed, is reversing the "historic idea of a unifying American identity."[284] The brief's own startling language belies the group's racialized understanding of who is "American": concepts embedded in the "American" civic mind "make us, the children of immigrants, the 'blood of the blood, and flesh of the flesh' of the Founders who came before us."[285]

In sum, Article 28 proponents recast unacceptable racial images as acceptable harmless cultural images. Even while proponents attempt studiously to avoid race using externally neutral arguments, their representations are distinctly race-based.[286] And their culture-cloaked racialization is a way to justify excluding certain undesirable racial groups from the polity.

The substantial racialization principle entails interrogation of cultural representations, both blatant and hidden. These representations, along with social structural impacts and effects create, shape and perpetuate substantial racial meaning. Through the *Yniguez* legal and political struggle, race is formed and reformed. Analysis of English Only cultural rhetoric, along with social structural effects, thus points toward the substantial racialization of Article 28.

3. Social Structural Effects

An examination of social structural effects also plays an essential part in ascertaining whether a classification is substantially racialized for strict scrutiny purposes. Social structure involves the reorganization and redistribution of resources along racial lines based on cultural representations, and the creation of racial hierarchies within an historical context.[287] Explicitly or implicitly racial policies enforce everyday racial politics.[288] At the same time, "a racialized social structure shapes racial experience and conditions

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[282] Amicus Brief of the Washington Legal Foundation, et al., as Amici Curiae in Support of Petitioners at 27-28, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) (citing S. Rep. No. 132, 99th Cong., 1st Sess. 7 (1985)).

[283] *Id.* at 26 (quoting Arthur Schlessinger).

[284] *Id.*

[285] *Id.* at 25 (quoting Abraham Lincoln).

[286] *See* Hing, *supra* note 40, at 874.

[287] OMI & WINANT, *supra* note 18, at 56.

[288] *Id.* at 83-84.

meaning."[289] Analysis of social structural effects thus means inquiring into whether the classification has racial impact and effects.

Article 28 has both racial meaning and impact: it determines along racial lines who is allowed or not allowed to participate in the American polity by excluding those deemed less than "American."[290] In effect, English Only laws enacted to counteract the perceived threat to mainstream culture operate to exclude nonwhites from it.[291]

In *Yniguez*, Judge Reinhardt recognized Article 28's disenfranchisement and political marginalization of Latinos and other non-English speaking minorities in Arizona.[292] Writing for the en banc majority, he observed how the amendment sanctions a hierarchical organization by viewing particular groups' language, and therefore their race, as secondary or subordinate.

> [M]onolingual Spanish-speaking residents of Arizona cannot . . . communicate effectively with employees of a state or local housing office about a landlord's wrongful retention of a rental deposit, nor can they learn from clerks of the state court about how and where to file small claims court complaints . . . .[293]

The passage identifies the racialized social structure created and perpetuated by Article 28. Unable to communicate with a housing office, a clerk of a small claims court or a state senator, racialized groups would be abruptly eliminated from America's social and political activity.[294]

The court further recognized that "[t]hose with a limited command of English will face commensurate difficulties in obtaining or providing

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[289] *Id.* at 59.

[290] *See* Amicus Curiae Brief of Hawai'i Civil Rights Commission, et al., in Support of Affirming the Judgment at 4, Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

[291] *See* Brief of Human Rights Watch, Amicus Curiae, in Support of Respondents at 5, Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) (arguing that repression of minority languages is usually "motivated by the desire to repress, marginalize or forcibly assimilate the speakers of those languages, who are often perceived as threats to the political unity. . . .").

[292] Yniguez v. Arizonans for Official English, 69 F.3d 920, 952 (9th Cir. 1995) (en banc) (Reinhardt, J., concurring).

[293] *Id.* at 941. The adverse effects, however, are not limited to Latinos. Indeed, the court recognized that Article 28 would adversely affect Native Americans by "preclud[ing] a legislative committee from . . . questioning a tribal leader in his native language concerning the problems of his community." *Id.* In addition, a Navajo state senator would be unable to "inquir[e] directly of his Navajo-speaking constituents regarding problems they sought to bring to his attention." *Id.*

[294] *See id.* (stating that non-English speaking minorities would be prevented from receiving essential information and ideas).

[essential] information."[295] If all state and local government officials and employees were prohibited from speaking non-English languages, the court reasoned, non-English speaking groups could not obtain information "concerning their daily needs and lives."[296] According to the court, Article 28 had a virtually limitless reach to include civil servants, teachers, town-hall discussions between constituents and representatives and translations of judicial proceedings.[297]

Judge Reinhardt's special concurrence also identified the racial element in Article 28's sweep and revealed most completely its sanction of racialized minorities' subordinate position in the social structure.

> [B]ilingual government clerks would not be able to advise persons who can speak only Spanish — or Chinese or Navajo — how to apply for food stamps, or aid for their children, or unemployment or disability benefits. Public employees would be prohibited from helping non-English speaking residents file complaints against those who mistreat them or who violate their rights or even from helping them secure driver's licenses or permits to open small businesses. Bilingual traffic officers would not be able to give directions to nearby medical clinics or schools.[298]

Chinese, Navajos and Latinos would be disenfranchised,[299] and in effect negated,[300] if the amendment were allowed to remain in effect. He also

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[295] *Id.*

[296] *Id.* at 936. The legislation leaves in place other languages in emergency situations, the requirement of bilingual schooling for children, and disallows English Only rules that conflict with federal laws. ARIZ. CONST. art. XXVIII § 3(2).

[297] *Yniguez*, 69 F.3d at 932. The federal English Only bill recently passed by the House of Representatives also legally sanctions a racialized social order. If implemented, the bill could eliminate tax forms, Social Security forms, tourism brochures, and immigration materials in languages other than English. *See* Marc Lacey, *Translating the English Only Bill*, L.A. TIMES, Aug. 9, 1996, at A3 (reporting on the effects of a federal English Only bill). It could also eliminate, for example, Selective Service information in Spanish, and a U.S. postal pamphlet showing Spanish-speakers how to buy stamps. *Id.* English Only laws such as these could also omit laws requiring translation of consumer contracts and hinder the development of legislative, administrative and judicial reforms to help language minorities. Bender, *supra* note 54, at 1052 (arguing that English Only laws adversely affect consumer protection of Latinos). Most importantly, the Federal bill would eliminate bilingual ballots, a provision added in 1975 to the Voting Rights Act of 1965, thereby reducing voter participation among limited-English speaking racialized groups and excluding them from full participation in the electoral process. *See* Bert Eljera, *Bilingual Voting Under Attack*, ASIANWEEK, May 31, 1996, at 8 (reporting on effects on over 1 million limited English-proficient voters if bilingual ballots are eliminated).

[298] *Yniguez*, 69 F.3d at 952-53 (Reinhardt, J., concurring).

[299] *See* Statement of Juan Perea before the United States Senate, March 7, 1996, 1996 WL 7135995 at *14 (arguing against a proposed Senate federal English Only bill).

[300] *See* Amicus Curiae Brief of Hawai'i Civil Rights Commission, et al., in Support of Affirming the Judgment at 3, Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir.

observed that under Article 28, non-English speaking migrant farm workers would find themselves deprived of almost all government assistance, and "[r]ecent immigrants . . . including many who fled persecution, would find their lives . . . unduly harsh . . . ."[301] The impact on racialized groups is clear: "migrant farm workers" clearly suggests Latinos, and "recent immigrants who fled persecution" implicates Vietnamese, Cambodian and Laotian immigrants.

Judge Reinhardt recognized that the sweeping prohibition of non-English languages would exclude undesirable immigrant groups from all realms: political (communication with representatives, reading and understanding ballots), state governmental (applications for benefits, directions for filing complaints and obtaining permits) and social (directions to clinics or schools, tourism brochures). Article 28 would be a vehicle for excluding groups who do not look and sound like "Americans."[302] In this manner, Article 28 reorganizes and redistributes resources along racial lines, preserving control over the political and social processes for whites and rendering invisible racialized minorities.

The preceding examples reveal the racialized impacts of Article 28 and the English Only movement. They also illustrate how racialization is a product of political and social forces. Finally, they show that despite resort to the rhetoric of "culture," Article 28 determines whether racial groups will be denigrated and "legitimately" cut off from the U.S. polity. Examination of social structural effects, along with other circumstances giving rise to the framing and adoption of the classification, shows how race is created, shaped and transformed by social and political forces and in turn creates racial and cultural meaning.[303] Analysis of the English Only debates using the substantial racialization framework also reveals how law and cultural

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1995) (No. 95-974).

[301] *Id.* at 952-53 (Reinhardt, J., concurring).

[302] ACLU attorney Edward Chen similarly argues that "official English" legislation implies that "those who do not speak English are somehow less than 'official' and thus relegates them to second class status in the eyes of the law." Statement of Edward Chen, Staff Counsel American Civil Liberties Union of Northern California on Civil Liberties Implications of "Official English" Legislation before U.S. Senate, Dec. 6, 1995. Racialization is also identified by the political rhetoric opposing other English Only legislation nationally. During debates on the House floor about the federal English Only bill, Luis Guiterrez, a Democrat Representative, declared that "English Only is the Jim Crow of the 1990s." *See* Mike Dorning, *House Clears English Only Measure After Emotional Debate*, CHIC. TRIB., Aug. 2, 1996, at 3 (describing charged House debates of federal English Only bill). By referring to laws which in the past disenfranchised African Americans, he recognized the racialization of the English Only discourse — Latinos are similarly disenfranchised through English Only's mandate of a racialized social order.

[303] OMI & WINANT, *supra* note 18, at 55-56.

representations unite to create and perpetuate racial meaning[304] and function to perpetuate a racialized social structure.[305] Applying the substantial racialization principle to the *Yniguez* judicial pronouncements, the surrounding political rhetoric and likely social structural effects suggests that Article 28 is substantially racialized and should therefore be subject to strict scrutiny review.

CONCLUSION

This Comment has shown, through Maria-Kelly Yniguez's story, how the law misdefines race for purposes of determining whether strict scrutiny review applies. Maria's story helps to illustrate the limitations of the current biologically-determined legal paradigm of race. It also helps us to rethink the notion of race as socially constructed — changeable, non-neutral, and deeply rooted in political struggle. Maria's story also highlights the need for an alternative framework with which to view facially neutral racial classifications. This Comment has advanced the beginnings of a principle, based on theories of racial formation and the social construction of race, to determine when facially neutral governmental classifications are "substantially racialized" in order to invoke strict scrutiny review. This framework suggests going beyond focusing merely on legislators' elusive "intent" to interrogate all of the circumstances giving rise to the framing, adoption and implementation of the classification. It entails acknowledging the social construction of race and inquiring into whether the classification is imbued with racial meaning. In doing so, the approach seeks to expose the ways in which English Only proponents' racially-coded, culture-based arguments demarcate who belongs and who does not belong to the U.S. polity largely along racial lines.

Not all will embrace this proposed principle of substantial racialization. Paradigm shifts occur over time. The preceding analysis urges others to rethink the concept of racial classifications and work within and beyond traditional legal paradigms to acknowledge race's socially contingent and value-charged nature. This rethinking, of course, extends beyond English Only. It is relevant to other "neutral" racial classifications and to future analysis of other contemporary race issues.

Maria-Kelly Yniguez spoke Spanish on the job. Racially-coded English Only laws silenced her voice. By acknowledging that racial classifications have tacit racial meanings and effects we can unmask "neutral" classifications

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[304] *See* Yamamoto, *Critical Race Praxis*, *supra* note 41, at 842.

[305] *Id.* at 844.

and reveal the racialization of governmental actions shaping the content and character of American society.

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Babbitt v. Youpee: Allotment and the Continuing Loss of Native American Property and Rights to Devise

This land between the worlds is that inexplicable place we all recognize once we experience it, but its nuances slip away and shape-change if one tries to pin them down, except when we use poetry, music, dance . . . or story.[1]

I. INTRODUCTION

The ownership of land and the right to pass that land to our heirs; few concepts strike a more fundamental chord in this country. However, for one group of Americans, ownership and the right to devise are in jeopardy. For Native Americans,[2] these rights rested squarely before the Supreme Court, cloaked in a recent case, *Youpee v. Babbitt*.[3]

Before the concepts of ownership by individuals and exclusivity of use became rooted in the American heritage, the land was used and occupied by Native Americans under a system of communal sharing of territory by members of distinct tribes.[4] The clash of disparate systems of property use has resulted in the disenfranchisement of Native American tribes from their most essential element: their land.[5] The systematic dismantling of tribal land holdings is believed by many to have been delegated to the realm of history books. Unfortunately for the remaining Native Americans, that history is not

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[1] CLARISSA PINKOLA ESTES, WOMEN WHO RUN WITH THE WOLVES (Ballantine Books 1992).

[2] The author recognizes the controversy surrounding terminology used to identify the original occupants of this country. With all due respect to this issue, the author will refer to these individuals as Native Americans throughout much of this note, but because many of the cases with which the note deals use the term "Indians" the author will, for the sake of clarity, occasionally use that term to denote "Native Americans."

[3] 67 F.3d 194 (9th Cir. 1995), *aff'd sub nom* Babbitt v. Youpee, ___ U.S. ___, 117 S. Ct. 727 (1997).

[4] Sizemore v. Brady, 235 U.S. 441, 447 (1914). Tribal property is a form of ownership in common, not analogous to tenancy or other forms of collective ownership known to Anglo-American private property law because an individual tribal member has no alienable or inheritable interest in the communal property holdings. *See, e.g.*, United States v. Jim, 409 U.S. 80 (1972); Minnesota Chippewa Tribe v. United States, 315 F. 906 (Cl. Ct. 1963); Prairie Bank of Potawatomi Indians v. United States, 165 F. Supp. 139 (Cl. Ct. 1958), *cert. denied*, 359 U.S. 908 (1959); Gritts v. Fisher, 224 U.S. 640 (1912); Delaware Indians v. Cherokee Nation, 193 U.S. 127 (1904).

[5] *See, e.g.*, United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). *See also* FELIX S. COHEN, HANDBOOK ON FEDERAL INDIAN LAW, 471 (Strickland et al. eds., 1982) ("Real estate holdings are the single most important economic resource of Indian tribes.").

so distant. As recently as 1983 Congress enacted the Indian Land Consolidation Act forcing small property interests out of the hands of the rightful Native American owners without compensation.[6] Despite a Supreme Court holding that this Act of Congress represents an unconstitutional taking of property,[7] Congress has failed to curb the forced escheatment of Native American property interests and continues to apply escheatment as a solution to a long-standing problem of its own making.[8]

The problem began over a century ago, when newly arriving settlers were hungry for land to satisfy the needs of an expanding new nation.[9] To facilitate in the accumulation of land, Congress adopted a policy to obtain land holdings of the tribes.[10] The policy was known as allotment, the partitioning of Native American territory to individual Native American ownership, and was implemented from the 1880s to the 1930s.[11] The policy freed up surplus land, serving as a way to accumulate much desired Native American-occupied land.[12] As parcels of reservation land were partitioned to Native Americans, the surplus was then ceded to the United States for settlement by land-hungry pioneers moving steadily and persistently westward.[13]

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[6] Pub. L. No. 97-459, Tit. II, 96 Stat. 2517 (codified at 25 U.S.C. § 2201 (1983)).

[7] Hodel v. Irving, 481 U.S. 704, 717 (1987).

[8] Indian Land Consolidation Act, 25 U.S.C. § 2206 (Supp. IV 1986); *see also* Youpee v. Babbitt, 67 F.3d 194 (9th Cir. 1995), *aff'd sub nom* Babbitt v. Youpee, ___ U.S. ___, 117 S. Ct. 727 (1997).

[9] *See, e.g.*, Act of Sept. 30, 1850, ch. 91, § 1, 9 Stat. 544, 558 (1850) (in which Congress appropriated $25,000, when gold was discovered in California, and dispatched commissioners to obtain lands of California Indians).

[10] *See, e.g.*, Dawes Act, ch. 119, 24 Stat. 388-91 (1887) (codified at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 354, 381 (1982 & Supp. IV 1986)).

[11] Although allotment of parcels had occurred through various treaties earlier, the policy was codified in the General Allotment Act of 1887, 24 Stat. 388 (1887) (codified in part at 25 U.S.C. §§ 331-381 (1983)). The General Allotment Act is also known as the Dawes Act named after its sponsor, Senator Henry L. Dawes.

[12] DELOS S. OTIS, DOCUMENTS OF UNITED STATES INDIAN POLICY 90 (Francis Paul Prucha ed., 1990) (citing Report of George W. Manypenny, Commissioner of Indian Affairs from 1853 to 1857, Annual Report, November 22, 1856) ("The quantity of land acquired by these treaties, either by the extinguishment of the original Indian title, or by the re-acquisition of lands granted to Indian tribes by former treaties, is about one hundred and seventy-four millions of acres."); *see also* COHEN, *supra* note 5, at 138. Due to the policy of allotment, approximately 60 million acres were lost to the surplus lands program. *Id.* Desire for Native American territory instigated disharmony between the tribes and settlers: "That the unjustifiable conduct of the [settlers] has most probably been dictated by the avaricious desire of obtaining the fertile lands possessed by the said Indians." OTIS, *supra*, at 12 (citing Report of Henry Knox, Secretary of War, to the Continental Congress, July 18, 1788).

[13] OTIS, *supra* note 12, at 22. President Jefferson's special message to Congress in January of 1803 outlines the prevalent belief that allotment would result in better use of the land: "The extensive forests necessary in the hunting life will then become useless, and they will see

The policy of allotment failed.[14] The Native American tribes were not assimilated;[15] they were isolated. Often the allotted tracts of land were later seized by tax foreclosure sales, or acquired by non-Native Americans, leaving many Native Americans landless and dependent on the federal government for the basic necessities of survival.[16] Congress then eliminated the right of Native Americans to alienate the allotments,[17] trying to prevent the further loss of land from the tribes.[18] Although well-meaning, that policy created a chain reaction of diminishing property and sovereign control for Native Americans.[19] Land interests which could not be sold became splintered

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advantage in exchanging them for the means of improving their farms and increasing their domestic comforts." *Id.* at 22.

[14] Act of June 18, 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-495 (1988)) ("[N]o land of any Indian reservation . . . shall be allotted in severalty to any Indian."). With the Indian Reorganization Act of 1934, Congress officially ended the allotment program and formally repudiated the assimilation policy. *Id.* Much of the land allotted to Native Americans quickly passed to white traders and land companies. *See* COHEN, *supra* note 5, at 130.

[15] *See, e.g.*, OTIS, *supra* note 12, at 220 (citing Meriam Report of 1928). "Some Indians proud of their race and devoted to their culture and their mode of life have no desire to be as the white man is. They wish to remain Indians, to preserve what they have inherited from their fathers, and insofar as possible to escape from the ever increasing contact with and pressure from the white civilization." *Id.*

[16] COHEN, *supra* note 5, at 129-30. Allotment had been attempted on a small scale on several occasions before the enactment of the General Allotment Act. *Id.* In most cases the experiment failed. *Id.* Lands were allotted immediately into individual fee ownership and often the Native American owners, unaccustomed to ownership, lost their lands to speculators, banks or sheriffs' auctions. *Id. See also* OTIS, *supra* note 12, at 225 (citing Annual Report of the Commissioner of Indian Affairs, 1934). "[T]he enactment of the Indian Reorganization Act indicated] that Congress was thoroughly convinced of the allotment system's complete failure and was eager to abandon it as the governing policy." *Id.*

[17] 25 U.S.C. § 461 (1988) ("[N]o land of any Indian reservation . . . shall be allotted in severalty to any Indian."). Initially, alienation of allotted land was not difficult. Congress established a procedure in 1902 allowing adult heirs of an allottee to petition for the sale of the allotment. Appropriations Act of May 27, 1902, ch. 888, § 7, 32 Stat. 245, 275 (codified at 25 U.S.C. § 379). The Burke Act of 1906 authorized elimination of all trust restrictions if an allottee was deemed competent. Ch. 2348, 34 Stat. 182 (codified at 25 U.S.C. § 349). The Appropriations Act of Mar. 1, 1907 permitted the sale of restricted lands of non-competent allottees; the proceeds to be used for the seller's benefit. Ch. 2285, § 1, 34 Stat. 1015, 1018 (codified at 25 U.S.C. § 405). In 1908, the Secretary of the Interior was authorized to issue fee patents to competent heirs of allottees dying prior to expiration of trust period. Act of May 29, 1908, ch. 216, 35 Stat. 444 (1908) (codified at 25 U.S.C. § 404).

[18] Dawes Act, ch. 119, 24 Stat. 388 (1887) (codified in part at 25 U.S.C. §§ 331-381 (1983)). Under the General Allotment Act of 1887, none of the lands would pass into fee status until 1912 at the earliest. *Id.* However, the trust status was later extended indefinitely. *Id.*

[19] OTIS, *supra* note 12, at 225 (citing the Annual Report of the Commissioner of Indian Affairs, 1934). "Congress and the President recognized that the cumulative loss of land brought about by the allotment system, a loss reaching 90,000,000 acres—two-thirds of the land

between heirs.[20] Through generation after generation, property interests inherited by children of tribal members fractionated into small, unusable undivided interests.[21] The allotment system, under its own momentum, continued to weaken the tribal standing and rendered the land remaining in Native American hands useless.[22]

In 1934, Congress attempted to rectify the damage created by the General Allotment Act of 1887 by passing the Indian Reorganization Act.[23] That year Congress abandoned the policy of allotting parcels of lands to individual Native Americans.[24] The damage continued, however, beyond the official denouncement of the allotment policy.[25] Although no further lots were parceled out, the land owned by Native Americans continued to dissipate into smaller and smaller fractional interests.[26] As ownership interests spread to greater numbers of individuals, it became more difficult to use the parcels.[27] Leases, sales, even agricultural uses required the consensus of all owners and the approval of the government.[28]

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heritage of the Indian race in 1887—had robbed the Indians in large part of the necessary basis for self-support." *Id.*

[20] *See, e.g.*, Hodel v. Irving, 481 U.S. 704 (1987); Youpee v. Babbitt, 67 F.3d 194 (9th Cir. 1995), *aff'd sub nom* Babbitt v. Youpee, ___ U.S. ___, 117 S. Ct. 727 (1997).

[21] *See, e.g.*, *Hodel*, 481 U.S. at 707; OTIS, *supra* note 12, at 247 (referring to the 1961 Annual Report of Stewart Udall, Secretary of the Interior):

> Calling attention to the complex problem of "heirship" land allotments owned by numerous Indians who either cannot be located or cannot agree on use of the property, the report advocated transferring these fractionated holdings to the tribe and permitting the latter to compensate the owners through some system of deferred payment.

Id. at 247.

[22] *See Hodel*, 481 U.S. at 707 (describing the failure of the allotment policy and fractionation of allotments).

[23] Indian Reorganization (Wheeler-Howard) Act, Pub. L. No. 73-383, ch. 576, 48 Stat. 984-88 (1934) (codified as amended at 25 U.S.C. §§ 4612-479 (1982 & Supp. IV 1986)).

[24] *See* OTIS, *supra* note 12, at 225 (citing the Annual Report of the Commissioner of Indian Affairs, John Collier, 1934):

> Congress and the President recognized that the cumulative loss of land brought about by the allotment system, a loss reaching 90,000,000 acres–two-thirds of the land heritage of the Indian race in 1887–had robbed the Indians in large part of the necessary basis for self-support.

Id.

[25] *See, e.g.*, Hodel v. Irving, 481 U.S. 704 (1987); Youpee v. Babbitt, 67 F.3d 194 (9th Cir. 1995), *aff'd sub nom* Babbitt v. Youpee, ___ U.S. ___, 117 S. Ct. 727 (1997).

[26] *Id.*

[27] *See, e.g.*, *Hodel*, 481 U.S. at 707.

[28] 25 U.S.C. § 177 (1983) ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.").

By the early 1980s, the problem was so severe that action was needed, and that action came in the form of the Indian Land Consolidation Act, passed by Congress in 1983.[29] The Act attempted to halt fractionation by forcing escheatment of small fractional interests to the federally recognized tribes.[30] In this way, Congress hoped to consolidate the fractional interests and vest them in tribal ownership.[31] However, this action taken by Congress was problematic and caused new controversy. The statute, through its provision of forced escheatment, effectively abolished both the descent and devise of the small fractional interests. Most importantly, Congress did not provide for compensation to the owners for the escheated interests.[32]

Under examination by the Supreme Court in *Hodel v. Irving*,[33] the Indian Land Consolidation Act was deemed unconstitutional and was held tantamount to an uncompensated taking under the Fifth Amendment.[34] Aware of the constitutional problems of the Act even before *Hodel*, Congress revised the Act in 1984,[35] hoping to solve the pressing problem of fractional interests and yet remain within the purview of the Constitution.[36] The amended Act,

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[29] 25 U.S.C. §§ 2201-2211 (1982 & Supp. IV 1986).

[30] Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, Tit. II, 96 Stat. 2517 (1984) (codified at 25 U.S.C. § 2201 (1984)). Section 207 of the Act provided that: "no undivided fractional interest . . . shall descendent [sic] by intestacy or devise, but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage . . . and has earned . . . less than $100 in the preceding year . . . ." *Id.*

[31] *Hodel*, 481 U.S. at 709.

[32] Indian Land Consolidation Act, 25 U.S.C. § 2201 (1983). In 1982, the Senate considered a bill that authorized the Devil's Lake Sioux Tribe of South Dakota to adopt a land consolidation plan, subject to the approval of the Secretary of the Interior. S. 503, 97th Cong., 2d Sess. (1982). In that bill, the tribe was to compensate individual owners for any fractional interests it might acquire. *Id.* The bill did not contain an escheatment provision. *Id.* The House of Representatives added section 207 to the Senate bill. H. R. Rep. No. 908, 97th Cong., 2d Sess. 5, 9, *reprinted in* 1982 U.S.C.C.A.N. 4415, 4419. The Senate accepted the addition without hearings or discussion of the escheat provision. 128 CONG. REC. S. 15, 568-70 (daily ed. Dec. 19, 1982). The Consolidation Act specifically provided that fractional interest acquired by a tribe must be purchased for a fair price. Indian Land Consolidation Act, Pub. L. No. 97-459, §§ 204-06, 96 Stat. 2517, 2519 (1983). Yet, section 207 was silent on compensation. Congress even omitted a grace period which gave owners of fractional interests an opportunity to avoid the escheatment by consolidating their interests with other owners. *Id.*

[33] 481 U.S. 704 (1987).

[34] *Id.* at 717; U.S. CONST. amend. V. "[N]or shall private property be taken for public use, without just compensation." *Id.*

[35] Indian Land Consolidation Act, 25 U.S.C. § 2206 (Supp. IV 1986).

[36] *See* Hodel v. Irving, 481 U.S. 704 (1987). Although Congress had amended the Act in 1984, prior to the Supreme Court's consideration of this issue in its 1987 Hodel v. Irving decision, the Supreme Court expressly refused to examine the amended Act, stating that the escheated interests involved in the *Hodel* action were escheated under the original Act. *Id.* at 710 n.1.

however, still provided for forced escheatment.[37] The Supreme Court recognized the need to comment on the amended statute by granting *certiorari* in *Youpee v. Babbitt*,[38] the Ninth Circuit case that addressed the amendment which the Court refused to consider in *Hodel*.[39]

This note will consider the impact of the Supreme Court decision in *Babbit v. Youpee*, in considering the amended Act. *Youpee* was rendered in the context of the allotment policy and Native American property rights as outlined through the history of Supreme Court decisions. Thus, to provide a comprehensive background for the Supreme Court's discussion, this note will explore the origin of the allotment policy and the extent of damage resulting from its implementation. Part II of this note will discuss the history of allotment, its failure, and finally, its termination. This section will also examine the role the Supreme Court has played in perpetuating the damage instigated by allotment.

In Part III, this note will examine the concept of regulatory taking of property, including the tests developed by the Supreme Court to identify an unconstitutional regulatory taking. This context is essential in light of the *Hodel* and *Youpee* opinions, in which the Court used a traditional analysis of property takings to conclude that the original Indian Land Consolidation Act was unconstitutional.

Part IV will discuss the Supreme Court's dilemma in reexamining Congress' attempt to solve the fractionation problem. Using *Hodel* as a logical starting point, this section will examine the Supreme Court's options in reconsidering the Act, and will consider the Court's analysis. Part V will conclude that the Supreme Court had no rational choice but to hold the amended Land Consolidation Act unconstitutional. Congress' attempts to correct the flaws in the original version of the Act miss the point: the Act continues to abolish the right of devise and descent to a particular group of individuals. The concerns articulated by the Supreme Court in *Hodel* have not been successfully addressed by the amended Act, as the Ninth Circuit correctly pointed out in *Youpee v. Babbitt*, and as the Supreme Court noted in its recent *Youpee* decision.

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[37] 25 U.S.C. § 2206 (Supp. IV 1986). The amendment of the Indian Land Consolidation Act still required escheatment of small fractional interests; however, it allowed interests to descend to other owners of the same parcels. *Id.* The Act also extended the period from one to five years during which the income generated by the ownership interest would be evaluated. *Id.*

[38] Youpee v. Babbitt, 116 S. Ct. 1874 (1996).

[39] *Hodel*, 481 U.S. at 710 n.1 ("We express no opinion on the constitutionality of § 207 as amended.").

II. HISTORY: ALLOTMENT AND ASSIMILATION

A. Allotment of Native American Land: A Failed Experiment

1. The General Allotment Act of 1887

The General Allotment Act of 1887, also known as the Dawes Act,[40] allotted each member of a recognized Native American tribe an interest in a tract of reservation land. The Act authorized the President of the United States to survey Native American territory and divide the land into "allotments."[41] The central feature of the General Allotment Act was the allotment of reservation land to individual Native Americans.[42] It was commonly believed that tying the Native American to a particular parcel of land would encourage him to leave his nomadic existence for a more "civilized," domestic way of life.[43] In recognition of prior failed attempts to allot Native American lands in fee,[44] Congress provided that the allotted lands would be held in trust by the federal government for the individual allottee for twenty-five years, after which time the individual would receive a fee patent, free of encumbrance and fully alienable.[45]

The Act originally provided for various size allotments depending on the status of the individual receiving the land.[46] Each head of the family received 160 acres, while single adults were granted 80 acres.[47] Orphans were allotted

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[40] General Allotment Act (Dawes Act), ch. 119, 24 Stat. 388-91 (1887) (codified at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 354, 381 (1982 & Supp. IV 1986)).

[41] *See* Affiliated Ute Citizens v. United States, 406 U.S. 128, 142 (1972) (defining allotment as a term of art in Native American law meaning "a selection of specific land awarded to an individual allottee from a common holding.").

[42] General Allotment Act, ch. 119, § 1, 24 Stat. 388 (1887) (codified at 25 U.S.C. § 348 (1982 & Supp. IV 1986)).

[43] OTIS, *supra* note 12, at 73 (citing Annual Report of the Commissioner of Indian Affairs, Nov. 25, 1838). Hartley, Commissioner of Indian Affairs, reported to Congress that "unless some system is marked out by which there shall be a separate allotment of land to each individual whom the scheme shall entitle to it, you will look in vain for any general casting off of savagism. Common property and civilization cannot co-exist." *Id.*

[44] COHEN, *supra* note 5, at 129-30. There had been earlier experiments with allotments on a smaller scale, prior to the General Allotment Act. *Id.* Often the allotment appeared as a clause in early treaties with Native American tribes. *Id.*

[45] General Allotment Act, ch. 119, § 5, 24 Stat. 389 (1887) (codified at 25 U.S.C. § 348 (1982 & Supp. IV 1986)).

[46] General Allotment Act, ch. 119, § 1, 24 Stat. 388 (1887) (codified at 25 U.S.C. § 348 (1982 & Supp. IV 1986)).

[47] *Id.*

smaller parcels.[48] Proponents of allotment believed that individual ownership of property would transform the Native American into a civilized and productive member of the western society taking root in the nation.[49]

The damage resulting from allotment was widespread and devastating.[50] Land within Native American territory and under the jurisdiction of the tribes decreased from approximately 156 million acres in 1881 to 78 million acres by 1900 and dropped to 48 million acres by 1934.[51] Ironically, the source of the greatest harm to the Native American tribes came as a result of a measure put in place to benefit them: the twenty-five year period during which the government held the land in trust for the allottee owner.[52] Congress implemented the trust period[53] to prevent Native Americans from losing further land holdings to unscrupulous land dealers and tax foreclosures. The twenty-five year trust period was repeatedly extended, and the Secretary of the Interior now holds title in trust "until otherwise directed by Congress."[54]

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[48] *Id.* The Act was amended in 1891 to equalize the size of the allotments. *Id.* Under the amended act, each member of the tribe was granted 80 acres. Act of Feb. 28, 1891, ch. 383, § 1, 26 Stat. 794. The Act was further amended in 1910, differentiating the type of land awarded. Act of June 25, 1910, ch. 431, § 17, 36 Stat. 859; *see* 25 U.S.C. § 331. Allotments of agricultural land remained at 80 acres, however allotments of grazing land were increased to 160 acres. *Id.*

[49] OTIS, *supra* note 12, at 177 (citing the Annual Report of the Commissioner of Indian Affairs, October 1, 1889). "The tribal relations should be broken up, socialism destroyed, and the family and autonomy of the individual [Native American] substituted. The allotment of lands in severalty . . . [is the means] to this end." *Id.*

[50] OTIS, *supra* note 12, at 89 (citing the Annual Report of the Commissioner of Indian Affairs, November 22, 1856). George Manypenny, Commissioner of Indian Affairs from 1853 to 1857, reported on the loss of Native American land through treaties:

> Since the 4th of March, 1853, fifty-two treaties with various Indian tribes have been entered into . . . . The quantity of land acquired by these treaties, either by the extinguishment of the original Indian title, or by the re-acquisition of lands granted to Indian tribes by former treaties, is about one hundred and seventy-four million of acres.

Id.

[51] COHEN, *supra* note 5, at 138 (citing D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (F. Prucha ed., 1973)).

[52] General Allotment Act, ch. 119, § 1, 24 Stat. 388 (1887) (codified at 25 U.S.C. § 348 (1982 & Supp. IV 1986)).

[53] 25 U.S.C. § 348 (1946) ("[T]he United States does and will hold the land thus allotted, for the period of twenty-five years, in trust . . ."); 25 U.S.C. § 462 (1934) ("The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.").

[54] 25 U.S.C. § 462 (1982); *see also* Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 368 (1968).

In 1902, Congress permitted heirs of allotment owners to sell allotments.[55] Sales were extremely difficult to orchestrate, however, since they required the approval of the Secretary of the Interior.[56] After 1910, Native Americans could devise allotments through wills, subject to approval of the Secretary of the Interior[57] and subject to regulations promulgated by the Secretary.[58] When a Native American testator died, an administrative law judge approved or disapproved the will.[59] The Bureau of Indian Affairs held a hearing to probate a Native American will and would notify all interested parties.[60] Therefore, where there were numerous devisees to an interest in an allotment, the Bureau of Indian Affairs assumed the responsibility of sorting out the various interests and providing notice to the possible devisees. Often the parties with interests in the land were difficult to locate and land was lost by default.[61]

Getting a will approved continues to be problematic for Native Americans; the Bureau of Indian Affairs regulations for testamentary disposition offer few guidelines, and potential testators are left with uncertainty as to whether their wills are likely to be approved.[62] As a result, few Native Americans are likely to leave a will to dispose of allotted land interests. If a will is disapproved, or

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[55] Act of 1902, Pub. L. No. 57-125, ch. 888, § 7, 32 Stat. 245, 275 (1902), *amended by* Act of 1910, Pub. L. No. 61-313, ch. 431, §§ 2-3, 36 Stat. 855-56 (1910) (codified as amended at 25 U.S.C. §§ 372-373 (1982)). After the Act of 1910, the Secretary of the Interior had to approve of any sales of inherited allotments. *Id.*

[56] *Id.*

[57] Act of 1910, Pub. L. No. 61-313, ch. 431, § 2, 36 Stat. 855-56 (1910) (codified as amended at 25 U.S.C. § 373 (1982 & Supp IV 1986)). There is a substantive limit on the Secretary of the Interior's power to approve an allottee's will. *Id.* The Secretary can only approve those wills that devise the allotted property in accordance with restrictions on alienation set forth in 25 U.S.C. 464. According to section 464, "the persons or entities to whom an Indian may devise trust property [are] as follows: (1) . . . the Indian tribe where the land is located; (2) . . . any member of such tribe; or (3) [the] heirs of the testator." Cultee v. United States, 713 F.2d 1455, 1459-60 (9th Cir. 1983) (quoting H.R. REP. NO. 1285, 9th Cong., 2d Sess. 2 (1980), *reprinted in* 180 U.S.C.C.A.N. 2916, 2917), *cert. denied*, 466 U.S. 950 (1984). "Heirs" is defined in accordance with the law of the state in which the property is located. *Id.* at 1460.

[58] Act of 1910, Pub. L. No. 61-313, ch. 431, § 2, 36 Stat. 855-56 (1910) (codified as amended at 25 U.S.C. § 373 (1982 & Supp IV 1986)).

[59] 43 C.F.R. §§ 4.202, 4.204, 4.233 (1990). An administrative law judge is "any employee of the Office of Hearings and Appeals upon whom authority has been conferred by the Secretary to conduct hearings in accordance with the regulations." *Id.* § 4.201(f).

[60] 43 C.F.R. §§ 4.240(b), 4.241 (1990).

[61] OTIS, *supra* note 12, at 247 (citing the Annual Report of the Commissioner of Indian Affairs, 1961) ("Calling attention to the complex problem of 'heirship' land allotments owned by numerous Indians who either cannot be located or cannot agree on use of the property, the report advocated transferring those fractionated holdings to the tribe and permitting the latter to compensate the owners . . .").

[62] 43 C.F.R. §§ 4.241-4.242; 25 U.S.C. § 373 (1990).

if the allotment owner dies intestate, his property passes by descent and partition according to the laws of the state or territory where the land is located.[63]

Congress authorized Native Americans to devise their interests in trust property at an early date;[64] however, most Native American land passed to heirs through intestate succession.[65] This resulted in ownership of allotment parcels in undivided interests: all of the heirs owned the parcel together rather than owning a specific part of the land.[66]

Generation after generation, the various undivided interests in the allotted lands became fractionated to such a point that the land became virtually unusable. The allotments were held by so many owners that the property could not be put to effective use to benefit Native Americans, or the government.[67] The Native American owners were placed in the position of absentee landlords, leasing their allotted lands rather than using it themselves for farming.[68] The Bureau of Indian Affairs was left with the mammoth task of attempting to keep track of the numerous heirs of deceased allottees.[69] Neither benefited.

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[63] 25 U.S.C. §§ 348, 373 (1982 & Supp. IV 1986). *See also* COHEN, *supra* note 5, at 722 (tribal custom must also be considered in determining the intestate disposition of property, further burdening the BIA since many tribes have not codified their customs). *Id.*

[64] 25 U.S.C. § 373 (1982 & Supp. IV 1986); Native Americans who are at least twenty-one years old and have an interest in trust property may devise that interest by a will, subject to the approval of the Secretary of the Interior. *Id.*

[65] *See* Estate of Baird, 287 P.2d 365 (Cal. Ct. App. 1955) (holding that if the property owner dies without leaving a valid will, the property passes through intestate succession). *See also In re* Cameron, 62 N.Y.S. 187 (1900), *aff'd* 166 N.Y. 1120 (1901).

[66] Hodel v. Irving, 481 U.S. 706, 707 (1987) ("[P]arcels became splintered into multiple undivided interests in land, with some parcels having hundreds and many parcels having dozens of owners.").

[67] *Id.*

[68] *Id.*

[69] *Id.* at 713. The Supreme Court used the Sisseton-Wahpeton Lake Traverse reservation as an example of the severe problem caused by allotment Tract 1305. *Id.* The tract, considered one of the most fractionated parcels in the country, is forty acres and produces $1,080 in annual income. *Id.* The Supreme Court stated:

> [Tract 1305] has 439 owners, one-third of whom receive less than $.05 in annual rent and two-thirds of whom receive less than $1. The largest interest holder receives $82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives $0.1 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated $8,000 value, he would be entitled to $.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at $17, 560 annually.

Id.

2. *The End of Allotment: A Failed Experiment*

Allotment proved disastrous[70] and, in 1934, Congress formally acknowledged the failure of its policy to assimilate Native American tribes and ended further allotment of Native American lands.[71] The system set in motion by allotment was perpetuated, and parcels owned by individual Native Americans continued to be divided into smaller and smaller undivided interests. The fractionation grew worse with each subsequent generation.[72]

In 1958, Senator James Murray, Chairman of the Senate Committee on Interior and Insular Affairs, persuaded the Secretary of the Interior to declare a moratorium on the sale of Native American lands until a study could be conducted to evaluate the extent of Native American land losses.[73] The results of the study showed the serious effects of the government's policies on Native American lands and increased congressional disillusionment with

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[70] OTIS, *supra* note 12, at 225 (citing Annual Report of Commissioner of Indian Affairs John Collier, 1934, "Congress and the President recognized that the cumulative loss of land brought about by the allotment system, a loss reaching 90,000,000 acres – two-thirds of the land heritage of the Indian race in 1887–had robbed the Indians in large part of the necessary basis for self-support.").

[71] Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. § 461 (1982 & Supp. IV 1986)).

[72] OTIS, *supra* note 12, at 227. Commissioner of Indian Affairs John Collier, architect of the policy embodied in the Indian Reorganization Act, anticipated the heirship problem in his Annual Report of 1934:

> The new law [Indian Reorganization Act of 1934], while allowing Indian owners to leave or devise their restricted land to any member of the tribe or to their heirs . . . bars the owners or heirs from selling restricted Indian lands to anyone except the tribe or the tribal corporation in the jurisdiction of which the land is located.
>
> Obviously this negative provision . . . does not solve the problem. Some 7,000,000 acres are now in the heirship status, the acreage is increasing every month. The tribes have not the money with which to purchase this land . . . .
>
> If the problem is to be solved within a reasonable time, the cooperation of the allottees and heirs must be had. They must learn that for the sake of their race and of their children they should voluntarily transfer the title to their individual holdings to the tribe or to the tribal corporation, receiving in return the same rights as they enjoy now; namely, the right to use and occupy the land and its improvements, to receive the income from the land and to leave the same rights to their children, except that the children and other heirs could not cut up the land into small, unusable pieces.
>
> Where the land in process of inheritance has already been so divided among numerous heirs, they will have the opportunity to return the small parcels to the tribe or tribal corporation, receiving interests in the corporate property in exchange. Thus the tribe would acquire title to now unusable land which, after consolidation, could be assigned for the use of interest-holders in tracts of usable size.

Id.

[73] COHEN, *supra* note 5, at 181.

termination.[74] A task force commissioned by the Secretary of the Interior in 1961 recommended a shift in policy toward development of human and natural resources on Native American reservations.[75]

The first action taken by Congress to deal with fractionation, however, did not occur until 1983, when the Indian Land Consolidation Act was passed in response to the worsening heirship problem.[76] Section 207 of the Act allowed for allotment interests of intestate owners to automatically escheat to the tribe if any of those allotment interests were less than two percent of the total of the original allotment and earned the decedent less than $100 in the year before death.[77] Congress made no provision for compensation to the owners for the escheated interests.[78]

In 1984, Congress amended the Act in response to the Supreme Court's decision in *Hodel v. Irving*,[79] which held that section 207 of the Act was an unconstitutional taking of property under the Fifth Amendment.[80] The 1984 amendment of the Indian Land Consolidation Act was Congress' effort to reconcile the concerns of a pressing administrative nightmare with constitutionally recognized individual property rights. Section 207, the escheat provision, was amended to: (1) allow a devise of allotment interests to other owners of a fractionated interest in that parcel;[81] (2) to allow for a five-year review to determine whether the land has earned its owner less than $100 in any one of the five years before the decedent's death to more fairly evaluate the land in true economic perspective;[82] (3) to allow for rebuttal of the statutory presumption that the land is without economic value;[83] and (4) to allow tribes to adopt a code of their own design to dispose of minor

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[74] *Id.* at 181-82.

[75] *Id.* at 182.

[76] Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, §§ 201-211, 96 Stat. 2519 (1983) (codified as amended at 25 U.S.C. § 2206 (Supp. IV 1986)).

[77] 25 U.S.C. § 2206 (Supp. IV 1986). Section 207 of the Act provided:

> No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descendent [sic] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.

Id. at 2519.

[78] Hodel v. Irving, 481 U.S. 704, 709 (1987).

[79] 481 U.S. 704 (1987). The Supreme Court held in *Hodel* that the abolition of both the descent and devise of a particular class of property might be a taking. *Id.* at 717.

[80] 25 U.S.C. § 2206 (Supp. IV 1986).

[81] *Id.* at § 2206(b).

[82] *Id.* at § 2206(a).

[83] *Id.*

fractionated interests, provided such codes prevent the further fractionation of the interests.[84]

B. The Supreme Court: Constitutional Support for Allotment

Despite the acknowledgment by Congress that allotment was a failure,[85] the Supreme Court, surprisingly, has been tenacious at applying the principles and precedent that created allotment and the problems that followed. As a result, the Supreme Court has been largely responsible for the legislative chipping away of Native American land holdings over the past century.[86]

The legal lexicon defining Native American property and sovereignty were first established by three Supreme Court decisions rendered in the nation's first fifty years.[87] These cases were instrumental in creating the political environment that engendered the allotment policy. Ironically, these decisions have been widely misconstrued and misapplied by subsequent Supreme Court decisions, interpreting the early cases to suit the political needs of the time, usually to the detriment of Native American concerns. Three cases, widely known as the "Marshall Trilogy,"[88] are credited as the foundation of Native American law; yet an earlier case, *Fletcher v. Peck*, is perhaps the most significant in terms of early definition of Native American property law.

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[84] *Id.* at § 2206(c).

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

[86] *See, e.g.*, South Dakota v. Bourland, 508 U.S. 679, 692 (1993) (holding that when Congress has broadly opened up reservation land to non-Native Americans, the effect of the transfer is the destruction of pre-existing Native American rights to regulatory control); Montana v. United States, 450 U.S. 544, 565 (1981) ("Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty" do not apply); United States v. Cherokee Nation of Oklahoma, 480 U.S. 700 (1987) (holding that a Native American tribe had no right to be compensated for damage to interest resulting from the government's exercise of servitude, notwithstanding the government's fiduciary obligation to the tribe); Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (holding that Native Americans whose claims to ownership of land had not been recognized by Congress and who had occupied the land, were not entitled to compensation for taking of timber from land); United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339 (1941) (holding that in the matter of extinguishment of Native American title based on aboriginal occupancy, the power of Congress is supreme and its exercise is not open to inquiry by the courts).

[87] The "Marshall Trilogy" cases are Johnson v. M'Intosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); and Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 581 (1832).

[88] *See M'Intosh*, 21 U.S. 543; *Cherokee Nation*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester*, 31 U.S. (6 Pet.) at 581.

1. *Native American Property and Conquest*

In *Fletcher v. Peck*,[89] the Supreme Court considered the nature of the property rights of the State of Georgia, and the nature of the property rights of Native American tribes.[90] The Court in an opinion authored by Chief Justice Marshall held that the Native American tribes had a right to exclusive use and occupancy of territory not acquired by the federal government or state through treaty or negotiation, and that neither a state nor its grantees could maintain an action for ejectment against the Native Americans.[91]

The Court held that Georgia had fee title *subject to* the exclusive use and occupancy of the Native American tribes, meaning, until Georgia acquired an exclusive right to the property from the tribes, any title Georgia might grant amounted to very little.[92] Chief Justice Marshall did not answer the question of exactly how the rights were divided between the federal government, the States and the tribes. He did clearly establish that Native Americans had existing property rights that could not be ignored.[93]

In *Fletcher v. Peck*, the seeds of misunderstanding had already been sowed in the fertile imaginations of the Court, its subsequent incarnations, and the political powers. This misunderstanding is reflected in a statement made by the grantees' attorney:

> A doubt has been suggested whether this power [a State's power to issue title to property] extends to lands to which the Indian title has not been extinguished. What is the Indian title? . . . It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. It is not a true and legal possession . . . . It is a right not to be transferred but extinguished.[94]

The belief that Native Americans had no concept of land ownership or property rights quickly caught on and was fostered by the Supreme Court's ambiguity in defining what those property rights were and how they could be extinguished. Yet, Marshall's enigmatic decisions seem clear on one point: that Native American tribes had an inherent sovereignty and acquisition of

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[89] 10 U.S. 87 (1810).

[90] *Id.* at 142-43. The Georgia legislature had granted property rights to individuals in Native American territory claimed by the state. *Id.* at 127-28. After elections were held, the new legislature rescinded those property grants and the grantees sued. *Id.*

[91] *Id.* at 142.

[92] *Id.* at 142-43.

[93] *Id.* For a period of time, the Supreme Court decisions reflected Marshall's conviction that Native American tribes held property rights that could not be abrogated at will. *See, e.g.*, Minnesota v. Hitchcock, 185 U.S. 373 (1902), "[The] Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." *Id.* at 389.

[94] Fletcher v. Peck, 10 U.S. 87, 121 (1810).

tribal holdings needed to be approached from that perspective.[95] Despite the clarity on this issue, subsequent case law blurred the lines of Native American sovereignty, property rights and extinguishment of title.

2. *Separate but Sovereign*

In 1823, the Marshall Court again addressed property concepts involving Native American tribal holdings in its decision in *Johnson v. M'Intosh*.[96] Two men, Johnson and M'Intosh, claimed title to the same parcel of land, which M'Intosh acquired from the federal government and which Johnson acquired directly from the Native Americans.[97]

The Supreme Court ruled in favor of M'Intosh, who received title from the United States government, and against Johnson, whose title originated from the tribe.[98] This outcome has often been interpreted as a denial that Native Americans had title to the land that could then be conveyed.[99] A close reading of the opinion clearly indicates that Marshall did not say that Native Americans could not issue title, as has frequently been assumed.[100] What Marshall does say is that the tribes cannot "dispose of the soil" except to those who made the discovery.[101] Marshall so stated the issue: "whether this title [issued by the tribe] can be recognized in the Courts of the United States?"[102]

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[95] *Id.* at 142-43 (holding that Native American title to property must be respected by all courts until it is legitimately extinguished).

[96] 21 U.S. 543 (1823).

[97] *Id.* at 571-72.

[98] *Id.* at 604-05.

[99] *Id.* at 574. To the contrary, Marshall noted that:

> [T]he rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished.

Id.

[100] *Id.* at 605 (holding that the Native Americans could not convey title that could "be sustained in the Courts of the United States.").

[101] *Id.* at 543. The discovery doctrine allowed the European state first making a claim to a particular territory to claim the right of acquisition against all other European states. *Id.* at 574. The applicability of the doctrine to Indian tribes originated in *M'Intosh*, where the Court said the doctrine applied to Indian tribes because they were neither Christian nor civilized. *Id.* at 543.

[102] *Id.* at 572 ("The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.").

Marshall clearly recognized that the tribes had sovereign and legal status; but the United States, as discoverer[103] and conqueror had exclusive rights to negotiate land purchases from the tribes.[104] He recognized that the tribes could issue title within their territory to Native Americans or to those outside the tribe. His holding simply concluded that a title issued by an unrecognized Native American tribe[105] could not be recognized in the courts of the United States.[106] At the time Johnson made his purchase from the tribe, the United States and the tribe had not entered into a treaty relationship.[107] Marshall's holding was that the courts of the United States could not sustain a title issued by a tribe with no political standing in the United States.[108] Also implied in his holding, however, was that Native American tribes had the right to possess and convey property interests to the land they occupied.[109]

3. *Reservation as Sovereign Territory*

Georgia's attempts to infringe on Cherokee territory kept the issue of Native American title in the forefront of the Supreme Court's docket for some time. In *Worcester v. Georgia*,[110] decided in 1832, the Court used the Commerce Clause of the Constitution to hold that the United States government had exclusive rights to deal with the tribes.[111] Again, Marshall's language clearly identified and confirmed Native American sovereignty.[112]

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[103] *Id.* at 587. Marshall credited this exclusive right of the United States to acquire land from the Native Americans as originating with the discovery doctrine. *Id.* The discovery doctrine, as elucidated by Marshall, gave an exclusive right to extinguish the Native American title of occupancy, "either by purchase or by conquest." *Id.*

[104] *Id.* at 574. Marshall stated that the Native Americans were "admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it." *Id.*

[105] *Id.* at 593 (holding that land conveyed by an unrecognized tribe is still "a part of their territory, and is held under them, by a title dependent on their laws.").

[106] *Id.* at 589 ("It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.").

[107] *Id.* at 594 ("These nations had been at war with the United States, and had an unquestionable right to annul any grant they had made to American citizens.").

[108] *Id.* at 593. Marshall was clear that a title issued by a tribe was "dependent on their laws" and that a court of the United States could not "revise and set aside" a title granted by the tribe. *Id.*

[109] *Id.* ("Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, by a title dependent on their laws.").

[110] 31 U.S. (6 Pet.) 515, 555 (1832).

[111] *Id.* at 581 ("Under the Constitution, no State can enter into any treaty; and it is believed that, since its adoption, no state, under its own authority, has held a treaty with the Indians.").

[112] *Id.* at 543 ("It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give

He described the Native American tribe as "a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character."[113] In *Worcester*, the Supreme Court also held that Georgia had no power to regulate the conduct of non-Native Americans inside their own territory.[114] Georgia, therefore, could not regulate the conduct of non-Native Americans within the reservation.[115] The implication of *Worcester* was that nonmembers of the tribe entering the reservation would be subject to tribal law.[116] The *Worcester* decision represented the strongest commitment to sovereign rights of Native American tribes that would come from the Supreme Court throughout its history. Since that decision, the Court has retracted and retreated from that position, eroding Native American property and jurisdictional rights.[117]

The allotment policy has eroded the concept of Native American rights of sovereignty and regulation within the reservation.[118] Allotment, through the sale of surplus land and through alienation of Native American allotments,[119]

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the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.").

[113] *Id.* at 55.

[114] *Id.* at 56.

[115] *Id.*

[116] *Id.* at 560 ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves"). This right has been severely abrogated by Congress and the courts. *See, e.g.*, Duro v. Reina, 495 U.S. 676 (1990) (holding that Native American tribes may not assert criminal jurisdiction over a nonmember Native American); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that non-Native Americans are exempt from tribal courts' criminal jurisdiction).

[117] *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (holding that Indians may not exercise external powers of sovereignty such as entering treaties with other nations); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191(1978) (holding that tribal jurisdiction to try non-Indian criminal defendants was terminated by dependent relationship of the tribe with the federal government); Montana v. United States, 450 U.S. 544 (1981) (holding that tribe lacked inherent civil authority to regulate fishing by non-Indians on non-Indian lands within the reservation when no important tribal interests were directly affected). Under these decisions, the powers lost by the tribes are the power to transfer tribal land without federal authority, the power to carry on relations with other nations, the power to regulate non-Indians when no compelling tribal interest justifies such regulation, and the power to impose criminal punishment on non-Native Americans. *Id.*

[118] *See, e.g.*, COHEN, *supra* note 5, at 130 ("[A]llotments were used as a method of terminating tribal existence.").

[119] OTIS, *supra* note 12, at 22 (quoting a private letter by President Thomas Jefferson to William Henry Harrison, governor of Indiana Territory, dated Feb. 27, 1803, elucidating the goal of acquiring Native American land: "[We will] be glad to see the good and influential individuals among [the Native Americans] run in debt, because we observe that when these debts get beyond what the individuals can pay, they become willing to lop them off by a cession

destroyed the integrity of the reservation and created a political climate which allowed future generations of the Supreme Court to conclude that a Native American tribe had no right to regulate within its own reservation.[120] Congress' attempts to create an automatic loss of Native American property interests in the Indian Land Consolidation Act is a further extension of not only allotment, but of the eroding of Native American property rights which were clearly recognized by the Marshall Court.

C. Youpee v. Babbitt: A Problem Revisited

1. A Persistent Problem

The constitutionality of the Indian Land Consolidation Act has come before the Supreme Court once before, in *Hodel v. Irving*.[121] The three appellees in *Hodel*, Mary Irving, Patrick Pumpkin Seed, and Eileen Bissonette, were members of the Oglala Sioux Tribe.[122] They were heirs of members of the tribe who died, leaving interests that automatically escheated to the tribe under the provisions of section 207 of the Indian Land Consolidation Act.[123] The Irving estate lost two interests with a combined value of approximately $100, Bissonette's decedent lost 26 escheatable interests with a total value of about $2,700, and the Pumpkin Seed estate lost 13 escheatable estates, with a total value of about $1,816.[124]

The appellees filed suit in the United States District Court for the District of South Dakota, claiming that section 207 resulted in a taking of property without just compensation, in violation of the Fifth Amendment.[125] The district court upheld the statute, stating that Congress had plenary power to

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of lands."). *Id.*

[120] *See* Brendale v. Yakima Indian Nation, 492 U.S. 408, 432 (1989) (holding that a Native American tribe could not regulate within its reservation if the area was largely populated by nonmembers of the tribe).

[121] Hodel v. Irving, 481 U.S. 704 (1987). In *Hodel*, the United States Supreme Court only considered the constitutionality of the original version of section 207 of the Indian Land Consolidation Act. Because none of the property which escheated in that case did so under the amendment, the court, in a footnote, declined to comment on the constitutionality of the amended Act. *Id.* at 704 n.1.

[122] *Id.* at 709.

[123] *Id.* Eileen Bissonette's decedent, Mary Poor Bear-Little Hoop Cross, left her property in a will, including the property subject to section 207, to her five minor children, in whose name Bissonette claimed the property. *Id.* Chester Irving, Charles Leroy Pumpkin Seed, and Edgar Pumpkin Seed died intestate. *Id.* At their death, they owned 41 fractional interests subject to the provisions of section 207 of the Act. *Id.* at 709-10.

[124] *Id.* at 71.

[125] *Id.*

abolish the power of testamentary disposition of Native American property.[126] The court also held that the heirs and devisees only had an expectancy of heirship and did not, in fact, have a vested property right[127] entitling them to constitutional protection.[128]

The case was appealed to the United States Court of Appeals for the Eighth Circuit, where the court held that section 207 of the Indian Land Consolidation Act violated the Fifth Amendment because it did not provide for compensation to the estates of the decedents for the escheated interests.[129] The Supreme Court affirmed the Eighth Circuit's decision, holding that the forced escheat provision of the Act amounted to an unconstitutional taking of decedent's property without compensation.[130] The Supreme Court was hardly unsympathetic to the concerns prompting Congress to take drastic measures to attempt to solve a problem that had blossomed into a bureaucratic quagmire. Justice O'Connor, delivering the opinion of a rare unanimous court, noted that the consolidation of the fractionated interests "is a public purpose of high order."[131] Even after recognizing the magnitude of the problem, the Court refused to accept section 207 as a solution.[132]

The Court did not concur with the argument made by the defendant that the interests escheated were *de minimis*.[133] Although the income generated by those interests might be minuscule, the value of the property was significant enough to warrant compensation.[134]

The *Hodel* decision is interesting for many reasons. On an initial reading, the opinion seems to indicate that the right to devise property is on a level with other clearly recognized constitutionally protected fundamental rights such as privacy.[135] The Court in *Hodel* suggests that the right to devise

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[126] *Id.*

[127] *See In re* Choate v. Trapp, 224 U.S. 665, 677 (1912) (stating that a Native American allottee's "private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States.").

[128] Hodel v. Irving, 481 U.S. 704, 710 (1987).

[129] Irving v. Clark, 758 F.2d 1260, 1267-68 (8th Cir. 1985), *aff'd*, 481 U.S. 704 (1987). The plaintiffs were not seeking compensation, but were seeking injunctions against enforcement of section 207 of the Indian Land Consolidation Act, and a declaratory judgment that the escheat provision was a taking without compensation. *Id.*

[130] *Hodel*, 481 U.S. at 709, 716-17.

[131] *Id.* at 712. The court recognized that the problem of fractionation would be justified by "dramatic action" to find a solution. *Id.*

[132] *Id.* at 712, 717.

[133] *Id.* at 714 ("Even if we accept the Government's assertion that the income generated by such parcels may be properly thought of as *de minimis*, their value may not be.").

[134] *Id.* After assessing the estimated value of the escheated interests lost to the appellees, the Supreme Court noted: "These are not trivial sums." *Id.*

[135] *Id.* at 715 ("There is no question . . . that the right to pass on valuable property to one's heirs is itself a valuable right.").

property may not be compromised, at least within the context of Native American allottee owners.[136] Yet, traditionally, inheritance has been considered a privilege rather than a fundamental, constitutionally protected right.[137] Inheritance is clearly subject to modification and limitation through statute, without violating constitutional parameters.[138]

As such, *Hodel*, does not support the proposition that the right to devise is a fundamental right. Instead, *Hodel* suggests that when the right to devise is already compromised, it cannot be totally abrogated. The Supreme Court's concern over limiting the right to devise must be viewed in the context of the limited property rights left to allottee owners, rights that were limited by the nature of the trust relationship.[139] The *Hodel* Court's preoccupation with interfering with testamentary disposition was coupled with a concern over the character of the government's action in implementing the mandatory escheatment provision, an important element in considering a regulatory taking.[140] In other words, the Supreme Court's decision is embedded in an analysis of a regulatory taking of property rights.[141]

In beginning its analysis, the Court decided the frustration of the decedent's investment-backed expectations was minimal.[142] Justice O'Connor, following a traditional takings analysis, also looked at the economic impact of section 207 on the allottee owner and the character of the government's action.[143] The character of the government's action was of primary concern to the Court.[144]

The Court was not satisfied that the decedents could have decided the disposition of their property interests through an *inter vivos* gift prior to

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[136] *Id.* ("There is no question, however, that the right to pass on valuable property to one's heirs is itself a valuable right.").

[137] *See* SUZANNE S. SCHMID, *Escheat of Indian Land as a Fifth Amendment Taking in Hodel v. Irving: A New Approach to Inheritance?*, 43 U. MIAMI L. REV. 739 (1989) (discussing inheritance prior to *Hodel*).

[138] *See* Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 283, 287 (1898) ("The right to take property by devise or descent is the creature of the law, and the law may therefore impose conditions upon it."); *see also In re* Luckey's Estate, 291 N.W.2d 235 (Neb. 1980); *In re* White's Estate, 101 N.E. 793 (N.Y. 1913); Withrow v. Edwards, 25 S.E.2d 343 (Va. 1943).

[139] Hodel v. Irving, 408 U.S. 704, 715 (1987). Interestingly, the Court pointed out that the individuals would enjoy an "average reciprocity of advantage" in that the escheated interests were lost to the tribe to which the individual had a nexus. *Id.* (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)). The Court, however, considered that this "reciprocal benefit" did not balance the loss of individual property rights. *Id.*

[140] *Hodel*, 408 U.S. at 716.

[141] *See infra* part III. A-B for a discussion of the Supreme Court analysis of regulatory takings.

[142] *Hodel*, 408 U.S. at 715.

[143] *Id.*

[144] *Id.* at 716 ("[T]he character of the Government regulation here is extraordinary").

death.[145] Section 207, the Court stated, amounted to the virtual abrogation of the right to pass property to one's heirs.[146] The Court also noted that, as worded, section 207 would result in the escheatment of property interests *even* in a situation where inheritance would result in consolidation.[147] In other words, the statute was overbroad.

Justice O'Connor was concerned that, prior to the Act, the right to pass property to one's heirs was one of the few remaining rights of ownership left to Native American allotment owners.[148] Many of the traditional rights of property ownership were usurped by the government since the allotted land remained in a trust status.[149] The right to devise was one of the remaining property rights left to the allottee. Removing that right through section 207 effectively eliminated the descendant's right to dispose of property. Therefore, in the context of property law, the Indian Land Consolidation Act went too far.[150]

2. *More Disenfranchised Heirs*

The issue skirted by the Supreme Court in *Hodel v. Irving* (whether the Indian Land Consolidation Act *as amended* is constitutional) will not long be avoided. In June 1996, the Supreme Court granted certiorari to hear the issue of forced escheatment again.[151] The plaintiffs in *Youpee v. Babbitt* were members of the Fort Peck Tribes[152] and filed in the District Court for the District of Montana,[153] seeking a declaration that the amended Indian Land

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[145] *Id.*

[146] *Id.*

[147] *Id.* This result would occur when an heir to the estate owned an interest in the parcel being devised to him. *Id.* Allowing the inheritance to pass would result in consolidation of interests in the property. *Id.*

[148] The trust relationship severely limited the property rights of the allottee owners. *See, e.g.*, Starr v. Campbell, 208 U.S. 527 (1908) (holding that the restrictions on the right of alienation of lands to be allotted extend to the disposition of timber on the land as well as to the land itself); United States v. Paine Lumber Co., 206 U.S. 467 (1907) (holding that the restraint upon alienation should not be exaggerated); Libby v. Clark, 118 U.S. 250 (1886) (holding that allottees had limited power of alienating granted lands).

[149] Lands allotted under the General Allotment Act were held by the government in trust for the benefit of the Indian allottees. Dawes Act, ch. 119, 24 Stat. 388-91 (1887) (codified at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 354, 381 (1982 & Supp. IV 1986)).

[150] *See* John H. Leavitt, *Hodel v. Irving: The Supreme Court's Emerging Takings Analysis—A Question of How Many Pumpkin Seeds Per Acre*, 18 ENVTL. L. 597, 625 (1988) (discussing section 207 of the Land Consolidation Act as chopping through the generally recognized bundle of property rights).

[151] Babbitt v. Youpee, 116 S. Ct. 1874 (1996).

[152] Youpee v. Babbitt, 857 F. Supp. 760, 763 (D. Mont. 1994).

[153] *Id.*

Consolidation Act[154] violates the Fifth Amendment.[155] Like the plaintiffs in *Hodel*, the *Youpee* plaintiffs were heirs of allottee owners who lost property interests through forced escheatment.[156] The government, defending the statute, argued that the amended version corrected the defects with the Act because, although still prohibiting intestate descent, the amendment allowed for the right to devise property if the devisee owned an interest in that particular parcel.[157] The plaintiffs argued that the right to devise land was lost to Native Americans under the age of 18, incompetent Native Americans, or those without heirs with an interest in that parcel of land.[158] To these groups, plaintiffs argued, passing by devise and descent is still precluded.[159] The district court held that the forced escheat provision under the Indian Land Consolidation Act as amended was unconstitutional.[160]

3. *The Ninth Circuit: Unconstitutional Taking*

Youpee was appealed to the Ninth Circuit.[161] The court acknowledged that the amended statute corrected for a small group of allottee heirs the complete abrogation of the inherited rights described in *Hodel*.[162] Most Native American landowners, the court noted, would still be placed in a position of having to choose either to devise their land to a collateral heir or a stranger, or allowing the interest to escheat.[163]

Following the Supreme Court's example in *Hodel v. Irving*[164] the Ninth Circuit analyzed the economic impact, the interference with investment-backed expectations and the character of the governmental action.[165] The economic impact could be substantial because the amended Act still took no

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[154] 25 U.S.C. § 2206 (Supp. IV 1986).

[155] *Youpee*, 857 F. Supp. at 761.

[156] *Id.* at 763.

[157] *Id.* at 762. The amended version permits the devise of escheatable interests to "any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land." *Id.* at 762 (citing 25 U.S.C. § 2206(b)).

[158] 25 U.S.C. § 373; *see also Youpee*, 857 F. Supp. at 764-65.

[159] *Youpee*, 857 F. Supp. at 764-65. For example, William Youpee, one of the decedents involved, did not have lineal heirs who possessed an interest in his allotment. *Id.* at 765.

[160] *Id.* at 766.

[161] Youpee v. Babbitt, 67 F.3d 194 (9th Cir. 1995), *aff'd sub nom* Babbit v. Youpee, ___ U.S. ___, 117 S. Ct. 727 (1997).

[162] *Id.* at 198.

[163] *Id.* The court noted that in most cases, a landowner "will be indifferent between these alternatives and will allow the land to escheat upon death. Thus, the amended version produces the same evil as the original." *Id.*

[164] 408 U.S. 704 (1987).

[165] *Id.*

notice of the fair market value of the interests to be escheated.[166] Although investment-backed expectations were not implicated, the character of the government action, as it was in *Hodel*, was still problematic.[167] The court noted the Supreme Court's *dicta* in *Hodel* that some restrictions on the right to devise fractional land interests might be permissible considering the severity of the heirship problem.[168]

Hodel had indicated a statute requiring a decedent to choose one heir to inherit each fractional interest might be constitutional.[169] The Ninth Circuit could not extend the constitutional umbrella over the amended Act, and held that the amended Act was unconstitutional.[170] Perhaps to encourage further legislative solutions, the court noted that:

> Congress may pursue other options to achieve consolidation of the innumerable fractional interests. For instance, the Government may purchase the land, it may condemn the land for a public purpose and must pay compensation, or as *Hodel* states, it may regulate in some limited fashion the devise and descent of fractional interests to prevent further fractionation.[171]

III. THE FIFTH AMENDMENT: REGULATORY TAKING

A. Just Compensation

In examining escheatment of Native American property interests, it is impossible to do so without the context of case law applied to property takings. Native American allotment interests are, after all, property rights, and should be constitutionally protected.[172] Furthermore, it is in the context of property law that the Supreme Court examined the Indian Land Consolidation Act in *Hodel*.[173]

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[166] *Id.* at 199. The government argued that the amended statute solved the problem because instead of looking back only one year to determine whether the land had produced $100 in income, the amendment called for a review of the last five years. *Id.*

[167] Youpee v. Babbitt, 67 F.3d 194, 199 (9th Cir. 1995), *aff'd sub nom* Babbit v. Youpee, ___ U.S. ___, 117 S. Ct. 727 (1997).

[168] *Youpee*, 67 F.3d at 199 ("Surely it is permissible for the United States to prevent the owners of such interests from further subdividing them among future heirs on pain of escheat."); *see also* Hodel v. Irving, 408 U.S. 704, 718 (1987).

[169] *Youpee*, 67 F.3d at 199.

[170] *Id.* at 200.

[171] *Id.*

[172] *See* Irving v. Clark, 758 F.2d 1260 (8th Cir. 1985). "Vested property rights of individual Indians are 'secured and enforced to the same extent and in the same way' as the equivalent rights of other citizens." *Id.* at 1262.

[173] Hodel v. Irving, 408 U.S. 704, 713-16 (1987).

The first distinction in a takings analysis is between a physical taking and a regulatory taking. A physical taking is relatively simple: any physical invasion, no matter how small, is a taking.[174] It is also possible to have a partial taking, which involves a more complex analysis and generally involves an evaluation of economic interests, investment-backed expectations and the character of government action.[175] It is possible to have a regulatory taking, however, without establishing that all of these factors are present; for example, if all beneficial economic use is denied.[176] The determination of whether there has been a regulatory taking reaches back to Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*,[177] outlining the analytical basis of his "too far" test.[178] The theory expressed by the *Mahon* decision examines the proportion of the value of the property that has been destroyed or taken as a result of the regulation.[179] The *Mahon* Court noted that if the diminution in value created by the regulation was too great, the regulation would constitute a taking.[180]

The persistent question remains: when does regulation go too far? To answer that question, the Supreme Court has established various tests.[181] This determination requires "ad hoc, factual inquiries" into the infringement of the property owner's rights against the benefit to society.[182]

The Supreme Court recently examined the issue of a regulatory taking in its 1992 opinion, *Lucas v. South Carolina Coastal Council*.[183] The *Lucas* Court held that when an owner of real property has been called on to sacrifice all economically beneficial uses of his property in the name of the common

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[174] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982).

[175] *See, e.g.*, Pennsylvania Central Transportation Co. v. New York City, 438 U.S. 104, 123-24 (1978).

[176] *See, e.g.*, Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992).

[177] 260 U.S. 393 (1922). In *Mahon*, a state statute prohibited most mining of coal that would lead to the subsidence of any house, rendering it "commercially impracticable" for the owners of the coal to mine it. *Id.* at 414.

[178] *Id.* at 393.

[179] *Id.* at 413 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law").

[180] *Id.* at 415.

[181] *See, e.g.*, Keystone Bituminous Coal Ass'n. v. DeBenidictis, 480 U.S. 470 (1987) (applying a balancing test of the benefit to the public versus the extent of the taking and diminution of property interests); Pennsylvania Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978) (applying a balancing test of the economic impact of the claimant versus the character of governmental action).

[182] Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); *see also* Pennsylvania Central Transportation, 438 U.S. 104 (1978).

[183] Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992). In *Lucas*, the Court considered whether a South Carolina regulation prohibiting development of beach front property resulted in an unconstitutional regulatory taking of property. *Id.*

good, he has suffered a taking and must be compensated, provided that the regulated activity is not a nuisance-like activity prohibited or constrained at common law.[184] The *Lucas* decision focused on the "bundle of rights" associated with property rights, and asserted that if one of the sticks in the bundle is taken away, compensation must be paid. [185]

Applying *Lucas* to the forced escheatment of Native American property interests, there is a strong argument that forced escheatment takes away one of the sticks in that bundle of rights. Furthermore, the rights being abrogated by the Act are rights that have already been limited. Allottee owners' rights are already constrained by the denial of rights to alienation.[186] Escheatment is just one more lost right to Native Americans, and could be extreme enough to trigger a *Lucas* taking. Although not expressly stated by Justice O'Connor in *Hodel*, the concern for further abrogation of property rights seems implied in the decision.[187]

A balancing of economic impact,[188] interference with reasonable investment backed expectations,[189] and the character of the governmental action [190] determines the validity of a regulation. For the purposes of Native American property issues, the third factor is the most important.[191] Tribal land is

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[184] *Id.* at 1029. The Court ruled that where a regulation deprives an owner of all economically beneficial use of the property, compensation may only be averted if the uses intended by the owner were not part of his title to begin with. *Id.*

[185] Although the *Lucas* decision articulated the deprivation of all economically viable use, this concept appeared in earlier takings decisions. *See, e.g.*, First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316-17 (1987); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652-53 (1981); *Penn. Central*, 438 U.S. at 124.

[186] *See, e.g.*, Starr v. Campbell, 208 U.S. 527 (1908) (holding that the restrictions on the right of alienation of lands to be allotted extend to the disposition of timber on the land as well as to the land itself); United States v. Paine Lumber Co., 206 U.S. 467 (1907) (holding that the restraint upon alienation should not be exaggerated); Libby v. Clark, 118 U.S. 250 (1886) (holding that allottees had limited power of alienating granted lands).

[187] Hodel v. Irving, 408 U.S. 704 (1987). This concern is implied by the extensive discussion by Justice O'Connor of the history and devastation resulting from the allotment policy. *Id.* at 706-10.

[188] *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (identifying the issue as whether the diminution in property value caused by the regulation effectively results in a taking of property). *Id.* at 413.

[189] *See* Andrus v. Allard, 444 U.S. 51 (1979). The court upheld a restriction on the sale of items made from eagle feathers on the ground that restriction on future profits was a "slender reed upon which to rest a takings claim." *Id.* at 66.

[190] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982) ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government.").

[191] *See, e.g.*, *Hodel*, 408 U.S. at 716 (holding that the character of the governmental action was extraordinary); Youpee v. Babbitt, 67 F.3d 194, 200 (9th Cir. 1995), *aff'd sub nom* Babbit v. Youpee, ___ U.S. ___, 117 S. Ct. 727 (1997) (holding that the government action was "an

intricately tied to the government through the trust relationship established through treaties and the allotment policy. Because any transactions involving Native American land necessarily involve the government, the character of the government's actions must be closely examined.

B. Unjust Compensation: The Taking of Native American Property

Most actions taken by Congress concerning Native American property rights have sought to obtain control or access to the abundant land occupied by the tribes.[192] Initially, this goal of land acquisition was achieved through treaties which "allowed" the tribes to retain portions of their land while ceding[193] large portions to the United States.[194] In these treaties, the United States covenanted to recognize those portions retained by the Native Americans as sovereign territory[195] and promised to keep non-members of the tribes off the reserved tracts of land.[196]

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extraordinary and impermissible regulation.").

[192] *See, e.g.*, OTIS, *supra* note 12, at 22. President Thomas Jefferson's desire to accumulate tribal land, expressed in a private letter: ". . . [We will] be glad to see the good and influential individuals among them [the tribes] run in debt, because we observe that when these debts get beyond what the individuals can pay, they become willing to lop them off by a cession of lands." *Id.* (citing letter from Pres. Thomas Jefferson to William Henry Harrison, Governor of the Indiana Territory (Feb. 27, 1803)).

[193] *See, e.g.*, COHEN, *supra* note 5, at 69 ("The most important intrusion upon tribal self-government having general effect during the treaty making era occurred in those treaties negotiated after 1853 conferring upon the President authority to allot tribal lands to individual Indians.").

[194] OTIS, *supra* note 12, at 87 (citing Treaty with the Oto and Missouri Indians, March 15, 1854) ("The confederate tribes of Ottoe and Missouria Indians cede to the United States all their country west of the Missouri River . . .").

[195] *See, e.g.*, Treaty with the Choctaw Indians, art. IV:

> The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants, and that no party of the land granted them shall ever be embraced in any Territory or State . . .

OTIS, *supra* note 12, at 54 (citing Treaty with the Choctaw Indians, Sept. 27, 1830).

[196] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 581 (1832) (citing the Treaty of Hopewell made with the Cherokee nation in 1785, in which the United States government guaranteed to the Cherokee nation all their lands not ceded in the treaty); *see also* Klamath and Moadoc Tribes and Yohooskin Bank of Snake Indians v. United States, 296 U.S. 244 (1935) (tribes claiming treaty was signed under duress); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (holding that the government could abrogate the provisions of an Indian treaty despite stipulations made in the treaty).

The United States failed to keep its promises.[197] Ironically, the treaties which initially were used to wrestle land from the tribes became the tribes' greatest hope for retaining the few property rights that remained.[198] Those tribes that had resisted treaty negotiations[199] found they had no legal standing to assert property rights in the government courts.[200]

Most disturbing and surprising, however, is the active role the Supreme Court played in abrogating treaty promises and failing to honor commitments to the tribes.[201] At critical points, the Supreme Court has refused to offer judicial protection to Native Americans.[202] Instead, the Court has deferred to the legislative branch, refusing to comment on the moral and economic

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[197] *See, e.g.*, COHEN, *supra* note 5, at 64 n.23 (citing Treaty with the Utes, Mar. 2, 1868 (which provided that a Native American chief violating a treaty provision would forfeit his authority)); Treaty with the Pitavirate Noisy Pawnees, June 19, 1818 (requiring the chiefs and warriors of the tribe to deliver any tribal member who violates the treaty to the federal government for punishment). *See also Lone Wolf*, 187 U.S. at 566 (holding that the government could abrogate the provisions of an Indian treaty despite stipulations made in the treaty); Brendale v. Confederate Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 422 (1989) (discussing abrogation of treaty made in 1855 with the Yakima Indian Nation).

[198] *See, e.g.*, *Worcester*, 31 U.S. (6 Pet.) at 548-50 (discussing the Treaty with the Delawares of Sept. 17, 1778).

[199] *See, e.g.*, OTIS, *supra* note 12, at 21. President Thomas Jefferson's special message to Congress on Native American issues stated:

> The Indian tribes residing within the limits of the United States have for a considerable time been growing more and more uneasy at the constant diminution of the territory they occupy, although effected by their own voluntary sales, and the policy has long been gaining strength with them of refusing absolutely all further sale on any conditions.

Id. (citing President Jefferson, Jan. 18, 1803, Special Message to Congress).

[200] *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281 (1955) (holding that the government may take property without compensation from Native American tribes that it has chosen not to recognize).

[201] *See, e.g.*, Solem v. Bartlett, 465 U.S. 463, 470-71 (1984) ("[w]hen such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its open land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished [despite the treaty language]"); Montana v. United States, 450 U.S. 544 (1981) (denying tribal rights to regulate non-Native American fishing within the reservation); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (denying tribal rights the jurisdiction to try non-Native Americans for their crimes committed on reservation land); De Coteau v. District County Court, 420 U.S. 425 (1975) (holding that an 1889 agreement resulted in the disestablishment of the Lake Traverse Reservation, which had been created by an 1867 treaty); Tee-Hit-Ton Indians v. United State, 348 U.S. 272 (1955) (holding that without a treaty or federal statute, Congress may extinguish the tribe's right of possession without incurring legal obligation to pay compensation); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (holding that Congress may abrogate a treaty).

[202] *See, e.g.*, United States v. Santa Fe Pacific R.R., 314 U.S. 339, 347 (1941) ("justness [of extinguishment of tribal title] is not open to inquiry in the courts").

implications of those decisions.[203] Although there is a degree of legitimacy in looking to the legislative branch of government for protection of Native American rights, the loss to Native Americans of the judicial checks-and-balances has been significant.[204]

The early Supreme Court decisions recognized, either expressly or implicitly, sovereignty rights of the tribes.[205] *Worcester v. Georgia* established that Native Americans had sovereign power within their own territory, which was not swept away by conquest.[206] The Court further held, by implication, that the States had no power over non-members of tribes inside Native American territory.[207]

Supreme Court decisions rendered over the last two decades have placed further restrictions on tribal sovereignty.[208] Many of the complex situations

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[203] *See, e.g., id.* at 347; United States v. Sioux Nation of Indians, 448 U.S. 371, 415 (1980) (holding that where a taking of treaty-protected property is alleged, a reviewing court must recognize that tribal lands are subject to Congress' power to control and manage the tribe's affairs); Hynes v. Grimes Packing Co., 337 U.S. 86, 106 (1949) (holding that Native American reservations in Alaska are subject to the unfettered will of Congress); Marchie Tiger v. Western Investment Co., 221 U.S. 286, 315 (1911) (holding that "[i]t is for [Congress], and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage"); Buttz v. Northern Pacific R.R., 119 U.S. 55, 66 (1886).

[204] *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (holding that the federal government may seize without compensation Native American lands it has refused to recognize through treaty); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (upholding forced allotment).

[205] *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 581 (1832) (holding that Native American tribes could convey property interests); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (holding that Native American tribes were sovereign, though dependent, nations); Johnson v. M'Intosh, 21 U.S. 543 (1823) (holding that Native American tribes had exclusive rights to negotiate land purchases of their property); Fletcher v. Peck, 10 U.S. 87 (1810) (holding that Native American tribes had a sovereign right to exclusive use and occupancy of territory not acquired through treaty or negotiation).

[206] *Worcester*, 31 U.S. (6 Pet.) at 543 ("It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.").

[207] *Id.* at 560 (noting that Georgia's own legislature had acknowledged that the Native American nations were possessed of "a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent; that their territory was separated from that of any state within whose chartered limits they might reside.").

[208] *See, e.g.*, Brendale v. Confederate Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 422 (1989) (limiting tribe's right to zone within the reservation); Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (holding that the federal government may seize without compensation Indian lands it has refused to recognize through treaty); Sioux Tribe v. United States, 316 U.S. 331 (1942) (holding that revocation of an unratified executive order reservation did not require compensation); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (upholding forced

leading to erosion of Native American property originated from allotment, which caused the loss of Native American property through alienation, sale of surplus land, and finally, through fractionation.[209] The loss of land located on former Native American reservations has resulted in a "checkerboard" pattern of ownership of land and jurisdiction.[210] Reservations include tribal land, trust allotment property, and property owned in fee simple by both tribe members and non-members.[211] This pastiche of interests and incongruent tapestry of ownership has been used by the Supreme Court to validate further uncompensated infringements on Native American territory.[212]

In 1981, the Supreme Court used this "checkerboard" characteristic of the reservations to assert that tribes had diminished jurisdiction over reservation lands, as outlined in *Montana v. United States*.[213] In its decision,[214] the Court divested the Crow tribe of its sovereign powers on the basis of the effects of

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allotment).

[209] *See* Appropriations Act of May 27, 1902, ch. 888, § 7, 32 Stat. 245, 275 (codified at 25 U.S.C. § 379) (establishing a procedure to allow adult heirs of an allottee to petition for sale of the allotment, which resulted in alienation of Native American lands). The Burke Act of 1906 authorized the elimination of all trust restrictions if an allottee was deemed competent, resulting in further loss of land. Act of May 8, 1906, ch. 2348, 34 Stat. 182 (1906) (codified at 25 U.S.C. § 349 (1982 & Supp. IV 1986)). During the first three years of the Act's operation, 2,744 applications were made, and 2,676 were approved. COHEN, *supra* note 5, at 136 (citing 2 DEP'T INT. ANN. REP. 62 (1912). At least sixty percent of the patentees disposed of their lands and the proceeds. *Id.*

[210] Solem v. Barlett, 465 U.S. 463 (1984). The "checkerboard" pattern developed as non-Native Americans settled on reservation land. *Id.* at 471 n.12.

[211] *See* Bates v. Clark, 95 U.S. 204 (1877) (considering the definition of "Indian Country" and reservation boundaries); Donnelly v. United States, 228 U.S. 243 (1913) (holding that "Indian Country" included reservation lands). The primary vehicle for homesteading on "surplus" tribal lands was section 5 of the General Allotment Act, ch. 119, § 5, 24 Stat. 388, 389 (codified as amended at 25 U.S.C. § 348).

[212] *See* Montana v. United States, 450 U.S. 544 (1981) (holding that tribes do not retain the right to implement regulations within reservation territory where non-Native American settlement has changed the character of the territory); Robert Hagen v. Utah, 510 U.S. 399 (1994) (holding that Congress had "diminished" the reservation by opening it to non-Native Americans).

[213] *Montana*, 450 U.S. at 564 (noting that since regulation of hunting and fishing by nonmembers of a tribe on lands the tribe did not own had no clear relationship to tribal self-government).

[214] *Id.* at 544. The Crow reservation had previously been devastated by allotment and land had been lost to non-members of the tribe through surplus land sales, alienation and infringement on reservation land. *Id.* at 564-67. By 1981, tribal trust land represented only 17 percent of the reservation; trust allotments accounted for 52 percent, with non-Native American fee lands accounting for 28 percent, state-owned fee lands two percent, and federal lands one percent. *Id.* at 548.

allotment.[215] The Crow tribe adopted a resolution in 1974 prohibiting hunting and fishing within the reservation by any person who was not a member of the tribe.[216] The Montana Supreme Court struck down the resolution, stating that the tribe's sovereign powers did not extend to lands not owned by Native Americans.[217] The Court held that the effects of allotment had divested the tribe of its treaty-endorsed rights to territorial jurisdiction.[218] Allotment, which had resulted in the tribe's tremendous loss of lands, was now the final justification for extinguishing tribal jurisdictional powers over reservation lands.

The Court rationalized that lands held in fee by non-members of the tribe were no longer exclusively used and occupied by the tribe, and therefore, were no longer within the purview of their jurisdictional or sovereign power.[219] Despite Congress' repudiation of allotment fifty years before, the Supreme Court expressly rejected the argument that it should interpret the Treaty of Fort Laramie[220] in light of that congressional repudiation.[221] The Court also rejected the argument that the tribe's inherent sovereign and jurisdictional rights were intact.[222] Instead, the *Montana* Court held that Native American tribes, by their dependent status, had been implicitly divested of any sovereign and jurisdictional powers inconsistent with that dependent status.[223] That diminishment included control over non-members living on the reservations.[224] This result is a far cry from the early holdings of Chief Justice

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[215] *Id.* at 564-67. The tribal lands of the Crow tribe of Montana had been allotted and surplus lands had been sold, with significant land passing into non-Native American ownership. *Id.* By 1981 more than one-quarter of the Crow Reservation was held in fee ownership by non-Native Americans. *Id.* More than two-thirds of the territory was held in trust by the government, most as trust allotments. *Id.*

[216] *Id.* at 544.

[217] *Id.* at 564-65.

[218] *Id.* at 548. *See also* Hagen v. Utah, 510 U.S. 399 (1994) (holding that Congress had "diminished" the reservation by opening it to non-Native Americans).

[219] Montana v. United States, 450 U.S. 544, 559 (1981).

[220] OTIS, *supra* note 12, at 110 (citing the Fort Laramie Treaty of April 29, 1868). The treaty provided that no non-Native Americans except government agents "shall ever be permitted to pass over, settle upon, or reside in" the reservation. *Id.*

[221] *See Montana*, 450 U.S. 544. The policy of allotment was rejected by Congress in 1934 by the Indian Reorganization Act. *Id.* at 559 n.9. The Court, however, determined that the fee status of the land, rather than the repudiation of the allotment policy was the appropriate basis for its decision. *Id.*

[222] *Id.* at 545.

[223] *Id.* at 564 (The tribe retained tribal power necessary to protect tribal self-government or to control internal relations only).

[224] *Id.* at 566. The only previous decisions that discussed restrictions on tribal sovereign powers over external relations were Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832), and Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 1718 (1831). Justice Marshall authored these opinions addressing foreign affairs between Indian nations and foreign nations.

Marshall in the 1830s, in which he recognized the right of Native Americans to hold jurisdiction within their own territories and over non-members residing within reservations.[225] The *Montana* Court stated that "the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe."[226]

The *Montana* Court, however, did carve out certain limited exceptions in which the tribal jurisdictional and sovereign authority would extend to non-members within the reservation.[227] First, the tribe had inherent authority to regulate activities of non-members entering into consensual relationships with the tribe.[228] Second, the tribes retained inherent authority to regulate conduct, including activities of non-members on fee land, which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[229] After outlining these exceptions, the Court determined that exercising authority over non-Native Americans with regard to hunting and fishing did not fall within the exceptions.[230]

The Court noted that the State of Montana had been regulating hunting and fishing activities and, since the Crow tribe had not asserted its authority in these areas earlier, these activities did not bear a "clear relationship to tribal self-government."[231] Through the *Montana* decision the Supreme Court united the concepts of tribal sovereignty with the loss of land through allotment.[232] According to the Court, allotment had summarily extinguished tribal sovereign and jurisdictional authority to regulate activities within its own territory.[233]

Initially, tribes were able to use the "direct effects" test of *Montana* to achieve decisions stating that a wide variety of non-member activities would

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[225] *See supra* note 87 and accompanying text.

[226] Montana v. United States, 450 U.S. 544, 565 (1981).

[227] *Id.* at 565-66.

[228] *Id.* at 565 ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."). Tribes, for example, have authority to tax non-Native Americans doing business on the reservation. *Id.*

[229] *Id.* at 566.

[230] *Id.* The Court held that there was no contractual relationship involved in non-Native Americans hunting or fishing, and held that these activities do not have a direct effect on tribal welfare. *Id.*

[231] *Id.* at 564.

[232] *Id.* at 544. "[Tribal authority] could only extend to land on which the Tribe exercises 'absolute and undisturbed use and occupation.' And it is clear that the quantity of such land was substantially reduced by the allotment and alienation of tribal lands . . ." *Id.* at 559.

[233] *Id.* at 559. *See also* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L. J. 1, 46-49 (1995) (discussing the Supreme Court's decision in *Montana*).

significantly impact tribal welfare.[234] A 1989 case, *Brendale v. Yakima Indian Nation*,[235] placed the "direct effects" test in direct line of fire.[236] The Yakima Nation filed in federal district court, seeking a declaratory judgment that the Yakima Nation had exclusive authority to zone within the reservation.[237] The district court held that the Yakima Nation had exclusive zoning authority over the property situated in the "closed area" (the Brendale lot), [238] but not the property in the "open area" (the Wilkinson lot). [239]

The district court applied the *Montana* test, determining that development of the "closed area" was a threat to the political integrity, the economic security and the health and welfare of the Yakima Nation.[240] The tribe could enforce its zoning ordinance in this area. Development in the "open area" conformed with the prevailing uses in the area and would not, therefore, threaten tribal interests.[241] The tribe could not enforce its zoning ordinance in areas predominantly populated by non-members.[242]

The Supreme Court, in a split decision, declined to follow the Ninth Circuit's decision to allow tribal zoning rights and reinstated the district court conclusion, limiting the tribe to zone fee lands in the "closed area", and

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[234] *See* Cardin v. De La Cruz, 671 F.2d 363, 366-67 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982) (upholding tribal building and safety codes); Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951, 964 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982) (upholding regulation of riparian rights).

[235] Brendale v. Yakima Indian Nation, 492 U.S. 408 (1989). Brendale involved two cases in which Yakima County's zoning ordinance allowed certain development of property on reservation land while the Yakima Nation ordinance prohibited development. *Id.* at 408. Philip Brendale, part Native American but a non-member of the tribe, owned land in the "closed area" of the reservation. *Id.* at 418. He applied to the Yakima County Planning Department for a permit to develop the land, and was granted the permit. *Id.* Stanley Wilkinson, a non-Native American and non-member of the tribe, applied for a permit to develop his parcel, situated in the "open area" of the reservation. *Id.*

[236] Brendale v. Yakima Indian Nation, 492 U.S. 408 (1989). For discussions of *Brendale*, *see* Royster, *supra* note 233; Joseph William Singer, *Legal Theory: Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991).

[237] *Brendale*, 492 U.S. at 419.

[238] Yakima Indian Nation v. Whiteside, 617 F. Supp. 735, 744, 747 (E.D. Wash. 1985).

[239] Yakima Indian Nation v. Whiteside, 617 F. Supp. 750, 758 (E.D. Wash. 1985).

[240] Yakima Indian Nation v. Whiteside, 617 F. Supp. 735, 743 (E.D. Wash. 1985); Yakima Indian Nation v. Whiteside, 617 F. Supp. 750, 757 (E.D. Wash. 1985).

[241] Yakima Indian Nation v. Whiteside, 617 F. Supp. 735, 743 (E.D. Wash. 1985); Yakima Indian Nation v. Whiteside, 617 F. Supp. 750, 757 (E.D. Wash. 1985).

[242] Yakima Indian Nation v. Whiteside, 617 F. Supp. 735, 743 (E.D. Wash. 1985). The Ninth Circuit affirmed the District Court's decision concerning the Brendale property, but reversed as to the Wilkinson property, stating that zoning laws were intended to promote public welfare and safety and, as such, affected tribal interests. Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529 (9th Cir. 1987).

prohibiting tribal regulation in the "open area."[243] Once again, as in *Montana*, the Supreme Court's conclusion was that allotment had diminished tribal sovereign power.[244] The impact of *Brendale* was more severe than *Montana*. The Supreme Court was willing to examine the encroachment of non-Native Americans on reservation land as a factor toward diminishment.[245] In essence, *Brendale* suggests that, as more reservation land falls into non-native hands, tribes will have a diminishing claim to jurisdictional authority over reservation land. The catalyst for the continuing damage: the Supreme Court.

It may be possible to dismiss *Brendale* because of the diverse split in the Court; however, a 1993 case, *South Dakota v. Bourland*,[246] clarified the Court's position.[247] Justice Clarence Thomas authored the majority opinion that rejected both inherent and treaty-recognized tribal power to regulate.[248] The *Bourland* Court affirmed that Congress had the right to abrogate the Fort Laramie Treaty,[249] and confirmed that when Native American tribes lost the right of use and occupation of land (i.e., through allotment and alienation), the tribes no longer had the incidental power to regulate the use of lands by non-members.[250]

Justice Thomas dismissed inherent sovereign power in a single footnote, saying that "the reality" is that "tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' and is therefore not

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[243] Brendale v. Yakima Indian Nation, 492 U.S. 408, 432 (1989). Justice White authored the majority opinion, joined by Justices Scalia, Kennedy and Chief Justice Rehnquist. They concluded that Native American nations have no inherent sovereign power to regulate fee lands owned by nonmembers. Justice Stevens, in a concurring opinion joined by Justice O'Connor, agreed that Indian nations do not have the authority to regulate fee lands in open areas populated by non-Indians. However, Justices Stevens and O'Connor agreed with the three dissenters that Indian nations retain inherent sovereign power to regulate fee lands owned by nonmembers in areas of the reservation with little non-Indian population. *Id.* at 432 (Stevens, J., concurring).

[244] *Id.* at 422. The Court concluded that the General Allotment Act abrogated the treaty rights with respect to reservation lands that had subsequently been alienated. *Id.*

[245] The Supreme Court later applied the *Montana* and *Brendale* rule that Congress had "diminished" the reservation by opening it to non-Native American settlement in a 1994 case, Hagen v. Utah, 510 U.S. 399, 421 (1994) ("[T]he current population situation in Uintah Valley, demonstrates a practical acknowledgment that the Reservation was diminished; a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area.").

[246] South Dakota v. Bourland, 508 U.S. 679 (1993).

[247] *Id.* The *Bourland* decision was 7-2, with Justices Blackmun and Souter dissenting. *Id.*

[248] *Id.* at 694.

[249] *Id.* at 688. The treaty had reserved to the Indian Nation the right to regulate hunting and fishing by non-Indians in Indian territory. *Id.* In its holding, the *Bourland* Court supported the rule that loss of title to land summarily means the loss of sovereign authority to regulate land. *Id.* at 692.

[250] *Id.* at 688.

inherent."[251] This statement is inaccurate, and ignores the historical fact that Native Americans' sovereign and jurisdictional rights over non-members were recognized in case law and treaties from the country's earliest days.[252]

Furthermore, Justice Thomas' statement is untrue.[253] Neither *Montana* nor *Brendale* denied tribal sovereign power over non-members in "closed areas" and the *Montana* exceptions acknowledge tribal authority in areas occupied by non-members if the conduct sufficiently impacts tribal interests.[254]

The erosion of Native American sovereign and jurisdictional authority, largely endorsed by the Supreme Court, threatens to encompass the remaining rights of tribes. For example, a 1994 decision by the Vermont Supreme Court indicates just how far this line of reasoning could go. In *State v. Elliott*,[255] the Vermont Supreme Court held that the title of the Abenaki tribe to its tribal lands in Vermont had been extinguished by "the increasing weight of history."[256] This decision comes full circle from the early nineteenth century opinions by Chief Justice Marshall, where Native American sovereignty could only be extinguished by express congressional intent.[257]

According to the Vermont Supreme Court, the salient historical events determining extinguishment of Native American title included the British Crown's implied consent to non-Native American settlement in the area, the "zeal" with which pre-statehood Vermont citizens protected their land, and the negotiations with Congress over statehood.[258] In other words, the slow but persistent intrusion on Native American territory was *sufficient* to extinguish

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[251] *Id.* at 695 n.15 (quoting Montana v. United States, 450 U.S. 544, 564 (1981)). The *Montana* Court actually held that tribal sovereign power inconsistent with the dependent status of the tribes could not exist without express congressional intent. *Id.*

[252] *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 561(1832) ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves.").

[253] *See* Royster, *supra* note 233 (discussing the inaccuracy of Justice Thomas' statement in light of the *Montana* and *Brendale* holdings).

[254] Montana v. United States, 450 U.S. 544, 565-66 (1981).

[255] State v. Elliott, 616 A.2d 210 (Vt. 1992), *cert. denied*, 507 U.S. 911 (1993). The Abenaki Nation never signed a treaty with the federal government surrendering their land holdings; consequently, the tribe had no treaty rights to stave off a court which was anxious to overturn the lower court's decision granting title to the tribe. State v. St. Francis, No. 1171-10-86Fcr, slip op. at 16 (Vt. Dist. Ct., Franklin Cir. Aug. 11, 1989).

[256] *Elliott*, 616 A.2d at 218.

[257] *See, e.g.*, Johnson v. M'Intosh, 21 U.S. 543 (1823) (holding that tribes were able to convey property rights); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (holding that obtaining title to Native American property required consent of the tribe); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 581 (1832) (holding that Native American tribes had property interests distinct from the title held by the States).

[258] *Elliott*, 616 A.2d at 218.

title. Where the "weight of history" becomes the determining factor for extinguishment, issues such as Native American consent to extinguishment, the existence of treaties, express congressional intent and just compensation carry little or no weight. The further impact on remaining Native American title rights would be devastating.[259] There certainly exists sufficient "weight of history" throughout most Native American territories to allow any court adopting this reasoning to completely extinguish the remnants of Native American jurisdictional rights.

C. Escheatment: A Taking or Solution?

Allotment, initiated in the late nineteenth century, was more devastating to the Native American population than the treaties coerced by an expanding nation, the settlers pushing into Native American territory, and the discovery doctrine that sanctioned acquisition of property with little or no compensation.[260] Tribal land under the jurisdiction of the tribes decreased from approximately 156 million acres in 1881 to 78 million acres by 1900 and to 48 million acres by 1934.[261] Further loss of tribal territory and jurisdictional power resulted directly from Supreme Court decisions, including *Montana*, *Brendale* and *Bourland*.[262]

The tribes' attempts to challenge the erosion of jurisdictional and sovereign rights on the basis of the trust relationship between the federal government

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[259] The Supreme Court declined to hear the Abenaki appeal. The best hope for Native American tribal rights advocates is that the State v. Elliott decision goes no farther than the Vermont borders. In State v. Cameron, a 1995 case, the Supreme Court of Vermont asserted that its decision in *Elliott* was made as a matter of law based on historical fact and, under the doctrine of stare decisis, is precedent binding in general, not just binding on the parties in the original case. State v. Cameron, 658 A.2d 939, 940 (Vt. 1995). The court said that *Elliott* "affects all lands within Vermont's boundaries." *Id.*

[260] OTIS, *supra* note 12, at 141 (citing the Annual Report of the Commissioner of Indian Affairs, Nov. 1, 1872). In his Annual Report of 1872, Francis Walker, Commissioner of Indian Affairs, commented on the devastation inflicted by allotment:

> The freedom of expansion . . . is to us of incalculable value. To the Indian it is of incalculable cost. Every year's advance of our frontier takes in a territory as large as some of the kingdoms of Europe. We are richer by the hundreds of millions; the Indian is poorer by a large part of the little that he has. This growth is bringing imperial greatness to the nation; to the Indian it brings wretchedness, destitution, beggary. Surely there is obligation found in considerations like these; requiring us in some way, and in the best way, to make good to these original owners of the soil the loss by which we so greatly gain.

Id.

[261] COHEN, *supra* note 5, at 138 (citing Delos OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (F. Prucha ed., 1973)).

[262] *See supra* text accompanying note 86; *see also supra* text accompanying note 243.

and the tribes have been disappointing.[263] The tribes argued that allotment created a trust/guardian relationship and that the federal government had failed in its fiduciary duty by allowing allotment land to fall into non-Native American ownership.[264] The Supreme Court responded that the General Allotment Act[265] provision providing that the government would hold allotted land "in trust" for the allottee was not sufficient to create a full fiduciary relationship, and instead, created a only limited trust.[266]

Allotment, as originally conceived by Congress, would divide the communal reservations of Native American tribes into individual allotments, and would provide surplus lands which would be made available for settlement by non-Native Americans.[267] As the allotted lands passed to Native American heirs through intestate succession, allotment did its most severe damage.[268] The policy created progressive fractionation of interests in Native American land, until most allotment parcels had too many owners to be put to effective use.[269]

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[263] *See, e.g.*, United States v. Cherokee Nation of Oklahoma, 480 U.S. 700 (1987) (holding that the tribe had no right to be compensated for damage to interest resulting from the government's exercise of servitude, notwithstanding the government's fiduciary obligation). Often "gratuitous" gifts made by the federal government (such as food and blankets) were used to offset damages to the tribes resulting from the fiduciary relationship. *See, e.g.*, Seminole Nation v. United States, 316 U.S. 286, 309 (1942) (remanding for examination of what "gratuitous expenditures" by the Government could offset the Government's liability to the tribe.).

[264] *See* Short v. United States, 719 F.2d 1133 (Fed. Cir. 1983), *cert. denied*, 467 U.S. 1256 (1984) (recognizing government's role as fiduciary in regulating timber management); United States v. Mitchell, 463 U.S. 206, 223 n.24 (1983) (Mitchell II) (describing broad authority allocated to the government to invest tribal and individual Indian trust funds if "deemed advisable" and for the "best interest" of the tribes); *see also* Act of June 24, 1938, ch. 648, § 1, 52 Stat. 1037 (codified as amended at 25 U.S.C. § 162a (1988)) (authorizing the Secretary of the Interior to manage Indian trust funds and detailing procedures to be followed to guarantee protection of the Indians' "best interest[s].").

[265] Dawes Act, ch. 119, 24 Stat. 388-91 (1887) (current version at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 354, 381 (1982 & Supp. IV 1986)).

[266] United States v. Mitchell, 445 U.S. 535, 542 (1980). *See also* United States v. Cherokee Nation of Oklahoma, 480 U.S. 700 (1987) (holding that the tribe had no right to be compensated for damage to interest allegedly resulting from the government's fiduciary obligation).

[267] General Allotment Act, 25 U.S.C. §§ 331-332 (1982). *See* COHEN, *supra* note 5, at 132 ("The pressure for Indian land was a powerful motivating force for the allotment policy.").

[268] Property passes through intestate succession when the property owner dies without leaving will, or when the will is not validated by the Secretary of the Interior. Estate of Baird, 287 P.2d 365, 372 (Cal. Ct. App. 1955).

[269] Hodel v. Irving, 481 U.S. 704, 708-09 (1987).

The solution to this problem, Congress hoped, was achieved in the 1983 Indian Land Consolidation Act.[270] The purpose of the statute was to reduce the number of small fractional interests in the individually owned allotments.[271] Congress' good intentions were lost on the heirs of intestate decedents, who perceived the Act as a taking of property interests in violation of the Fifth Amendment.[272] Ironically, the escheatment provision in section 207 of the Act emphasizes tribal communal ownership over individual ownership, a type of property ownership resembling the communal system typical of pre-contact tribes. The Act, nonetheless, deprives individual owners of interests in allotments, thereby denying them constitutionally protected rights.[273]

The only way the allotment owner can avoid the forced escheatment is to purchase additional interests in the same parcel to increase his ownership interest to more than two percent of the total; convey his interest to relatives and reserve a life estate; or, if feasible, re-partition the tracts to enlarge the owner's interest in a portion of the parcel.[274] These methods of avoiding forced escheatment do not alter the loss of descent and devise and, according to the Supreme Court, represent a possible Fifth Amendment taking.[275]

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[270] Indian Land Consolidation Act, Pub. L. No. 97-459, 96 Stat. 2519 (1983) (codified as amended as 25 U.S.C. § 2206 (Supp. IV 1986)).

[271] *Hodel*, 481 U.S. at 712 ("Congress, acting pursuant to its broad authority to regulate the descent and devise of Indian trust lands . . . enacted § 207 as a means of ameliorating, over time, the problem of extreme fractionation.").

[272] *See Hodel*, 481 U.S. at 716 (holding the escheatment of fractionated interests was a taking); Youpee v. Babbitt, 67 F.3d 194, 200 (9th Cir. 1995), *aff'd sub nom* Babbitt v. Youpee, ___ U.S. ___, 117 S. Ct. 727 (1997) (holding that the escheatment of fractionated interests was a taking).

[273] Indian Land Consolidation Act, §§ 201-211, 25 U.S.C. § 2206 (Supp. IV. 1986). Section 207 of the Act provided that:

> no undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descendent [sic] by intestacy or devise, but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.

Id. The Supreme Court held in *Hodel* (481 U.S. 704 (1987)) that section 207 was an unconstitutional taking of property.

[274] *Hodel*, 481 U.S. at 723 n.6. After the Consolidation Act became effective, the Bureau of Indian Affairs of the Department of the Interior issued a memorandum to area directors instructing them that the statute had been enacted. *Id.* The memorandum explained the three methods of enlarging a fractionated interest to avoid the impact of section 207. *Id.* at 722-23.

[275] *Id.* at 716.

IV. THE SUPREME COURT'S DILEMMA

A. Hodel v. Irving Revisited: Questions Resurfaced

Hodel v. Irving[276] is the logical starting point for an analysis of the outcome of the Supreme Court's decision in *Babbitt v. Youpee*.[277] In *Hodel*, the Supreme Court held that the forced escheatment provision of the unamended version of the Indian Land Consolidation Act, section 207, was unconstitutional.[278] The Court refused to consider the constitutionality of the amended version of the Act, stating that none of the escheated interests at issue in *Hodel* involved the amended version.[279]

The Supreme Court's grant of *certiorari* in *Youpee v. Babbitt*[280] made clear the importance and severity of the fractionation problem. Indeed, the Court's decision in *Hodel* may have precipitated the need for further decision on the escheatment issue. *Hodel* was not a model of clarity. Although it identified some of the flaws in the Indian Land Consolidation Act, it offered no explicit guidance as to how to correct those flaws to preserve constitutionally protected property rights.[281]

The *Hodel* Court was strongly in favor of congressional efforts to solve the fractionation problem; nonetheless, it was not pleased with the results Congress had proposed to date.[282] The Court began its analysis by stating: "We agree with the Government that encouraging the consolidation of Indian lands is a public purpose of high order. The fractionation problem on Indian reservations is extraordinary and may call for dramatic action to encourage consolidation."[283]

The Court then identified extreme examples of fractionated parcels,[284] and noted that past decisions had granted Congress considerable latitude in regulating property rights.[285] The Court found that although the fractionation problem was extraordinary, the enactment of the Indian Land Consolidation

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[276] *Id.* at 704.

[277] Babbitt v. Youpee, No. 95-1595, 1997 WL 17839 (Sup. Ct. Jan. 21, 1997).

[278] *Hodel*, 481 U.S. at 716-18.

[279] *Id.* at 710 n.1 ("We express no opinion on the constitutionality of § 207 as amended.").

[280] Youpee v. Babbitt, 67 F.3d 194, 194 (9th Cir. 1995), *aff'd sub nom* Babbitt v. Youpee, ___ U.S. ___, 117 S. Ct. 727 (1997).

[281] *See Hodel*, 481 U.S. at 718. The Court noted that it might "be appropriate for the United States to ameliorate fractionation by means of regulating the descent and devise of Indian lands. Surely it is permissible for the United States to prevent the owners of such interests from further subdividing them among future heirs on pain of escheat." *Id.*

[282] *Id.* at 712.

[283] *Id.*

[284] *Id.* at 712-13.

[285] *Id.* at 713.

Act was a government action of extraordinary and unacceptable character.[286] The Court's concerns were not allayed by the allotment owners' control over dispositions of property interests through *inter vivos* transfers.[287] The greatest dissatisfaction of the Court was that: "[section 207] effectively abolishes both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property."[288]

It is not easy to narrow the source of concerns leading to *Hodel*. The *Hodel* Court was clearly concerned with the overbreadth of the Act in that it prevented the descent and devise of property *even when consolidation* of property interests resulted from inheritance.[289] Congress allowed fractionated interests to go to heirs so long as they held interests in the same parcel.[290] In all likelihood, the *Hodel* Court examined the property rights at stake in the context of the unique nature of Native American property and jurisdictional rights, and the existing limitations on allotment land.[291] The Indian Consolidation Act takes on a more ominous slant when viewed in light of decisions such as *Montana*, *Brendale* and *Bourland*, where the property and jurisdictional rights of the Native Americans are narrowed and restricted.[292] The *Hodel* Court was clearly aware of the history of allotment and its subsequent failure.[293] The Court focused on the character of the government action, a natural focal point, given the trust relationship between the Native American and the federal government. Crucial to the *Hodel* Court's decision was the limited nature of Native American property rights and the restrictions already placed on these property interests.[294]

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[286] *Id.* at 716.

[287] *Id.*

[288] *Id.*

[289] *Id.*

[290] 25 U.S.C. § 2206(b) (Supp. IV 1986). "Nothing in this section shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land." *Id.*

[291] *Hodel*, 481 U.S. at 707. The *Hodel* Court made a point of tracing the details and history of the allotment policy, setting the context for its decision. *Id.*

[292] *See supra* text accompanying note 86; *see also supra* text accompanying note 249.

[293] *Hodel*, 481 U.S. at 706-11.

[294] General Allotment Act, ch. 119, § 5, 24 Stat. 388, 389 (1887) (codified as amended at 25 U.S.C. § 348). The General Allotment Act renders "null and void" any conveyance of an allotment "or any contract made touching the same" before expiration of the trust period. *Id.* Under the allotment policy, alienation of land by Native American allotment owners was limited by the trust status of the property. Further, it is a criminal offense "to induce any Indian to execute any contract deed, mortgage, or other instrument purporting to convey any land or any interest therein held by the United States in trust for such Indian." *Id.* Any alienation required the approval of the Secretary of the Interior. *Id.* Although the purpose for this limitation was to prevent Native American lands from being lost to non-Native American ownership, the limitation is, nonetheless, a restriction on the right to transfer property. *Id.*

The restrictions imposed by section 207 appear minor when viewed from an isolated perspective: the property interests involved are minuscule, the purpose of the Act commendable. When viewed in the context of the already limited rights of allotment owners, the Act resulted in the removal of one of the few rights left in the bundle of rights belonging to Native American property owners.[295] This, the *Hodel* Court said, could not be upheld.[296]

B. Analyzing Youpee in Light of Hodel

The Supreme Court heard arguments for *Babbitt v. Youpee* on December 2, 1996 and rendered a decision on January 21, 1997, affirming the Ninth Circuit's holding.[297] In a brief, concise opinion authored by Justice Ginsburg, the Supreme Court concurred with the Ninth Circuit's identification of the problems that remain in section 207 of the Indian Land Consolidation Act.[298] The issue addressed in *Hodel* remains primarily the same: property interests and regulatory taking.

1. Investment-Backed Expectations and Economic Impact.

The analysis of investment-backed expectations mirrored that found in the *Hodel* evaluation. The *Youpee* appellees, like the *Hodel* appellees, cannot point to specific investment-backed expectations.[299] The *Babbitt* Court noted that section 207 "likely did not interfere with investment-backed expectations."[300] The issues did not revolve around this test, and the Court quickly moved to the issue of economic impact.[301]

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[295] *See, e.g.*, South Dakota v. Bourland, 508 U.S. 679, 692 (1993) (holding that when Congress has broadly opened up reservation land to non-Native Americans, the effect of the transfer is the destruction of pre-existing Native American rights to regulatory control); United States v. Cherokee Nation of Oklahoma, 480 U.S. 700 (1987) (holding that a Native American tribe had no right to be compensated for damage to interest resulting from government's exercise of servitude, notwithstanding government's fiduciary obligation to the tribe); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, (1955) (holding that Native Americans whose claims to ownership of land had not been recognized by Congress and who had occupied the land, were not entitled to compensation for taking of timber from land).

[296] Hodel v. Irving, 481 U.S. 704 (1987).

[297] Babbitt v. Youpee, ___ U.S. ___, 117 S. Ct. 727 (1997).

[298] *Id.* at 732.

[299] *Hodel*, 481 U.S. at 715. The *Hodel* Court said that the appellees could not point to any investment-backed expectations beyond the fact that their ancestors agreed to accept allotment after ceding large parts of the original reservation to the United States. *Id.*

[300] *Babbitt*, ___ U.S. ___, 117 S. Ct. at 730.

[301] *Id.*

The question of economic impact is more problematic. The *Babbitt* Court noted that its *Hodel* decision observed that the income-generation test in section 207 "might fail to capture the actual economic value of the land."[302] In *Hodel,* the Court pointed out that even though the income generated by the allotment parcels might be *de minimis,*[303] the market value of the land was significant, and thus there might be a significant economic impact on the appellees.[304] In the amendment of the Indian Land Consolidation Act, Congress increased the "look-back" provision[305] from one year to five years.[306] The United States argued to the *Babbitt* Court that the expansion of the look-back provision from one to five years moderated the economic impact of the provision.[307] The *Babbitt* Court remained unconvinced, and agreed with the Ninth Circuit's contention that this argument misses the point.[308] The response by Congress is not sufficient in light of *Hodel.* The look-back provision only considers the income generated by the parcel, but does not address the value of the parcel itself. Although the allottee owners may not derive significant income from the parcels, the land arguably has potential economic value.[309] Native American owners of allotment interests rarely derive significant income from those interests, often because the fractionation has made it impossible for the owners to lease or rent the parcels, yet the parcels themselves have value.[310]

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[302] *Id.*

[303] Hodel v. Irving, 481 U.S. 704, 714 (1987). The Court noted that the value of the interests lost to the Irving estate were approximately $100, while the Cross and Pumpkin Seed estates lost approximately $2,700 and $1,816 respectively. *Id.* The Court noted that these sums were not trivial. *Id.*

[304] *Id.* at 710.

[305] *See* Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, Tit. II, 96 Stat. 2517 (1984) (providing a one-year look-back provision to determine whether property interest brings in $100 in income); 25 U.S.C. § 2206 (Supp. IV 1986) (providing an increased look-back provision of five years).

[306] 25 U.S.C. § 2206(a) (Supp. IV 1986). The provision in the amended Act states:

> if such interest represents 2 per centum or less of the total acreage in such tract and is incapable of earning $100 in any one of the five years from the date of decedent's death where the fractional interest has earned to its owner less than $100 in any of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning $100 in any one of the five years following the death of the decedent.

Id.

[307] Babbitt v. Youpee, ___ U.S. ___, 117 S. Ct. 727, 732-33 (1997).

[308] *Id.* at 733.

[309] Hodel v. Irving, 481 U.S. 704, 710 (1987).

[310] *See* COHEN, *supra* note 5, at 137. Native Americans were often given English names in applying for allotment parcels, and when the trust patent was issued and returned to the local agent, often neither the agent nor the Native Americans could identify the allottee. *Id.*

The *Hodel* Court focused on the value of the land itself, not the income generated.[311] In *Babbitt*, the Court noted that the value of the parcels in *Youpee* were similar to those in *Hodel*.[312] The *Youpee* fractional interests were valued at $1,239, similar to the values in *Hodel*.[313] Both cases, thus, involved parcels with more than *de minimis* market values. Clearly, the amendment failed to cure the defect pointed out in *Hodel*: the Act did not take into account the market value of the property interests being escheated.[314]

2. Character of the Governmental Action.

In *Youpee v. Babbitt*, the Ninth Circuit noted that the character of the government action was the most important factor to be considered.[315] The *Babbitt* decision reiterated that the primary flaw with section 207 was in the extraordinary character of the governmental action,[316] and then concluded that the amended version of section 207 did not rehabilitate the Act.[317] The amended statute attempted to address what the *Hodel* Court had called its "extraordinary" action.[318] Congress attempted to correct the overbreadth of the earlier version, as pointed out by *Hodel*.[319] Unlike the original version, the amended Act allowed the devise of an undivided interest to other owners of that particular allotment parcel.[320] The *Babbitt* Court affirmed the Ninth Circuit's findings that the amendment failed: "Congress' creation of an ever-so-slight class of individuals equipped to receive fractional interests by devise does not suffice, under a fair reading of [*Hodel*], to rehabilitate the

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[311] *Hodel*, 481 U.S. at 714.

[312] *Babbitt*, ___ U.S. ___, 117 S. Ct. at 733 ("The value of the disputed parcels in this case is not of a different order [as those in *Hodel*]").

[313] *Id.* The appellees in *Hodel* had property interests with market values ranging from $100 to $2,700. *Hodel*, 481 U.S. at 714. *See also* Youpee v. Babbitt, 67 F.3d 194, 199 (9th Cir. 1995), *aff'd sub nom* Babbitt v. Youpee, ___ U.S. ___, 117 S. Ct. 727 (1997) (noting that Youpee's fractional interests were valued at $1,239).

[314] *Youpee*, 67 F.3d at 199 (holding that while the income generated from a parcel of land may be a contributing factor in computing its fair market value, is not the only factor to be considered).

[315] *Youpee*, 67 F.3d at 199. The *Hodel* Court also considered the character of the governmental action to be critical. Hodel v. Irving, 481 U.S. 704, 716 (1987).

[316] *Babbitt*, ___ U.S. ___, 117 S. Ct. at 733.

[317] *Id.*

[318] *Hodel*, 481 U.S. at 716.

[319] *Id.* The Court noted that the forced escheatment provision abolished both descent and devise of property interests even when the passing of the property to an heir might result in consolidation of property, as when the heir already has another undivided interest in the same parcel. *Id.*

[320] 25 U.S.C. § 2206(b) (Supp. IV 1986).

measure."[321] The amendment still goes too far.[322] The amendment, although narrowing the scope of the forced escheatment, continues to be problematic. Ultimately, the *Babbitt* Court noted, the Act "severely restricts the right of an individual to direct the descent of his property."[323]

C. The Implications of the Supreme Court Babbitt Decision

The Supreme Court's *Babbitt* decision solidifies and confirms the position outlined for the first time in *Hodel*: uncompensated escheatment of Native American parcels is an unconstitutional taking.[324] The Indian Land Consolidation Act, as amended, continues to severely restrict the right of an individual to direct the descent of his property.[325]

If, on the other hand, the *Babbitt* Court had found the amended Act constitutional, the forced escheatment would then *not* be considered a taking under the Fifth Amendment and no compensation would be required. The Court would have had to distinguish *Hodel*, however, before such a stance could be taken. Had the Court found the Act constitutional, Native American property interests falling within the purview of section 207 would have automatically escheated to the tribe, with no compensation to the owners.[326] The Court might have argued that the escheated interests go to the tribe and thereby benefit tribal members; however, many of the heirs of allotment owners will not benefit individually because they will not be eligible for tribal membership.

The *Babbitt* Court might have used existing case law to approve the amended Act. In *U.S. v. Sioux Nation*, [327] the Supreme Court held that the Fifth Amendment protection against uncompensated takings does not apply when Congress acts in its role as trustee over tribes and tribal property. As long as Congress provides "equivalent value" for land taken in the good faith exercise of its trust powers, no compensation is required, according to the *Sioux Nation* Court.[328]

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[321] Babbitt v. Youpee, ___ U.S. ___, 117 S. Ct. 727, 733 (1997).

[322] Youpee v. Babbitt, 67 F.3d 194, 199 (9th Cir. 1995), *aff'd sub nom* Babbitt v. Youpee, ___ U.S. ___, 117 S. Ct. 727 (1997).

[323] *Babbitt*, ___ U.S. ___, 117 S. Ct. at 733.

[324] *Id.* ("arguments [in support of section 207] did not persuade us in *Irving* and they are no more persuasive today.").

[325] *Id.*

[326] *Youpee*, 67 F.3d at 199.

[327] 448 U.S. 371, 408-09 (1980).

[328] United States v. Sioux Nation of Indians, 448 U.S. 371, 409 (1980) (quoting Three Tribes of Forth Berthold Reservation v. United States, 390 F.2d 686, 691 (1968)). *Cf.* United States v. Creek Nation, 295 U.S. 103 (1935) (holding that a taking of recognized title property requires just compensation).

In another recent case, *United States v. Dann*,[329] the Court held that there was no obligation to distribute compensation to the individual Native American owners of property seized. Another decision, *Almota Farmers Elevator and Warehouse Co. v. United States*,[330] distinguished between non-Native American property seizure and Native American property seizures.[331] Where property owned by a non-Native American is seized, the Fifth Amendment is not satisfied if the government makes a "good faith effort" to provide "equivalent value" for property interests taken; the Constitution requires the government to pay the full amount required by the "just compensation" clause.[332]

Using this precedent, the Supreme Court could have made an argument that the property interests which escheat under the amended Act are offered as "equivalent value" to the deprived Native American owners because the interests are transferred to the tribe. Relying on the above-cited cases and the trust relationship between the government and the tribes, the Supreme Court could have found that section 207 escheatment does not require compensation.

The *Hodel* decision, however, made it nearly impossible for the Court to hold that the amended Act is constitutional. Furthermore, the *Hodel* decision was one of those rare occasions upon which the Supreme Court decided unanimously. To back away from an unanimous decision in this case would be unjustified.[333] The *Babbitt* Court correctly chose to affirm the reasoning applied in *Hodel*: "The narrow revisions Congress made to § 207, without the benefit of our ruling in [*Hodel*], do not warrant a disposition different than the one this Court announced and explained in [*Hodel*]."[334] Any other holding from the Court would threaten the future of Native American property rights.

The *Babbitt* Court noticed the close analogy between the reasoning applied in *Hodel* and that propounded by the Ninth Circuit in *Youpee*.[335] In confirming the Ninth Circuit's and *Hodel's* analysis, the *Babbit* decision clearly demonstrates that the Court's concern was more than just the overbreadth of the original Act. The Ninth Circuit, rendering its decision in 1995, expressed more serious concerns; and the Supreme Court has now ratified and affirmed those concerns in *Babbitt*.[336]

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[329] 470 U.S. 39 (1985).

[330] 409 U.S. 470 (1972).

[331] *Id.* at 473-74.

[332] *Id.*

[333] Babbitt v. Youpee, ___ U.S. ___, 117 S. Ct. 727, 733-34 (1997) (Justice Stevens, who concurred in the *Hodel* decision, dissented in the *Babbitt* decision).

[334] *Id.* at 732.

[335] *Id.* ("Hewing closely to the reasoning of this Court in [*Hodel*], the Ninth Circuit determined that amended § 207 did not cure the deficiencies that rendered the original provision unconstitutional.").

[336] *Id.*

V. CONCLUSION

The Supreme Court, in *Babbitt*, has done more than simply affirm the Ninth Circuit decision in *Youpee* and reject as unconstitutional the amended version of the Indian Land Consolidation Act. The Court, in essence, has sent a strong, clear message to Congress that Native American property rights are to be respected and protected.[337] The amendment to the Indian Land Consolidation Act does not adequately address the issues raised in *Hodel*, and only continues the damage caused by allotment. If Congress attempted to apply a policy of forced escheatment to non-Native Americans, it would be rejected without question. The status of Native Americans as dependent wards of the federal government[338] is not a sufficient justification for tolerating a policy of abrogation of property rights without compensation.[339]

Ultimately, it is essential that allotment be finally and definitively delegated to its place in the history books; *Babbitt* is a further step in that direction. Congress formally recognized the failure of the policy in 1934, more than sixty years ago.[340] Yet the effects of allotment have done the most severe damage within the last sixty years. Native Americans are not only losing property interests, they are losing the ability to regulate, zone and direct activities within their reservations.[341] The ultimate result, if the trend is not

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[337] *Id.*

[338] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). The concept of a federal trust responsibility to Native Americans evolved from Chief Justice Marshall's decision in *Cherokee Nation*, in which the Chief Justice concluded that Native American tribes "may . . . be denominated domestic dependent nations . . . in a state of pupilage" and that "[t]heir relation to the United States resembles that of a ward to his guardian." *Id.* at 17. *See also* Marks v. United States, 161 U.S. 297, 479 (1896) (affirming that Native Americans were "the wards of the United States, and the legislation of Congress is to be interpreted as intended for their benefit."); United States v. Rickert, 188 U.S. 432, 437 (1903) (holding that "[t]hese Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition.").

[339] The trust status of the Native American has resulted in inequities such as the abrogation of treaty rights with no compensation. The Supreme Court has repeatedly held that Congress can abrogate a treaty provision unilaterally without consent of the tribe or compensation. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903). In dissolving the federal trust relationship with a tribe Congress may also liquidate and distribute tribal property. *See, e.g.*, United States v. Seminole Nation, 299 U.S. 417 (1937). *See also* United States v. Nice, 241 U.S. 591, 598 (1916). In two fairly recent cases, the Supreme Court has construed termination statutes without suggesting that unilateral termination presents constitutional difficulties. *See* Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972).

[340] *See* Indian Reorganization (Wheeler-Howard) Act, Pub. L. No. 73-383, ch. 576, 48 Stat. 984-88 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (1982 & Supp. IV 1986)).

[341] *See, e.g.*, South Dakota v. Bourland, 508 U.S. 679, 692 (1993) (holding that when Congress has broadly opened up reservation land to non-Native Americans, the effect of the

reversed, will be the loss of what remains of sovereign and jurisdictional rights of the Native American tribes.

Section 207 and the forced escheatment provision must be considered in light of *Montana*, *Brendale*, and *Bourland*; decisions that have drastically diminished the jurisdictional control held by Native American tribes over tribal territory. Section 207 extends that restriction into the right to devise property interests held by individual Native Americans. The Supreme Court, in *Babbitt*, has dealt a blow to the continuing damage resulting from allotment. If the Court fails to follow this strong stance with further support for Native American property rights, allotment will continue to be a reality in the lives of twenty-first century Native Americans, rather than a tragic memory of a mistake finally recognized and rectified.

Elizabeth A. C. Thompson[342]

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transfer is the destruction of pre-existing Native American rights to regulatory control); United States v. Cherokee Nation of Oklahoma, 480 U.S. 700 (1987) (holding that a Native American tribe had no right to be compensated for damage to interest resulting from government's exercise of servitude, notwithstanding government's fiduciary obligation to the tribe); Montana v. United States, 450 U.S. 544 (1981) (holding that Native American tribal authority over reservation land is dependent on whether the land is largely populated by non-members of the tribe); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, (1955) (holding that Native Americans whose claims to ownership of land had not been recognized by Congress and who had occupied the land, were not entitled to compensation for taking of timber from land); United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339 (1941) (holding that in the matter of extinguishment of Native American title based on aboriginal occupancy, the power of Congress is supreme and its exercise is not open to inquiry by the courts).

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BMW v. Gore: Curbing Excessive Punitive Damages

I. INTRODUCTION

In recent years, punitive damage awards have skyrocketed at an alarming rate, causing growing nationwide concern. Commentators have likened the current state of punitive damage law to a civil tort system "gone mad,"[1] and many have complained that such awards have reached "crisis proportions."[2] The United States Supreme Court has similarly expressed concern and dismay in the past regarding large punitive damage awards, but has never definitively overturned any such awards.[3] In *BMW of North America, Inc. v. Gore*,[4] the Supreme Court addressed the specific issue of punitive damages again, but for the first time, reversed the punitive damage award. The Court found that the award was "grossly excessive" and in violation of the due process clause of the Fourteenth Amendment.[5]

Gore has since become the focus of attention throughout the country, and is often cited as a prime example of what is wrong with the civil justice system. Business lawyers and organizations have touted the case as a pivotal decision for American businesses that will curb out of control juries.[6] By

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[1] Dick Thornburgh, *Tort Hell: Outlandish GM Case Solidifies Alabama's Reputation*, THE MONTGOMERY ADVERTISER, Aug. 1, 1996, at 13A.

[2] Alexander Volokh, *What to Do About Punitive Damages*, INVESTOR'S BUSINESS DAILY, Aug. 7, 1996, at A1 [hereinafter Volokh].

[3] *See* Honda Motor Co., Ltd. v. Oberg, 114 S. Ct. 2331, 2340-41 (1994) (holding that State must provide appellate review of punitive damage awards under the Due Process Clause of the Fourth Amendment and expressing discomfort with absolute jury discretion in imposing large punitive damage awards); *see also* TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 469 (1993) (Kennedy, J., concurring) ("I confess to feeling a certain degree of disquiet in affirming this award . . ."); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 16-18 (1991) (holding that punitive damages award was adequate, but noting "once again our concern about punitive damages that 'run wild'"); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (1989) (Brennan, J., concurring) (noting that punitive damage awards are imposed by juries lacking statutory guidelines); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring in part and concurring in the judgment) (expressing concern for the lack of an objective standard limiting punitive damages because possibility of "windfall recoveries" exists); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270-71 (1981) (warning that punitive damage awards are often unpredictable and substantial).

[4] 116 S. Ct. 1589 (1996).

[5] *Id.* at 1591.

[6] *See Supreme Court Curbs Jury Awards*, NEWSDAY, May 21, 1996, at A7. U.S. Chamber of Commerce general counsel Steve Bokat called the decision, "'the victory business has been waiting for . . . [it is] a nail in the coffin of excessive punitive-damage awards'." *Id.*; *see also* David G. Savage, *Justices Reject Size of Punitive Damage Verdict*, LOS ANGELES TIMES, May

contrast, trial lawyers and consumer groups have condemned the decision's adverse impact on injured persons, portraying it as a step backwards for consumers.[7] *Gore* clearly signals the high court's disapproval of grossly excessive awards,[8] and is thus significant in three important ways. First, it ends the Supreme Court's inability to set limits on the amount of recoverable punitive damages[9] by establishing a three-prong test to identify when an award is "grossly excessive."[10] This test requires consideration of: 1) the degree of reprehensibility of the defendant's conduct; 2) the disparity between the actual harm and the punitive damages; and 3) the difference between the punitive award and other comparable sanctions.[11] The Court's new test is intended to finally set limits on punitive damages and constitutionalizes an area of law that has traditionally been in the domain of state courts.[12]

Second, the decision prohibits state courts from using punitive damage awards to affect policies and regulate conduct in other states.[13] The Court recognized each state's power to protect its own consumers, but expressly rejected a state's use of punitive damages as a means of imposing its regulatory policies on the entire nation.[14] The effect of the Court's decision is that it prohibits jurors from punishing a defendant for similar conduct in other jurisdictions. Ultimately, the decision precludes state courts from attempting to multiply damages with injuries or lawsuits filed in other states, as such attempts intrude upon constitutional principles.[15]

21, 1996, at A1 [hereinafter Savage].

[7] *See* Savage, *supra* note 6, at A1; *see also* David Lightman, *Ruling on Punitive Damage Award Called Good News for Business*, THE HARTFORD COURANT, May 21, 1996, at A15 [hereinafter Lightman] (Arthur Bryant, executive director of Trial Lawyers for Public Justice says "'[i]t's a sad day for justice in America'").

[8] *See generally* Lightman, *supra* note 7, at A15.

[9] In four decisions over the past eight years, the Supreme Court has struggled with the premise that due process imports some limits on the amount of punitive damages recoverable without ever setting those limits. *See* Honda Motor Co., Ltd. v. Oberg, 114 S. Ct. 2331 (1994) (analyzing a due process attack on a punitive damages award); TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988).

[10] BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1599-1603 (1996).

[11] *Id.*

[12] Thomas E. Baker, *Justices Void Punitive Award: Five Eyebrows to Four*, *in* 6 WASHINGTON LEGAL FOUNDATION LEGAL POLICY PAPERS, [hereinafter Baker] (Legal Opinion Letter No. 19, 1996).

[13] *Gore*, 116 S. Ct. at 1595-98; *see also infra* notes 94-106 and accompanying text.

[14] *Gore*, 116 S. Ct. at 1595-98; *see also infra* notes 94-106 and accompanying text.

[15] *Gore*, 116 S. Ct. at 1598 (stating that out-of-state conduct must be eschewed, and awards based solely on conduct in that state). One practical ramification of the Court's holding is that it will prohibit closing arguments that "urge jurors to take into account or punish a defendant for repeated similar acts or . . . [injuries] in other jurisdictions." *See* Michael Hoenig, *Reviewing Excessive Verdict: The Supreme Court Speaks*, NEW YORK LAW JOURNAL, July 8, 1996, at 3.

Finally, and perhaps most importantly, the *Gore* decision is significant because of its basic message. *Gore* calls state courts to exercise some consistency and regularity in awarding and reviewing damages in a civil system perceived to be in crisis.[16]

Notwithstanding the decision's significance, the Supreme Court's ruling contains serious shortcomings. It does not set forth dramatically new legal guidelines limiting punitive damage awards, and is essentially neither a great victory for businesses nor a significant setback for the consumer. It is an opinion fraught with ambiguities and illusory standards, which do little to provide definitive guidance for future damages awards.

This casenote analyzes the impact and weaknesses of the *Gore* decision, explaining why the Court's new "guideposts" provide less than specific guidance in the area of punitive damages law. Section II provides a brief overview of the history and significance of punitive damages awards, including the underlying problems and rationales. Section III states the facts of *Gore*. Section IV analyzes the critical issues and the uncertainties in the majority opinion, including the difficulty in applying the court's three-pronged test for excessiveness. It also discusses the concurring and dissenting opinions in *Gore*. Finally, Section V highlights the legal and practical implications of *Gore*, concluding with a discussion of its impact on Hawai'i law.

II. OVERVIEW OF PUNITIVE DAMAGE AWARDS

A. Rationale Underlying Punitive Damage Awards

The doctrine of punitive damages has a long common-law history,[17] and is centuries old.[18] Punitive or exemplary damages are generally defined as those

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Such arguments will now intrude upon the constitutional principles set forth by the *Gore* Court. *Id.* Counsel advocating such arguments or introducing evidence of out-of-state conduct, when claiming punitive damages, "need to know that they may be injecting serious error into their cases." *Id.*

[16] *See* Marcia Coyle, *New Jury Verdict Role for Courts*, THE NAT'L LAW JOURNAL, July 8, 1996, at A22 [hereinafter Coyle].

[17] Lynda A. Sloane, *The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages*, 28 VAL. U. L. REV. 473, 479 (1993) [hereinafter Sloane]. "The award of punitive damages was a concept developed from the English common law . . ." *Id.* (citing Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763)). Such awards were grounded in public policy, and "were intended to be an outlet for society to express outrage at the defendant's conduct." *Id.* at 479 n.36.

[18] *See* James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1124 (1984) [hereinafter Sales & Cole] (noting that punitive damages have been part of the American judicial system since the eighteenth

damages assessed in addition to, or over and above, the amount necessary to fully compensate plaintiffs for injuries sustained.[19] Such awards are therefore, not intended to compensate a plaintiff for harm suffered. Instead, they are intended to punish a defendant's egregious conduct, as well to deter the defendant and others from engaging in similar misconduct in the future.[20]

Accordingly, because the purpose of punitive damages is not compensation of the plaintiff, but rather punishment and deterrence of undesirable conduct, "[s]omething more than the mere commission of a tort is always required" to justify such an award.[21] More specifically, whether an award of punitive damages is warranted will depend upon the defendant's mental state, and to a lesser degree upon the nature of the defendant's wrongdoing.[22] Such awards are thus predicated upon the enormity of the defendant's offense, rather than on the measure of compensation to the plaintiff.[23]

Generally, punitive damages are imposed when behavior is found to be "malicious, willful, wanton, oppressive, or outrageous."[24] Courts have

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century).

[19] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9, 34 (5th ed. 1984) [hereinafter PROSSER].

[20] *See* James R. May, *Control of Toxic Substances: Fashioning Procedural and Substantive Due Process Arguments in Toxic and Other Tort Actions Involving Punitive Damages After Pacific Mutual Life Insurance Co. v. Haslip*, 22 ENVTL. L. 573, 574 (stating that "[p]unitive damages serve to punish the tortfeasor, and to provide both specific deterrence, as to the tortfeasor, and general deterrence, as to other parties") (citation omitted). The *Restatement (Second) of Torts* also sets forth similar rationales for punitive damages, "[p]unitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." RESTATEMENT (SECOND) OF TORTS § 908 (1977).

[21] PROSSER, *supra* note 19, at 9 (citations omitted). Punitive damages are not awarded for mere negligence. *Id.* at 10 (citations omitted).

[22] DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 205 (1973).

[23] *See* Day v. Woodworth, 54 U.S. 363, 371 (1851).

[24] Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 7 (1990); *see also* PROSSER, *supra* note 19, at 9-10 (requisite behavior is "aggravation or outrage, such as spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton") (citations omitted). The *Restatement (Second) of Torts* also deals with the requisite standard of aggravating conduct:

> Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

RESTATEMENT (SECOND) OF TORTS § 908 (1977).

permitted punitive awards for such egregious conduct on the basis that such wrongdoing "has the character of outrage frequently associated with crime."[25]

A debate over the propriety and desirability of punitive damages has erupted in recent years due to an increase, in "crisis proportions," of the amounts and frequency with which punitive damage awards are assessed.[26] Accordingly, a flurry of criticism has been directed at the doctrine of punitive damages, attacking the unfairness of awarding windfall verdicts to already fully compensated plaintiffs.[27] Some tort reformists have gone so far as to advocate the total abolition of punitive damage awards,[28] while others have pushed for legislated caps and other limitations on punitive awards.[29]

Despite its critics, the punitive damages doctrine remains entrenched in the common law, and most agree to some extent that "punitive damages are a necessary component in an efficient civil justice system."[30] Most importantly, "the doctrine of punitive damages . . . serve[s] the useful purposes of expressing society's disapproval of intolerable conduct and deterring such conduct where no other remedy would suffice."[31] While "[a]n award of compensatory damages may be sufficient when injury has resulted from well-intentioned, but poorly-advised behavior[,] [w]hen the defendant's conduct can be characterized as malicious, oppressive, or otherwise outrageous, a stronger sanction is needed."[32] Accordingly, punitive damages are often the only means by which to punish and deter outrageous conduct, and consumer

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[25] *See* PROSSER, *supra* note 19, at 9. While the ideas of punishment or deterrence usually do not enter into tort law, in this "one rather anomalous respect . . . the ideas underlying the criminal law have invaded the field of torts." *Id.* Thus, "[w]here the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime, all but a few courts have permitted the jury to award . . . [punitive damages.]" *Id.*

[26] *See* Volokh, *supra* note 2, at A1.

[27] *See, e.g.*, Sloane, *supra* note 17, at 474-75; David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 9 (1982) [hereinafter Owen].

[28] *See, e.g.*, John D. Ingram, *Punitive Damages Should Be Abolished*, 17 CAP. U. L. REV. 205, 224 (1988); Sales & Cole, *supra* note 18, at 1171.

[29] *See* Mary Ellen Fox, *Punitive Damages Decision: 'No Hard and Fast Rule'*, PENNSYLVANIA LAW WEEKLY, June 10, 1996, at 7 [hereinafter Fox] ("sixteen states already have punitive damages caps"); *see also* Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform - State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in Haslip*, 42 AM. U. L. REV. 1365, 1380-85 (1993) (advocating three reforms which meet the "spirit of Haslip": 1) adopting the "clear and convincing evidence" burden of proof standard; 2) allowing for bifurcated trials; and 3) immunity from punitive damages based on a regulatory compliance defense).

[30] Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 69 (1992) (citation omitted).

[31] Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 641 (1980) (citation omitted).

[32] *Id.* at 648.

advocates argue that they are necessary deterrents for inducing corporations to make their products safer.[33] Thus, when applied appropriately, punitive damages can convey society's intolerance of offensive behavior and effectively force industries to stop harmful practices.[34]

However, in recent years an increasing number of frivolous lawsuits have been filed, many resulting in obscene punitive damage awards that cripple manufacturers and businesses.[35] When imposed excessively, punitive damages can have serious repercussions, profitting plaintiffs and lawyers at the expense of businesses and consumers alike.[36] Furthermore, excessive punitive damages go beyond what is necessary to curb undesirable conduct, and instead encourage lawsuit abuse by plaintiffs compelled to take advantage of some companies' deep pockets.[37] Accordingly, it is evident that despite the logical and desirable functions punitive damages may serve, there are serious problems associated with their imposition. Namely, urgent attention is needed to address the lack of adequate assessment standards or limits to control against excessive punitive damage awards.

B. Problems Associated With Punitive Damage Awards

The public's perception of a "crisis" in the civil justice system stems from the recent rash of windfall jury awards.[38] Such concerns, however, are warranted, given that the top ten jury awards in 1991 increased by forty-one

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[33] *See* Colbern C. Stuart, III, *Mean, Stupid Defendants Jarring Our Constitutional Sensibilities: Due Process Limits on Punitive Damages After TXO Production v. Alliance Resources*, 30 CAL. W. L. REV. 313, 316 (1994) [hereinafter Stuart] (stating that "[i]nsofar as punitive damages serve to force defendants to give greater weight to the extrinsic costs of human suffering and death, punitive damages make products safer").

[34] *See generally*, Richard Carelli, *Supreme Court Curtails Whopping Punitive-Damage Awards*, The Associated Press, May 20, 1996, *available in* LEXIS, Nexis Library, AP File.

[35] *See* Sales & Cole, *supra* note 18, at 1154-58; *see also infra* note 40 and accompanying text.

[36] *See* Stuart, *supra* note 33, at 316 ("When punitive damages increase beyond what is necessary, defendants will either pass these costs along to consumers, or simply stop doing business in the industry. In either case, society as a whole will suffer." (citing David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1262 (1976))); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part); *see also* Owen, *supra* note 27, at 6 (arguing that large and frequent punitive damages may jeopardize future stability of American industries).

[37] *See generally* Pat Getter, *Business is Way too Eager to Settle*, THE NAT'L LAW JOURNAL, Oct. 14, 1996, at A21 [hereinafter Getter].

[38] *See* Volokh, *supra* note 2, at A1; *see also infra* note 40 and accompanying text.

percent over awards in 1990, and ranged from $36 million to $127 million.[39] The nation, and corporate executives in particular, have continuously watched juries return enormously excessive punitive awards which punish businesses above and beyond any actual harm that has been done.[40]

Consequently, with million dollar punitive damage awards becoming more and more commonplace, companies are operating in constant fear of being driven out of business by outlandish jury awards.[41] Further, the threat of oversized punitive damage awards can drive some companies to settle lawsuits, even if they aren't legally liable.[42] Unfortunately, such fears and threats are inconsistent with the original intent of punitive damages,[43] and the

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[39] *See* Charles D. Stewart & Philip G. Piggott, *Punitive Damages Since Mutual Life Insurance Co. v. Haslip*, 16 AM. J. TRIAL ADVOC. 693, 697 (1993) (citing Thomas F. Harrison, *The TopTen Jury Awards of 1991*, LAWYERS ALERT, Feb. 17, 1992, at 1).

[40] *See, e.g.*, Civil jury awarded $5 billion in punitive damages against Exxon — "largest ever made by any jury." Volokh, *supra* note 2, at A1; Jury returns verdict against McDonald's and awards customer scalded by hot coffee $2.7 million. Kevin Johnson and Earle Eldridge, *High Court Reins in Punitive Damages Ruling in BMW Case Divides Legal Arena*, USA TODAY, May 21, 1996, at 1B; Texas court awarded "cool $200 million, or nearly 600 times the actual damages" for foul-smelling drinking water in case against Houston's Mitchell Energy Co: William McKenzie, *Court Gives Sensible Lawsuit Guidelines*, THE DALLAS MORNING NEWS, June 4, 1996, at 17A. "In a suburb of San Diego, Denise and Dominick Tomaselli sued TransAmerica Insurance Co. for $170,000 over a crack in their kitchen floor. A jury awarded the couple $260,000 for the crack, plus $500,000 for emotional distress and $11,250,000 in punitive damages. The crack, in short, became worth more than 50 times the value of the Tomaselli house." Ralph Reiland, *Court Repair Job on Punitive Damages*, THE WASHINGTON TIMES, May 28, 1996, at A13.

[41] *See generally* Sales & Cole, *supra* note 18, at 1141 (noting that punitive damages in products liability cases may "bankrupt or financially cripple a business"); *Damages — The U.S. Supreme Court Isn't Making Much Sense on Punitive Damage Awards*, CHARLESTON DAILY MAIL, May 22, 1996, at 4A (stating that "lawyers have used punitive damages to squeeze billions from businesses and professionals").

[42] *See* Getter, *supra* note 37, at A21. Even before a case goes to trial, damage can be inflicted on defendants. *Id.* Plaintiffs' attorneys often portray their clients as victims to rouse the indignation and support of "the general public, who are, after all, the consumers." *Id.* Thus, it is no surprise that big businesses, who don't want to "argue [their] case in the media[,] . . . . [are] so willing to settle lawsuits . . . [even if] they are [not] necessarily culpable." *Id.* "[I]t is an accepted dictum that it is [altogether] cheaper and less damaging to settle than to go to trial." *Id.*; *see also* Sales & Cole, *supra* note 18, at 1156 (noting that plaintiffs use demands of punitive damages "to compel defendants to settle meritless cases because of the fear that a jury will return an outrageous punitive damage award"); Timothy J. Mullaney, *Court Limit on Punitive Damages Clouds Product Liability Cases*, THE SUN, June 2, 1996, at 1L [hereinafter Mullaney] (noting "punitive damages' ability to force people into settlement").

[43] *See* Sloane, *supra* note 17, at 479. Although punitive damages serve two functions, punishment and deterrence, "[u]nderlying each one of these justifications [is] the ultimate goal of restoring and preserving social order." *Id.* (citation omitted). However, lawsuits today "are often not inspired by the goal of identifying outrageous conduct for the public benefit," rather, plaintiffs are preoccupied only with increasing their own awards. *Id.* at 481. "Such a practice

concept that punitive awards should punish a defendant without financially ruining them.[44]

The problems associated with punitive damages are many, but they can generally be categorized into two main criticisms: 1) the unpredictability of awards based on the broad and unbridled discretion a jury is afforded in making its determinations;[45] and 2) the failure of appellate judges to adequately control unfair verdicts based on the vague and arbitrary standards that guide review in this area.[46]

1. Unbridled jury discretion

The imposition of punitive damages is a question of fact which has always been left to the jury's discretion.[47] However, given the drastic increases in the size and number of punitive judgments in recent years, many commentators have begun to question a jury's ability to appropriately evaluate and determine punitive damage awards.[48] Juries are generally instructed to impose punitive damages at the level necessary to punish or deter defendants according to community values, and based on the degree of defendants' wrongdoing.[49] The amount of allowable awards is unrestrained by any fixed standards, and

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hardly seems in keeping with the goals of punitive damages." *Id.*

[44] *See* Michael J. Pepek, *TXO v. Alliance: Due Process Limits and Introducing a Defendant's Wealth When Determining Punitive Damages Awards*, 25 PAC. L.J. 1191, 1223 (1994). The concept that punitive damages should punish without financially ruining a defendant dates back to the Magna Carta. *Id.*

[45] *See infra* notes 46-61 and accompanying text.

[46] *See infra* notes 62-69 and accompanying text.

[47] Day v. Woodworth, 54 U.S. 363, 371 (1851). In most cases the jury determines both whether punitive damages should be awarded, as well as the amount of the punitive award. *See* Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 940-41 (1989) [hereinafter Wheeler]; *see also* Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975, 990 (1989) [hereinafter Ellis].

[48] *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (1989) (Brennan, J., joined by Marshall, J., concurring) ("punitive damages are imposed by juries guided by little more than an admonition to do what they think is best"); *see also* Editorial, *Fairness in Torts: The U.S. Supreme Court Has Acted Wisely in Trying to Rein in Excessive Damage Awards in Civil Cases*, THE FRESNO BEE, May 28, 1996 (stating an opinion that "misguided juries have awarded [punitive damages] at levels out of balance with the degree of wrongdoing by the defendant").

[49] *See generally* Lyndon F. Bittle, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 CALIF. L. REV. 1433, 1437 (1987) [hereinafter Bittle]; *see also* Kochan v. Owens-Corning Fiberglass Corp., 610 N.E.2d 683, 694 (Ill. App. Ct. 1993), *cert. denied*, 510 U.S. 1177 (1994).

instructions are highly subjective and devoid of meaningful guidelines.[50] As such, juries are afforded "extraordinary," unfettered discretion in making determinations.[51] Essentially, it is this lack of clear guidelines or criteria for determining the amount of any assessment that leads to the unpredictability of jury awards.[52]

Unbridled discretion necessarily invites juries to apply their own biases, "private beliefs, and personal predilections" in making their assessments.[53] Allowing a jury's bias to come into play however, may detrimentally affect the defendant. A prime example of such an adverse effect exists in the instances when evidence of a defendant's wealth is given to the jury.[54] Such evidence may possibly prejudice a jury's determination of liability and fuel its desire "to seek punitive damages from defendants with 'deep pockets'."[55]

Reformers argue that the unpredictability of jury awards adversely affects the nation's competitiveness by increasing "avoidance costs"[56] and deterring

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[50] *See* Wheeler, *supra* note 47, at 940-41; *see generally Browning-Ferris*, 492 U.S. at 281 (Brennan, J., joined by Marshall, J., concurring).

[51] Ellis, *supra* note 47, at 979 (stating that "[t]he determination of the amounts of punitive damage assessments is . . . characterized by uncertainty . . . . This is largely the result of the extraordinary discretion given to the jury, under instructions that are singularly opaque").

[52] *See Browning-Ferris*, 492 U.S. at 281 (Brennan, J., concurring) (noting that juries lack statutory guidelines on punitive damage awards and are "left largely to themselves in making this important and potentially devastating decision"); *see also* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting) (noting that lack of meaningful jury instructions leads to "unpredictable results").

[53] *Haslip*, 499 U.S. at 43 (O'Connor, J., dissenting) (arguing that a lack of meaningful jury instructions, "invit[es] juries to rely on private beliefs and personal predilections"); *see also*, Baker, *supra* note 12 (noting that the jury is afforded the "power to dispense a juster justice or a vindictive vengeance").

[54] *See* Bittle, *supra* note 49, at 1453-54 (arguing that "use of wealth as a criterion for assessing fines also creates an extreme risk of prejudicing the judgment") (citations omitted).

[55] Ellis, *supra* note 47, at 979; *see also* TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 489-95 (O'Connor, J., dissenting) (noting that jurors were not inhuman, and that they were susceptible to impermissible influences, as it seems "inescapable[] that the jury was influenced unduly by TXO's out-of-state status and its large resources"); Bittle, *supra* note 49, at 1457 (stating that "evidence of financial status may influence the jury to impose a much harsher award than the offense warrants").

[56] Dick Thornburgh, *Punitive Damages After BMW v. Gore*, 11 LEGAL BACKGROUNDER 27 [hereinafter Thornburgh, *Punitive Damages After Gore*] (citing Dick Thornburgh, *America's Civil Justice Dilemma: The Prospects for Reform*, 55 MD. L. REV. 1074, 1076 (1996)). Uncertainty "increases avoidance costs including additional insurance and legal costs" because businesses cannot forecast their potential liability risks. *Id.* Avoidance costs can be defined as the costs of avoiding or protecting against certain legal uncertainties, such as the inability to gauge potential liability risks. *See id.* Examples of such costs include additional insurance and/or legal costs. *See id.*

research and development.[57] Furthermore, cases tried today are increasingly more complex, and consequently may exceed a jury's comprehension.[58] Many commentators thus question whether jurors are qualified to perform the difficult task of determining punitive damages, and suggest instead that a judge, and not a jury, should determine the amount of punitive awards.[59] Such a suggestion seems to indicate that the present common law method for determining punitive damages is no longer serving its purpose.[60] In fact, commentators argue that the uncertainty of jury awards actually promotes the failure of the original purpose of punishing and deterring defendants and others.[61]

2. *Inadequate standard of review*

In addition, appellate courts do not adequately review the verdicts handed down by juries. Appellate courts often employ an "excessiveness review" when examining jury awards.[62] However, there is no consistent definition of excessiveness. Instead, the courts have attempted to determine excessiveness based on vague and often standardless terms such as whether the jury's verdict

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[57] *See* Alfred W. Cortese, Jr. & Kathleen L. Blaner, *Civil Justice Reform in America: A Question of Parity with Our International Rivals*, 13 U. PA. J. INT'L BUS. L. 1, 52-53 (1992) (arguing that reform of punitive damage awards would improve international competitiveness).

[58] Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 49 (1983) (noting that the complexity of product liability cases leaves juries ill-equipped to impose fair punishments).

[59] *See* Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U.L. REV. 1269, 1278-83 (1993) [hereinafter Rustad & Koenig] (citing Model State Punitive Damages Act (Office of the Vice President 1992) 5(f)). Former Vice President Dan Quayle's proposal for reforming punitive damages included a recommendation for allowing the judge instead of the jury to determine punitive damages amount. *Id.* at 1280 n.60. *See also* Sales & Cole *supra* note 18, at 1167 (emphasizing that judges rather than unknowledgable juries should decide if punitive damages are merited).

[60] *See generally* Ellis, *supra* note 47, at 990 (noting that the common law system of imposing punitive damages is "lacking in fundamental fairness"); *see also supra* note 43 and accompanying text.

[61] *See* Wheeler, *supra* note 47, at 943-46 (arguing that by giving the jury discretion to determine the amount of a punitive damage award (1) there is so much uncertainty that actors contemplating wrongful conduct are not in fact deterred because they have no clear guidelines and can only guess as to the costs of their actions, and (2) it keeps juries from imposing similar, consistent awards for similar misconduct, thus resulting in disproportionate and arbitrary punishments).

[62] *See* Honda Motor Co., Ltd. v. Oberg, 114 S. Ct. 2331, 2335 (1994) (stating that the practice of judicial review of excessive damages verdicts was a deeply rooted practice); *see also* Kochan v. Owens-Corning Fiberglass Corp., 610 N.E.2d 683 (Ill. App. Ct. 1993), *cert. denied*, 510 U.S. 1177 (1994) (adopting an excessiveness standard of review in holding that the award was constitutional).

indicated some type of "passion [or] prejudice;"[63] "if the verdict is so grossly excessive as to shock the court's conscience;"[64] when "the verdict represents a monstrous or shocking injustice,"[65] or if it does not meet "concerns of reasonableness."[66] Such general and ambiguous standards provide skeletal guidance, and give the illusion of judicial certainty when in fact none exists. Further, standardless judicial reviews do not sufficiently impose meaningful restraints on jury excess, and fail to provide an adequate check on the jury's discretion.[67]

The clear inference from the problems illustrated here is that some uniform framework or standard is sorely needed for determining: 1) when punitive damages should be imposed; 2) what standard of conduct should warrant a punitive award; 3) what standard should be used to evaluate the amount of punitive damages to impose; and 4) what standard should be used to evaluate the propriety of a punitive award.[68] The *Gore* decision reflects the Supreme Court's effort to address these issues by setting forth a nationwide standard for evaluating whether a punitive award is excessive.[69]

III. *BMW V. GORE*

In January 1990, Dr. Ira Gore, Jr., purchased a new BMW automobile from an authorized dealership in Birmingham, Alabama, for $40,750.[70] Dr. Gore drove the car for approximately nine months before discovering that the car had been repainted.[71] Dr. Gore brought suit against petitioner BMW of North

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[63] *See* Hammond v. City of Gadsden, 493 So. 2d 1374, 1378 (Ala. 1986) (citing Aspinwall v. Gowens, 405 So. 2d 134 (Ala. 1981)).

[64] *See* American Business Interiors, Inc. v. Haworth, Inc., 798 F.2d 1135, 1146 (8th Cir. 1986) (citing Ouachita Nat'l Bank v. Tosco Corp., 716 F.2d 485, 488 (8th Cir. 1983) (en banc)).

[65] *See id.* (citing Vanskike v. Union Pac. R.R., 725 F.2d 1146, 1149-50 (8th Cir. 1984)).

[66] *See* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

[67] *See* Sales & Cole, *supra* note 18, at 1166-168 (arguing for more stringent standards and vigorous judicial review).

[68] *See generally*, Thornburgh, *Punitive Damages After Gore*, *supra* note 56, at 27 (citing RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE BY STATE GUIDE (1991)).

[69] *See id.*

[70] BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1593 (1996).

[71] *Id.* Dr. Gore took the car to an independent detailer to make the car look "'snazzier than it normally would appear'." *Id.* (citation omitted). The proprietor detected evidence that the top, hood, trunk and quarter panels of the car had been repainted. *Id.* at 1593 n.1. The parties presumed that the panels of Dr. Gore's car had been exposed to acid rain and damaged during shipping from Germany, and that the vehicle preparation center in Brunswick, Georgia had thus repainted the car. *Id.*

America ("BMW"), the American distributor of BMW automobiles, claiming fraud and suppression of a material fact.[72]

At trial, BMW asserted that it had adopted a formal policy of nondisclosure in 1983 relating to vehicles that required refinishing or repairs upon arrival in the United States.[73] If the cost of pre-sale repairs exceeded three percent of the manufacturer's suggested retail price ("MSRP"), the car would be placed into company service and later sold as a used vehicle.[74] If however, the cost of the repairs performed on the vehicle did not exceed three percent of the MSRP, BMW considered the car new and sold it to a dealer without disclosure of the repairs.[75] The repairs performed on Dr. Gore's car cost $601.37, approximately 1.5 percent of the MSRP, substantially less than the three percent threshold adopted.[76] Consequently, BMW sold the car as new, and did not disclose information of the damage or repairs to the Birmingham dealer.[77]

Dr. Gore asserted that BMW's failure to disclose the repainting constituted suppression of a material fact, and alleged that he had been deceived into purchasing a defective product.[78] In support of his claim, Dr. Gore introduced evidence that BMW had sold approximately 1,000 repainted cars nationwide during the previous ten years without disclosure of the repairs.[79] The Alabama jury returned a verdict holding BMW liable for $4,000 in compensatory damages.[80] In addition, the jury found that BMW's conduct in failing to

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[72] *Id.* at 1593 n.3. Alabama's statute provides that: "'Suppression of a material fact which the party is under an obligation to communicate constitutes fraud.'" *Id.* (quoting ALA. CODE § 6-5-102 (1993)). Dr. Gore also named the German manufacturer of BMW automobiles, Bayrische Motoren Werke, Aktiengesellschaft (hereinafter BMW AG), and the Birmingham dealership as defendants. BMW v. Gore, 646 So. 2d 619, 621-22 (Ala. 1994). The jury found the dealership liable for Dr. Gore's compensatory and punitive damages. *Id.* at 622. The dealership did not appeal the judgment against it. *Id.* As for the BMW AG, the Alabama Supreme Court found on appeal that the trial court did not have jurisdiction over the German manufacturer, and reversed the judgment against it. *Id.*

[73] *Gore*, 116 S. Ct. at 1593.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.* Since 1983, BMW had sold 983 refinished cars as new, without disclosure of repairs or damages, including 14 in Alabama. *Id.* The cars included in this statistic were all those that were repainted at a cost of more than $300 per vehicle. *Id.*

[80] *Id.* The former owner of the Birmingham dealership testified that a repainted BMW was worth approximately ten percent less than a BMW automobile that had not been refinished. *Id.* The actual damage estimate of $4,000 was based on his testimony. *Id.*

disclose the refinishing was "gross, oppressive [and] malicious," and therefore assessed BMW $4,000,000 in punitive damages.[81]

A post-trial motion was filed by BMW to set aside the punitive damage award.[82] In challenging the punitive award, BMW argued that its non-disclosure policy comported with the most stringent of disclosure statutes, which mandate only a three percent disclosure threshold,[83] and that based on this, its nondisclosure was lawful.[84] Further, BMW argued that just months before Dr. Gore's case went to trial, the jury in a case with identical facts[85] found that BMW's failure to disclose paint repair constituted fraud, but only awarded comparable compensatory damages, and no punitive damages.[86] In response to BMW's argument, Dr. Gore pointed to BMW's subsequent institution of a nationwide full disclosure policy as being illustrative of the efficacy of the award's deterrent effect.[87]

The trial judge denied BMW's motion to set aside the punitive award, and BMW subsequently appealed to the Alabama Supreme Court.[88] On appeal, the Alabama Supreme Court upheld the punitive damages award finding that it was not excessive or constitutionally impermissible.[89] The court, however,

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[81] *Id.* at 1594. Based on Dr. Gore's argument that BMW should be imposed a penalty for adopting a nationwide nondisclosure policy, the jury apparently calculated the four million dollars in punitives by multiplying $4,000 — the decreased value of Dr. Gore's car — by 1,000, the approximate number of repainted cars sold as new. *Id.* at 1593.

[82] *Id.* at 1594.

[83] *Id.*; *see also* Brief for the Petitioner, BMW of N. Am., Inc. v. Gore, 646 So. 2d 519 (Ala. 1994) (No. 94-896). Introducing evidence that at present, 22 states, including even Alabama, had explicit disclosure thresholds requiring disclosure only of repairs that cost more than three percent of MSRP. *Id.* Twenty-five states have not addressed the issue by statute or regulation, and three states even arguably require disclosure of repairs costing less than the three percent threshold. *Id.* Even out of these three states, only the Georgia statute, explicitly requires disclosure of paint repairs costing more than $500, but Dr. Gore's car was purchased before this statute was enacted. *Id.* (citing GA. CODE ANN. § 40-1-5(b), (c), (d) & (e)).

[84] *Gore*, 116 S. Ct. at 1594.

[85] Yates v. BMW of N. Am., Inc., 642 So. 2d 937 (Ala. 1993). In *Yates*, another Alabama BMW purchaser brought suit after discovering that his car had been repainted. *Id.* at 938. While awarding a comparable amount of compensatory damages, the *Yates* jury awarded no punitive damages. *Id.*

[86] *Gore*, 116 S. Ct. at 1594 n.8.

[87] *Id.* at 1594. Prior to the judgment in the *Gore* case, BMW had changed its nondisclosure policy in Alabama and two other states, to avoid sales of refinished vehicles there. *Id.* Immediately proceeding the four million dollar punitive verdict, however, BMW instituted a nationwide policy of full disclosure of all repairs. *Id.*

[88] *Id.*

[89] BMW of N. Am., Inc. v. Gore, 646 So. 2d 619 (Ala. 1994). In determining whether the punitive award was excessive the court applied the factors stated in Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989). *Id.* at 624-28. The court concluded that: 1) BMW's conscious adoption of a nondisclosure policy constituted sufficiently "reprehensible" conduct; 2) BMW's

found that the jury improperly included BMW's out-of-state conduct in calculating the punitive damages.[90] Accordingly, the Alabama Supreme Court held that "a constitutionally reasonable punitive damages award in this case is [two million dollars]," and ordered a remittitur of the four million dollar jury verdict.[91] BMW appealed to the United States Supreme Court, which granted a writ of *certiorari* to "illuminate 'the character of the standard that will identify constitutionally excessive awards' of punitive damages."[92]

IV. MAJORITY, CONCURRING AND DISSENTING OPINIONS

A. Majority Opinion

The United States Supreme Court, in an opinion written by Justice Stevens, reversed the punitive damages award in a sharply divided five-to-four decision.[93] The Court began its "excessiveness review" by pointing out that such an inquiry necessarily requires an identification of the state interests the award is designed to serve.[94] Thus, the Court initially focused on "the scope of Alabama's legitimate interests in punishing BMW and deterring it from

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wrongful conduct was profitable; 3) imposition of such an award would not jeopardize BMW's financial position; 4) the costs associated with the trial were substantial enough; 5) no criminal sanctions were imposed on BMW for their conduct; 6) the *Yates* decision awarding no punitive damages "[w]as a reflection of the inherent uncertainty of the trial process"; and 7) BMW's conduct bears a "reasonable relationship" to the punitive award. *Id.*

[90] *Id.* at 627. The court expressly stated that the "acts that occurred in other jurisdictions" were not considered in its determination of its remitted award. *Id.* at 628. Further, Justice Houston in a special concurrence clarified that the Alabama Supreme Court itself had determined "'the maximum amount that a properly functioning jury could have awarded.'" *Id.* at 630 (Houston, J., concurring specially) (quoting Big B, Inc. v. Cottingham, 634 So. 2d 999, 1006 (Ala. 1993)).

[91] *Id.* at 629.

[92] BMW of N. Am., Inc. v Gore, 116 S. Ct. 1589, 1595, *cert. granted*, 115 S. Ct. 932 (1995) (citation omitted).

[93] *Id.* at 1592. The case is significant because of the fractionalization of the court members in the 5-4 decision. Justices O'Connor, Kennedy, Souter, and Breyer joined in the majority opinion. Justice Breyer filed a concurring opinion, in which Justices O'Connor and Souter joined. Four justices filed two dissents: Justice Scalia filed a dissenting opinion, in which Justice Thomas joined, and Justice Ginsburg filed a dissenting opinion, in which Chief Justice Rehnquist joined. *Id.*

[94] *Id.* at 1595. Generally, the only requirement upon which states predicate punitive damage awards, is that the award be "reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence." *Id.* (citations omitted). Thus, an award can only be found to be unconstitutionally excessive if it can be characterized as "'grossly excessive' in relation to [those state] interests." *Id.* Accordingly, an excessiveness inquiry must necessarily begin with the identification of such interests. *Id.*

future misconduct."[95] The Court noted that states have the fundamental right to protect their citizens from deceptive trade practices in the automobile industry, including enacting disclosure requirements obligating presale disclosure of repairs and damages by automobile manufacturers, distributors and/or dealers.[96] However, states do not currently provide such protections in a uniform manner.[97] Instead, varying processes and statutes are employed to define state disclosure obligations.[98] The resultant effect is a diverse "patchwork of rules" in this area.[99]

The Court stated that such a divergence of rules essentially reflects that "reasonable people may disagree about the value of a full disclosure requirement."[100] Accordingly, the Court emphasized the impropriety of arbitrarily imposing upon Alabama's neighboring states *Gore*'s full disclosure rule.[101] "[I]t is clear that no single State could . . . impose its own policy choice on neighboring states."[102] Further, the Court articulated that such principles of state sovereignty and comity effectively restrain states from "impos[ing] economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other [s]tates."[103]

Relying on such principles, the Court rejected Dr. Gore's argument that large punitive damages were necessary to deter BMW's conduct nationwide, stating that such an attempt "to alter BMW's nationwide policy . . . would be [tantamount to] infringing [up]on the policy choices of other [s]tates."[104] The Court further stressed that Alabama only has the power to protect its own consumers, and may not use the punitive damages deterrent as a means of imposing its regulatory policies on the entire nation.[105] The Court concluded that the Alabama Supreme Court was correct in remitting the punitive damages award which had impinged upon the sovereignty of other states by punishing BMW for sales outside of Alabama.[106]

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[95] *Id.*

[96] *Id.* at 1595-96.

[97] *Id.* at 1596.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* at 1596-97.

[102] *Id.* ("No State can legislate except with reference to its own jurisdiction . . . . Each State is independent of all the others in this particular." (citing Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881))).

[103] *Id.* at 1597.

[104] *Id.*

[105] *Id.* at 1597-98.

[106] *Id.* at 1598. The Court expressly distinguished its ruling that it was error for the Alabama jury to base its award computation on the number of sales in other states, from situations where it is proper to consider evidence of out-of-state transactions to determine the degree of

The Court went on, however, to use what it termed "guideposts," to find the two million dollar award levied by the Alabama court, although remitted, grossly excessive.[107] The Court's three "guideposts" included: 1) the degree of reprehensibility of the nondisclosure policy; 2) the disparity between actual harm and the punitive award; and 3) the difference between the award against BMW and other comparable actions.[108] The Court's consideration of the award's excessiveness in relation to each guidepost is now discussed in turn.

1. Degree of reprehensibility

First, the Court considered the degree of reprehensibility of BMW's conduct, noting that this was "[p]erhaps the most important indicium of the reasonableness of a punitive damages award."[109] The Court found no evidence of egregiously improper conduct or other aggravating factors associated with reprehensible conduct, and thus concluded the punitive award was exorbitant in relation to this factor.[110] In so ruling, the Court noted that the harm suffered by Dr. Gore was purely economic.[111] In addition, the Court emphasized that BMW's conduct was not reckless or indifferent to the health and safety of others.[112]

By contrast, Dr. Gore argued that BMW's nationwide nondisclosure policy constituted a pattern of tortious conduct that was sufficiently reprehensible.[113] Further, Dr. Gore maintained that state statutes regarding disclosure requirements "supplement[ed], rather than supplant[ed], existing remedies for breach of contract and common-law fraud," and thus, BMW should have expected its nondisclosure policy to expose it to liability for fraud.[114] The Court rejected these arguments, stating instead that the state disclosure statutes could reasonably be interpreted as providing "safe harbors" against such liability.[115] Additionally, the Court stressed BMW's decision to institute a disclosure policy as comporting with the strictest threshold requirements,

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reprehensibility of a defendant's conduct. *Id.* at 1598 n.21 (citations omitted).

[107] *Id.* at 1598-1603.

[108] *Id.*

[109] *Id.* at 1599 ("The flagrancy of the conduct is thought to be the primary consideration in determining the amount of punitive damages." (citing David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 387 (1994))).

[110] *Id.* at 1599-1601.

[111] *Id.* at 1599. The Court observed that the repair did not affect the performance or safety of Dr. Gore's automobile, nor was the appearance of the car even affected, at least for nine months. *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* at 1600 (citing Respondent's Brief 4-5, 18-19).

[115] *Id.* at 1600-01.

and as being demonstrative of conduct which was not sufficiently reprehensible to justify the verdict.[116] Moreover, the Court emphasized that Dr. Gore's "recidivist" theory "overlook[ed] the fact that actionable fraud requires a material misrepresentation or omission."[117] There is a fine line between minor damage and damage requiring disclosure, and the Court acknowledged the propriety of BMW's reliance on state disclosure statutes for guidance in this area.[118] Accordingly, the Court held that absent "deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive," BMW's nondisclosure, which was based on a good faith belief that no duty to disclose existed, was not sufficiently reprehensible to warrant the large verdict.[119]

2. Ratio

Next, the Court considered the second indicium of excessiveness, the ratio of the punitive damage award to the actual harm inflicted.[120] In its review, the Court noted the importance of following well-established principles of law which require an exemplary award to bear a "reasonable relationship" to the compensatory award.[121] Revisiting its rulings in *Haslip*[122] and *TXO*,[123] the Court also emphasized how the two million dollar jury award in this case was

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[116] *Id.*

[117] *Id.*

[118] *Id.* at 1601.

[119] *Id.* (citations omitted).

[120] *Id.*

[121] *Id.* (footnote omitted).

[122] Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991). In *Haslip*, the Supreme Court directly addressed the issue of due process. *Id.* at 9. The case involved an action against an insurance company, by an insured, for fraudulent failure to cover medical expenses, in which a jury awarded $840,000 in punitive damages. *Id.* at 4-6. The Court in *Haslip* concluded that even though a punitive damages award of "more than 4 times the amount of compensatory damages," might be "close to the line," it did "not cross the line into the area of constitutional impropriety." *Id.* at 23-24.

[123] TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993). In *TXO*, the jury returned a verdict of $19,000 in damages and $10 million in punitive damages, 526 times the actual damages. *Id.* at 447, 459. Following dicta in *Haslip*, the Court in *TXO* refined the excessiveness inquiry into "whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred." *Id.* at 460 (citation omitted). The Court considered the potential monetary harm of TXO's conduct, rather than the actual damages, and stated that when viewed in this light, the disparity between the actual and punitive damages was not severe. *Id.* at 462 (citation omitted). Based on this fact, the Court held that the award was not unconstitutionally excessive, stating that "the disparity between the punitive award and the potential harm does not, in our view, 'jar one's constitutional sensibilities'." *Id.*

"dramatically greater than [the awards] considered in [those cases]."[124] The Court renounced the Alabama jury award as excessive, observing that it was "500 times the amount of [Dr. Gore's] actual harm."[125] Further, the award was made despite the lack of any threat of additional potential harm to Dr. Gore or other BMW purchasers from BMW's nondisclosure policy.[126]

The Court then, once again[127] reiterated its position against creating a mathematical formula for punitive damages, stating: "'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however that a general concern of reasonableness . . . properly enters into the constitutional calculus.'"[128] The Court inferred that the award crossed the line into "constitutional impropriety" because the award's "breathtaking" ratio of 500 to 1 "must surely 'raise a suspicious judicial eyebrow'."[129]

3. *Sanctions for comparable misconduct*

Finally, the Court considered the third indicium of excessiveness, comparing the "punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct."[130] Citing *Browning-*

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[124] *Gore*, 116 S. Ct. at 1602. The Court's statement was based on the reasoning that the disparity between the punitive damage award and the amount of actual harm in *Gore* was much greater than the disparities which had been considered in *Haslip* and in *TXO*, and which had been ruled as not being excessive. *Id.*

[125] *Id.* at 1602 (footnote omitted).

[126] *Id.*

[127] The Court first set forth this theme in *Haslip*, 499 U.S. at 18, and has since reaffirmed this position in *TXO*, 509 U.S. at 458, and now in *Gore*.

[128] *Gore*, 116 S. Ct. at 1602 (citing *TXO*, 509 U.S. at 458 (quoting *Haslip*, 499 U.S. at 18)). The Court's reasoning for not advancing a "categorical approach," is that in some instances when the conduct involves "a particularly egregious act" or when an injury or monetary determination may be hard to detect or to value, respectively, then a higher ratio punitive award may be properly warranted. *Id.* at 1602. Therefore, one cannot even conclude from *TXO* or *Gore* that the line between the acceptable and unacceptable ratios of punitive damages to compensatory damages lies between 10:1 and 500:1, because the egregiousness of the conduct at issue influences whether the ratio is constitutionally permissible. *See id.*

[129] *Id.* at 1603 (quoting *TXO*, 509 U.S. at 482 (O'Connor, J., dissenting)). The Court explains in a footnote that the 500 to 1 ratio may have been an application of the Alabama Supreme Court's reading of the plurality opinion in *TXO*, which predicted that "future due process challenge[s] to . . . punitive damages award[s] could be disposed of with the simple observation that 'this is no worse than *TXO*['s]' [526 to 1 ratio]." But the majority states that, as they had explained in the opinion, "this award is significantly worse than the award in *TXO*," in which the relevant ratio, after considering the potential harm that could have resulted was not more than 10 to 1. *Id.* at 1602 n.37.

[130] *Id.* at 1603.

Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.,[131] the Court agreed with its prior decision in stating that "'substantial deference [should be accorded] to legislative judgments'" in order to determine appropriate sanctions in this case.[132] The Court observed that while various state statutes impose sanctions ranging from $5,000 to $10,000,[133] "the maximum civil penalty authorized by the Alabama Legislature for a violation of its Deceptive Trade Practices Act is $2,000."[134] Further, the Court noted how none of these statutes provided a first time offender, or even a fourteen time offender,[135] with fair notice of liability for a multi-million dollar penalty.[136]

Based on its analysis, the Court concluded that there was no evidence a "more modest sanction would not have been sufficient to motivate full compliance with the disclosure requirement imposed by the Alabama Supreme Court."[137] Further, BMW had no "history of noncompliance with known statutory requirements," and this rendered the punitive award against BMW unjustifiable.[138] The Court therefore reversed the judgment and remanded the case to the Alabama Supreme Court.[139]

B. Concurring Opinion

Justice Breyer, in his concurring opinion, joined by Justices O'Connor and Souter, explained how the Supreme Court overcame the "'presumption of validity'"[140] usually afforded an award which is the product of fair

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[131] 492 U.S. 257 (1989).

[132] *Id.* at 1603 (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)).

[133] *Id.* at 1603. The Court looked at statutes from various states in making its consideration, and cited the following:

> ARK. CODE ANN. § 23-112-309(b) (1992) (up to $5,000 for violation of state Motor Vehicle Commission Act that would allow suspension of dealer's license; up to $10,000 for violation of Act that would allow revocation of dealer's license); FLA. STAT. § 320.27(12) (1992) (up to $1,000); GA. CODE ANN. §§ 40-1-5(g), 10-1-397(a) (1994 and Supp. 1996) (up to $2,000 administratively; up to $5,000 in superior court); IND. CODE ANN. § 9-23-6-4 (1993) ($50 to $1,000); N.H. REV. STAT. ANN. §§ 357-C:15, 651:2 (1995 and Supp. 1995) (corporate fine of up to $20,000); N.Y. GEN. BUS. LAW § 396-p(6) (McKinney Supp. 1995) ($50 for first offense; $250 for subsequent offenses).

Id. at 1603 n.40.

[134] *Id.* at 1603 (citing ALA. CODE § 8-19-11 (b) (1993)).

[135] Fourteen Alabama consumers purchased repainted BMW's. *Id.* at 1602 n.35.

[136] *Id.* at 1603.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 1604.

[140] *Id.* at 1604 (Breyer, J., concurring) (citation omitted). There is a strong presumption of validity attached to judgments that are the product of a fair process and procedures. *Id.* at 1604

procedures.[141] He emphasized how the "vague and open-ended" standards used by the Alabama court did not properly constrain or limit the jury's discretion in awarding punitive damages, and created the possibility of arbitrary results.[142] Further, Justice Breyer stated that "'the lack of clear guidance heighten[ed] the risk of [an] arbitrar[y] . . . verdict'"[143] and thus, invited the scrutiny given the *Gore* verdict.[144] Consequently, he reasoned that because the award in this case was a product of unconstrained jury discretion and was "grossly excessive," any presumption of validity was overcome.[145] Accordingly, Justice Breyer concluded that based on the "lack of constraining standards" on the jury, the award violated the "basic guarantee of nonarbitrary governmental behavior that the Due Process Clause provides," and the majority's detailed review of the case was therefore warranted.[146]

C. *Dissenting Opinions*

1. *Justice Scalia*

Justice Scalia, joined by Justice Thomas, in a strong dissent, reproached the majority for delivering a decision "dressed up as a legal opinion."[147] Scalia renounced the majority's opinion as being merely "no more than a disagreement with the community's sense of indignation or outrage expressed in the punitive award," and objected to the majority giving its judgment precedence over the judgment of state courts and juries.[148] Further, he criticized the majority opinion for creating federal standards that govern and

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(Breyer, J., concurring) (citing TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 457 (1993)).

[141] *Id.* at 1604 (Breyer, J., concurring).

[142] *Id.* at 1605 (Breyer, J., concurring).

[143] *Id.* (citing *TXO*, 509 U.S. at 475).

[144] *Id.* at 1605 (Breyer, J., concurring). In reaching the conclusion that the standards utilized by the Alabama Supreme Court did not adequately constrain the jury against an arbitrary decision, Justice Breyer examined 5 factors and determined that: 1) the Alabama statute permitting punitive damages contains a standard that authorizes punitive awards for a range of conduct encompassing serious misrepresentations, to much less serious acts; 2) the Alabama court interpreted and applied the factors set forth in Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989), in such a manner that they "could not have significantly constrained the [jury];" 3) the Alabama court did not apply any constraining "economic theory that might explain the [award];" 4) there are no historical or community standards in this case that could "provide background standards constraining arbitrary behavior and excessive awards;" and 5) there are no other statutes that could impose limits on the jury. *Id.* at 1605-09 (Breyer, J., concurring).

[145] *Id.* at 1609 (Breyer, J., concurring).

[146] *Id.*

[147] *Id.* at 1611 (Scalia, J., dissenting).

[148] *Id.*

intrude upon the "hitherto exclusively state law" province, stating that "[t]he Constitution provides no warrant for federalizing yet another aspect of our Nation's legal culture (no matter how much in need of correction it may be)."[149]

Justice Scalia, however acknowledged the opinion as significant as this was the first time the Supreme Court overturned a punitive damage award as excessively large.[150] He then set forth a detailed dissent criticizing each of the majority's points.[151] Initially, Scalia denounced the majority's opinion as "a false alarm" that provides "virtually no guidance" to state courts and governments as to when an award crosses the boundaries of constitutional impropriety.[152]

Specifically, Scalia condemned the majority's three guideposts as "mark[ing] a road to nowhere . . . [and] provid[ing] no real guidance at all."[153] His conclusion was based on three grounds: 1) the guideposts can be overridden through a "loophole;" 2) the guideposts are vague and marked by less than meaningful specifics; and 3) the Court failed to state that the three standards were the only "guideposts" to be considered.[154] Elaborating further, Scalia stated that the three articulated "guideposts" could be overridden by state courts upholding awards as "'necessary to deter future misconduct'."[155] Moreover, he predicted that the loopholes would invite state reviewing courts to "concoct rationalizations" to justify the awards of their state juries.[156] He also observed that by creating the possibility of such reactions, the Court was not "accord[ing] [either] category of institution the respect it deserves."[157]

Additionally, Scalia asserted that the majority's three "guideposts" provided no real guidance, because they did not mark clear cut boundaries for review.[158] Instead, he noted that the majority's vague standards identified "'the degree of reprehensibility'" only in terms of whether defendant's conduct was a violent or a nonviolent crime, and on the basis that "'trickery and deceit' are more reprehensible than negligence."[159] Quoting other examples of the majority's vagueness, Scalia stated that standards such as "general concern[s] of reasonableness" and "breathtaking" ratios provided little, or no illuminative guidance, for state courts trying to comply with this

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[149] *Id.* at 1610-11 (Scalia, J., dissenting).
[150] *Id.* at 1611 (Scalia, J., dissenting).
[151] *Id.* at 1611-14 (Scalia, J., dissenting).
[152] *Id.* at 1612 (Scalia, J., dissenting).
[153] *Id.* at 1613 (Scalia, J., dissenting).
[154] *Id.* at 1613-14 (Scalia, J., dissenting).
[155] *Id.* at 1613 (Scalia, J., dissenting) (quoting the majority opinion).
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*

new law.[160] Furthermore, he admonished the Court's failure to identify the three "guideposts" as the only "guideposts" to be considered, and pointed out how the guideposts could accordingly be "overridden by [any number of] unnamed considerations."[161]

He also rebuked the majority's finding that Alabama may not impose sanctions on BMW to deter conduct deemed lawful in other states.[162] He emphasized the Court's lack of supporting authority in this area, and condemned the Court's statements regarding the same, as constituting pure unsupported dicta.[163] Finally, Scalia pointed out that under the majority's logic, all disputes over evidentiary sufficiency of state jury awards would be elevated to "question[s] of constitutional moment, subject to review in [the U.S. Supreme] Court . . . . a stupefying proposition."[164]

2. *Justice Ginsburg*

In a dissent joined by Chief Justice Rehnquist, Justice Ginsburg admonished the majority for "unnecessarily and unwisely ventur[ing] into territory traditionally within the State's domain."[165] Echoing Justice Scalia, Ginsburg expressed her belief that the "extraterritoriality" issue considered by the majority was a "false issue."[166] She pointed out that the Alabama Supreme Court had provided a clear statement on the law in this area, and of the impermissibility of multiplying out-of-state conduct into the punitive damages.[167] Further, based on the clarity of the Alabama law articulated and the unlikelihood of such improper multiplications occurring again, Ginsburg stressed the impropriety of the majority's position.[168]

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[160] *Id.* at 1613-14 (Scalia, J., dissenting) (quoting the majority opinion).

[161] *Id.* at 1614 (Scalia, J., dissenting).

[162] *Id.* at 1611-12 (Scalia, J., dissenting).

[163] *Id.* at 1611-13 (Scalia, J., dissenting).

[164] *Id.* at 1614 (Scalia, J., dissenting).

[165] *Id.* at 1614 (Ginsburg, J., dissenting).

[166] *Id.* at 1615 (Ginsburg, J., dissenting).

[167] *Id.*

[168] *Id.* at 1616 (Ginsburg, J., dissenting). Justice Ginsburg elaborated on the majority's needless correction by recognizing that the Alabama Supreme Court had itself corrected the jury's improper multiplication of the out-of-state events by not considering those acts in determining the remitted award. *Id.* Further, such a corrective endeavor was made by the Alabama court, even in the wake of "one counsel's slip" in suggesting a nationwide sales multiplier in his summation, and of "the other's oversight" in not objecting to the suggestion. *Id.* Further, she noted that the majority had even acknowledged that the "Alabama high court [had] 'properly eschewed reliance on BMW's out-of-state conduct'" but still chose to extrapolate on this issue. *Id.*

More specifically, Justice Ginsburg believed the Alabama jury's award was "entitled to a presumption of legitimacy" based on the longstanding principle that the Court will "'respect the decision of the State courts'."[169] She also observed that the Alabama Supreme Court had exercised a thorough and painstaking review of the award using the very factors that the majority had endorsed in its prior decisions on the issue.[170] Accordingly, she reproached the majority for being "quick to find a constitutional infirmity when the [Alabama] state court endeavored" to correctly apply the law, and to follow the process approved by the majority in its previous decisions.[171]

Finally, Ginsburg predicted that the majority's opinion would open the door and commit the court to "now and again" consider and correct "'misapplication[s] of a properly stated rule of law,'" an exercise of review hitherto exclusively within the States' domain.[172] Further, she stressed that the Court would be "policing the area" alone,[173] despite the fact that it was "not well equipped" to do so.[174] Ginsburg expressed her disbelief at the Court's desire to expose itself to such a task, especially in light of the Court's hesitation in prior cases to condone the review of verdict size, and because a sufficient review process exists at the state court and legislative level.[175] Accordingly, she renounced the Court's reversal of the Alabama Supreme Court's judgment.[176]

D. Case Analysis

Given the importance of the issue and the Court's signal that it may overrule the punitive damages award, the case attracted several *amicus curiae* briefs which urged the Court to overrule the award, and to set forth

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[169] *Id.* (citing Rowan v. Runnels, 5 U.S. (1 How.) 134, 139, (1847)).

[170] *Id.* at 1616 (Ginsburg, J., dissenting). The Alabama court applied several factors, including consideration of BMW's "deliberate [and] (reprehensible)" conduct, its "financial position . . . and the costs of litigation." *Id.* Justice Ginsburg noted that these standards were previously held as "impos[ing] a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages" in both *TXO* and *Haslip*. *Id.* (ctiation omitted).

[171] *Id.*

[172] *Id.* at 1617 (Ginsburg, J., dissenting). Based on Supreme Court Rule 10, "'[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law'." *Id.* (citing S. Ct. Rule 10).

[173] *Id.* at 1617 (Ginsburg, J., dissenting). Justice Ginsburg noted that the federal district courts and the court of appeals would not be involved in the task now relegated to the U.S. Supreme Court. *Id.*

[174] *Id.*

[175] *Id.* at 1617-18 (Ginsburg, J., dissenting).

[176] *Id.* at 1618 (Ginsburg, J., dissenting).

meaningful guidelines limiting punitive awards.[177] Instead of creating definitive uniform law however, the *Gore* case further perpetuates the uncertainty surrounding excessive punitive damages. The Court's decision does not increase the proportionality of punitive damage awards, nor does it create the kind of clear prospective guidelines that businesses had sought.[178] In evaluating the *Gore* decision, two important points of analysis emerge. The first is the Court's apparent call for congressional action in the area of punitive damages. The second is the inherent difficulty in applying the *Gore* test.

1. The need for legislation

Many commentators have interpreted the Court's decision as a call for congressional action addressing the issue of damages.[179] Such an interpretation seems particularly appropriate in light of Justice Breyer's concurring opinion which cites to legislation in other states while pointing out that "there are no . . . legislative enactments here that . . . impose quantitative limits . . . [to] cabin the fairly unbounded discretion [in making the award]."[180] Further, the majority's third guidepost proclaims that substantial deference must be accorded to legislative judgments on sanctions, and infers that any state tort reform measures setting caps or limiting damages will be respected as they arise.[181] Additionally, even Justice Ginsburg in her dissent seems to suggest vindication of recent efforts to reform punitive damages.[182] Despite the

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[177] *See, e.g.*, Brief of Amici Curiae of the New England Council and New England Legal Foundation in Support of Petitioner, BMW of N. Am., Inc. v. Gore, 646 So. 2d 519 (Ala. 1994) (No. 94-896) ("guidelines on punitive damage awards will enhance their value as deterrents").

[178] *See generally*, Henry J. Reske, *Guidelines Instead of Bright Lines: State Rulings on Punitives Unlikely to be Uniform Despite High Court Guidance*, ABA JOURNAL, July 1996, at 36 [hereinafter Reske].

[179] *See, e.g.*, Coyle, *supra* note 16, at A22 ("[T]he Supreme Court . . . is asking courts basically to do their job in the damages context . . . [to] apply legislative standards."); Fox, *supra* note 29, at 7 (Pittsburgh defense lawyer, John Robb said, "the court was trying to 'set a tone' for the state[s] . . . to pursue punitive damages control on their own."); Malcomb Daniels, *Business Groups Applaud Ruling*, THE MONTGOMERY ADVERTISER, May 21, 1996, at 1A [hereinafter Daniels] ("The U.S. Supreme Court's strongly worded order . . . points out . . . a jackpot system of justice which needs reform."); John F. Rooney, *Plaintiff Bar Sees Ruling on Punitive Damages as an 'Aberration Limited to Grossly Excessive' Award*, CHICAGO DAILY LAW BULLETIN, May 21, 1996, at 1 [hereinafter Rooney] ("Representatives of groups that supported tort reform measures . . . 'view[ed] it as a victory and a vindication of . . . punitive damages cap[s]'.").

[180] BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1608 (1996) (Breyer, J., concurring).

[181] *Id.* at 1603 (citation omitted); *see also* Coyle, *supra* note 16, at A22.

[182] *See Gore*, 116 S. Ct. at 1614 (Ginsburg, J., dissenting). Ginsburg reasoned that the majority decision was unnecessary in light of "reform measures recently adopted or currently

Court's general message, to address and limit punitive damages, the decision does not provide state officials with much guidance to that end.

2. Difficulty in applying the Gore test

Several shortcomings exist in the Court's decision rendering *Gore*'s test difficult to apply. First, the majority indicated that the Constitution is violated only when the award is "grossly excessive."[183] Yet, the Court refused to establish with bright-line clarity when an award is considered "grossly excessive." Thus, the decision left state courts with a great deal of unreviewable discretion as to where to draw the line.[184] Litigants seeking federal review of state punitive damage decisions therefore must go to the Supreme Court for redress. However, the high court does not take many cases.[185] Further, it is precisely such broad conferrals of discretion which tend to induce overly large awards.[186]

Second, the Court's three "guideposts" were vague at best, and failed to set definite guidelines. In proclaiming its three-prong test for excessiveness, the Court was careful to emphasize it was neither endorsing a "bright line" approach, nor setting a specific formula for evaluating awards.[187]

The first "guidepost," the "degree of reprehensibility of the defendant's conduct," requires consideration of "'the enormity of [the defendant's] offense'."[188] Such a determination involves an inherently subjective evaluation which is defined by less than clear community-based standards of misconduct.[189] As Scalia's dissent emphatically points out, the majority's opinion fails to provide pertinent factors for weighing levels of reprehensibility.[190] Rather, the Court makes only obscure distinctions between

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under consideration in legislative arenas." *Id.* She also provided a lengthy appendix to her dissent, which set forth a list of current and proposed state legislative controls on punitive damages. The measures surveyed included reforms such as: 1) statutory caps; 2) allocation of damages to state funds; and 3) bifurcated trials with separate proceedings for the punitive damages issue. *Id.* at 1618-20.

[183] *Id.* at 1604.

[184] *See generally Justices Rule Against Excessive Damages; High Court Rejects $2 Million Award for Repainted BMW*, THE PLAIN DEALER, May 21, 1996, at 1A; *see also Other Supreme Court News; Punitive Damages Award Overturned*, FACTS ON FILE WORLD NEWS DIGEST, May 23, 1996, at B1 (noting that the decision left the lower courts with a great deal of discretion).

[185] *See* Baker, *supra* note 12 (stating that "[i]n recent Terms, the Justices have been reviewing fewer than 100 cases selected from a docket totaling more than 7000 cases").

[186] *See supra* notes 47-61 and accompanying text.

[187] *See Gore*, 116 S. Ct. at 1602, 1604.

[188] *Id.* at 1599 (quoting Day v. Woodworth, 13 U.S. (1 How.) 363, 371, 14 L.Ed 181 (1852)).

[189] *See generally id.* at 1609 (Breyer, J., concurring).

[190] *Id.* at 1613-14 (Scalia, J., dissenting).

violent crimes being more serious than nonviolent crimes,[191] and of "'trickery and deceit' [being] more reprehensible than negligence."[192] Further, the Court alludes to conduct such as that which is "egregiously improper," or that which involves "deliberate false statements," or an "improper motive," but does not further clarify these terms.[193] Instead, it cites to *Haslip* and *TXO*, cases which have only added to the chaos and controversy surrounding the punitive damages issue, as cases by which to define such conduct.[194] The only issue the Court establishes with certainty in this area is that large awards will be upheld for economic injury inflicted by intentional acts of misconduct or if targeted at the financially vulnerable.[195] However, the Court was quick to note that even in such instances, not all acts will be sufficiently reprehensible.[196]

The second "guidepost" is similarly vague as it requires courts to examine the ratio between the punitive damages award and the compensatory damages based on a general standard of "reasonableness."[197] The majority, while finding punitive damages 500 times the actual damages as excessive, refused to say whether four times or even ten times the amount of actual damages would, or would not bear a "reasonable relationship."[198] It seems somewhat paradoxical that a court unwilling to purport some mathematical proportion between punitive and compensatory damages would in turn require some "reasonable relationship" between the two. Further, standards of "reasonableness" perpetuate uncertainty, and have long been criticized as subjective standards which provide "'so vague a line as to afford no rule at all'."[199] Therefore, it is not surprising that the "reasonableness" test employed by the *Gore* Court provides little guidance, except in those rare cases where very large ratios sufficient to "'raise a suspicious judicial eyebrow'" exist.[200]

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[191] *Id.* at 1599 (citing Solem v. Helm, 463 U.S. 277, 292-93 (1983)).

[192] *Id.* at 1599 (citing TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 462 (1993)).

[193] *Id.* at 1601.

[194] *Id.* at 1599-1601 (citations omitted).

[195] *See id.* at 1599 ("To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty.") (citations omitted).

[196] *Id.* at 1599.

[197] *Id.* at 1601-02.

[198] *Id.* at 1601.

[199] *See* JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS 202 (4th ed. 1994) (citation omitted).

[200] *See generally Gore*, 116 S. Ct. at 1603 (quoting TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 482 (1993) (O'Connor, J., dissenting)). However, as Scalia points out in his dissent, the Court's rationale that a "breathtaking 500 to 1" ratio "raise[s] a suspicious judicial eyebrow," is somewhat contradictory, especially in light of the fact that the Court quotes *TXO*, a case which upheld a 526 to 1 ratio. *Id.* at 1614 (Scalia, J., dissenting).

In its third "guidepost," the Court dictates a comparison of the punitive award with statutory penalties for the same conduct.[201] In developing its comparative analysis, however, the Court conceded that this guidepost and the other guideposts,[202] could be overcome, if the award "was necessary to deter future misconduct," or to "adequately protect[] the interests of [state] consumers."[203] In his dissent, Scalia strongly criticized such cursory qualifications, saying that they would only provide encouragement for state reviewing courts to "concoct rationalizations" based on those grounds.[204]

As Justice Scalia further indicates, the majority's "guideposts" are apparently not the only factors to be considered.[205] Scalia interprets the Court's "explaining away [of] the earlier opinions that do not really follow [the] guidelines," as an indication of how the three "guideposts" can be "overridden by unnamed considerations."[206] Such an interpretation is significant because it suggests that the very guidelines heralded as a constructive framework for lower and appellate courts do not have to be adhered to, and is especially illustrative of the decision's failure to provide uniformity.

Moreover, the "guideposts" set forth by the majority are not new,[207] but in fact are traditional state tort standards.[208] Consequently, these "guideposts" are already being examined or considered by the very same courts in which exorbitant verdicts have been awarded.[209] Therefore, it is evident that the majority's guideposts are based on doctrines of measurability which have clearly been ineffective.

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[201] *Id.* at 1603.

[202] *See id.* at 1613 (Scalia, J., dissenting).

[203] *Id.* at 1603.

[204] *Id.* at 1613 (Scalia, J., dissenting).

[205] *Id.* at 1614 (Scalia, J., dissenting).

[206] *Id.*

[207] The third guidepost comparing the punitive award with statutory penalties, however, is fairly new. Until now such comparisons have been rejected. *See* CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 77, at 276 (1935) ("while fines in criminal cases are limited by statutes, exemplary damages are limited only by the caprice of jurors, subject to a review by the judges").

[208] Marcia Coyle, *Punies Decision Gives Business Potent Ammo*, THE NATIONAL LAW JOURNAL, June 3, 1996, at A11.

[209] Indeed, even the Alabama Supreme Court expressly considered the reasonable relationship between the punitive damages award and the harm, as well as the degree of reprehensibility of BMW's conduct, before concluding that the punitive award was constitutionally appropriate. BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 624-28 (Ala. 1994).

Third, as emphasized in Breyer's concurring opinion, punitive damage awards are "entitled to a strong presumption of validity."[210] Under such a standard, it will be difficult for appellate judges to justify reversing a jury verdict based on *Gore*'s general notions of caprice or excess, without more.[211] Thus, although the *Gore* case sends a message to lower courts to scrutinize punitive damages with vigilance, the lack of specific guidelines will impair the ability of judges who must do the scrutinizing.

3. Critical issues

The two dissenting opinions are opposed to the Court's intrusion into an area which has traditionally been the exclusive province of state courts and governments.[212] Scalia writes in his dissent: "The Constitution provides no warrant for federalizing yet another aspect of our nation's legal culture."[213] Such criticism is characteristic of the sharp disagreement over federalism in the ongoing debate over national tort reform.[214] Therefore, to the extent that punitive damages were constitutionalized, it was unfortunately at the expense of some federal interference with state civil justice systems and how they govern punitive damages.

Additionally, several commentators have noted that the Supreme Court's ruling makes explicitly clear that it is narrowly limited to the facts presented in *Gore*.[215] The Court in effect confined its opinion to the narrow issue of limiting punitive damages for commercial or economic losses.[216] The decision does not address the availability of punitive damages in cases involving personal injury or death.[217] Thus, despite the majority's apparent desire to set a nationwide standard for evaluating punitive damages, the decision only creates uncertainty, especially as to whether punitive damage awards in

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[210] *Gore*, 116 S. Ct. at 1604 (Breyer, J., concurring) (citing TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 457 (1993)).

[211] *See generally* Baker, *supra* note 12.

[212] *Gore*, 116 S. Ct. at 1610 (Scalia, J., dissenting), 1615 (Ginsburg, J., dissenting).

[213] *Id.* at 1610-11 (Scalia, J., dissenting).

[214] *See generally* Baker, *supra* note 12.

[215] *See, e.g.*, Rooney, *supra* note 179, at 1 ("the [Gore] decision was limited to the facts of the case"); Reske, *supra* note 178, at 36 (noting that "the justices went to great lengths to confine themselves to the facts of the case"); Daniels, *supra* note 178, at 1A (the "ruling is limited to the facts of the BMW case").

[216] *Gore*, 116 S. Ct. at 1599 (noting that the harm inflicted was "purely economic in nature"). Gore suffered only economic harm - the loss in value of his car - and no physical or psychic harm. *Id.*

[217] Although, Justice Stevens did suggest that if safety and health were at issue, the award may have been upheld, when he said, that "BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others." *Id.* at 1599.

products liability and personal injury cases — cases which traditionally award large punitive damage verdicts — can effectively be challenged for excessiveness under the *Gore* test.

V. LEGAL AND PRACTICAL IMPLICATIONS OF *GORE*

Just as much of the confusion over punitive damages has been attributable to the difficulty of ascertaining general standards from past decisions, the less than clear standards in this case will also prompt differing interpretations of *Gore*. Undoubtedly, the courts will reach opposite conclusions, as they are forced to interpret the ambiguous and uncertain standards set forth by *Gore*, infusing additional confusion and inconsistency into the area of punitive damages.

A. Ex Post Facto Review

The *Gore* test does not provide the clear, uniform, prospective guidelines that businesses need to assess the risks of operating in national and local markets. The *Gore* test only provides for *ex post facto* review of an award already imposed.[218] Thus, while the *Gore* decision may change the general scrutiny with which such awards are examined, uncertainty about how and when punitive damage awards will be imposed still exists. The inability of businesses to accurately forecast such liability risks has in the past increased avoidance costs and jeopardized the economic stability of such businesses.[219] Unfortunately, the *Gore* test will not provide much relief in this area. American businesses will still be faced with the significant obstacle of planning for and anticipating claims that are often random and largely disproportionate.[220]

Moreover, the *Gore* decision does not promise to substantially alter the settlement process either. The enormous uncertainty surrounding punitive damages has led defendants, during pretrial negotiations, to settle just to avoid outrageous legal fees and insurance losses.[221] The lack of clear guidelines constraining punitive awards hampers a defendant's efforts to negotiate sensibly, especially with plaintiffs who believe they can "shoot for the moon."[222] While the *Gore* decision affords limited review of the substantive amount of punitive damages awarded, such *ex post facto* review is only

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[218] *See* Thornburgh, *Punitive Damages After Gore*, *supra* note 56.

[219] *See id.*

[220] *See id.*

[221] *See supra* note 42 and accompanying text.

[222] *See* Aaron D. Twerski, *A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 U. MICH. J.L. REF. 575, 612 (1985).

available to the cases that actually go to trial and are appealed. Thus, the decision does not assist the vast majority of lawsuits that end in settlement.

Without clear nationally uniform standards, it is undisputed that the threat of unchecked punitive damages still looms large. In short, *Gore*'s ability to provide for only retrospective glances at awards imposed will do nothing to restore confidence in the civil justice system, but will only perpetuate the economic instability of American industries,[223] and have a limited impact on pretrial negotiations.

B. Increased Burden on the Courts

The legal ramification of *Gore* is that it requires judges to exercise increased scrutiny and more exacting appellate review of punitive damages.[224] However, judicial review based on these heightened standards will delay the swiftness and certainty with which such lawsuits can be adjudicated, and may increase unnecessary litigation.[225]

In addition, *Gore* is a signal to defendants that an appeal to the U.S. Supreme Court may provide relief from a punitive damages award. Thus, the opinion may actually spur an increase in litigation, as many more punitive damages challenges are brought to the Supreme Court.[226] It is important to note, however, that the Supreme Court does not take many cases, and the chance that such appeals will be reviewed is unlikely.[227] As Justice Ginsburg stressed in her dissent, it is simply impossible for the Supreme Court to review every punitive damages award.[228]

C. Mixed Message

Finally, it is significant to note that in the aftermath of *Gore*, the Supreme Court returned to their inconsistent and amorphous approach of handling

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[223] *See generally* Rustad & Koenig, *supra* note 59, at 1277-82 (indicating that the President's Council on Competitiveness proposed necessary reforms to protect the competitiveness of American businesses) (citations omitted); *see also* Owen, *supra* note 27, at 6.

[224] *See generally* Mullaney, *supra* note 42, at 1L (stating that the decision will force judges to take a more serious look at punitive damages).

[225] *See generally* Thornburgh, *Punitive Damages After Gore*, *supra* note 56. At present it takes more than 2 1/2 years for a verdict to be awarded in an average product liability suit. *Id.* The *Gore* decision promises to further increase this time by increasing scrutiny of punitive damage awards. *Id.*

[226] *See id.*

[227] *See id.*

[228] BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1617 (1996) (Ginsburg, J., dissenting). Lower federal courts have no jurisdiction to review state civil jury awards.

punitive damages. Usually, cases involving similar issues are held on the court's docket pending a decision, and then are sent back to the lower courts with instructions to consider the new ruling.[229] However, of the seventeen punitive damages cases which were held by the Supreme Court during the pendency of *Gore*, only four were vacated and remanded for reconsideration to their respective state courts.[230] The Court denied review in three cases, essentially affirming the damage awards, and took no action in the rest.[231] By not remanding all of the punitive damages cases, the Court sent a mixed message to the state courts, ultimately reiterating a return to the confused and muddled arena of punitive damage law.

D. Impact on Hawai`i Law

The Hawai`i Supreme Court first defined the standard for awarding punitive damages in *Bright v. Quinn*.[232] The court held that punitive damages may be awarded in cases where a defendant has "acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations" or where there has been some "willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences."[233] Subsequent Hawai`i decisions have reaffirmed this standard,[234] which focuses on the defendant's state of mind, as well as on the nature of the defendant's conduct.[235] Thus, the *Bright* standard remains the current standard in Hawai`i by which a determination for punitive damages is made.[236]

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[229] Baker, *supra* note 12.

[230] Linda Greenhouse, *Supreme Court Roundup; Justices to Review Law That Keeps More Than One Party From Nominating a Candidate*, THE NEW YORK TIMES, May 29, 1996, at A14.

[231] *Id.*

[232] 20 Haw. 504 (1911). "*Bright v. Quinn*, . . . was the first case to clearly set forth the nature of the defendant's conduct and state of mind which the plaintiff must prove in order to recover an award of punitive damages." Masaki v. General Motors Corp., 71 Haw. 1, 11-12, 780 P.2d 566, 573 (1989).

[233] *Bright*, 20 Haw. at 512 (citations omitted).

[234] *See, e.g.*, *Masaki*, 71 Haw. at 10-11, 780 P.2d at 572; Quedding v. Arisumi Bros., Inc., 66 Haw. 335, 340, 661 P.2d 706, 710 (1983); Goo v. Continental Casualty Co., 52 Haw. 235, 239, 473 P.2d 563, 566 (1970); Howell v. Associated Hotels, Ltd., 40 Haw. 492, 496 (1954); Chin Kee v. Kaeleku, 29 Haw. 524, 532 (1926).

[235] The *Bright* standard can be interpreted as justifying an award of punitive damages in two situations: 1) where "a positive element of conscious wrongdoing" exists, such that the defendant knows, or had reason to know, that his conduct created an unreasonable risk of harm to the plaintiff; and to a lesser degree 2) where the defendant has engaged in conduct so wanton, oppressive, or malicious as to imply reckless indifference to the rights of another. *Masaki*, 71 Haw. at 7, 12, 780 P.2d at 570-71, 573 (citations omitted).

[236] *See Masaki*, 71 Haw. at 10-11, 780 P.2d at 572.

More recently, in *Masaki v. General Motors Corp.*,[237] the Hawai'i Supreme Court again upheld the *Bright* standard, applying it to provide punitive damages in a products liability action.[238] However, the court adopted the more stringent "clear and convincing" standard as the standard of proof required in the imposition of such awards.[239] The court stated that because the purpose of punitive damages is to punish the wrongdoer, like a criminal conviction, such an exemplary award can stigmatize the defendant.[240] Accordingly, the court reasoned that a more stringent standard of proof was necessary to assure the propriety of a punitive damages award.[241] Thus, after *Masaki*, plaintiffs in all punitive damage claims in Hawai'i must prove by clear and convincing evidence that the defendant has acted with the requisite aggravating conduct.[242]

Hawai'i has no calculated measurement for determining the amount of punitive damages.[243] Instead, such awards are based on "the degree of malice, oppression, or gross negligence which forms the basis for the award and the amount of money required to punish the defendant."[244] Accordingly, Hawai'i's standard for imposing punitive damages is vague, and basically allows juries to freely assess punitive damages as they deem necessary to punish the defendant.[245] Additionally, Hawai'i's standard, which includes terms such as "willful," "wanton," and "oppressive," provides little meaningful guidance for appropriately evaluating punitive judgments.[246]

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[237] 71 Haw. 1, 780 P.2d 566 (1989).

[238] *Id.* at 12, 780 P.2d at 573. In so holding, the court recognized that the imposition of punitive damages in products liability actions is surrounded by much controversy. *Id.* at 9-10, 780 P.2d at 571-72. Namely, critics oppose permitting punitive damages in such cases on the basis that liability is predicated on a strict liability theory, in which a "defendant's liability arises not from any finding of fault, but rather from a finding that the product is defective." *Id.* However, the court rejected this argument, stating that punitive damages do not depend on the "'classification of the underlying tort justifying compensatory damages but on the nature of the wrongdoer's conduct.'" *Id.* at 10, 780 P.2d at 572 (citing Wangen v. Ford Co., 97 Wis. 2d 260, 266-67, 294 N.W.2d 437, 442 (1980)).

[239] *Id.* at 16, 780 P.2d at 575.

[240] *Id.* (citations omitted).

[241] *Id.*

[242] *See id.* at 16-17, 780 P.2d at 575.

[243] *See* Randall H. Endo, *Punitive Damages in Hawaii: Curbing Unwarranted Expansion*, 13 U. HAW. L. REV. 659, 663 (1991) [hereinafter Endo] (indicating that "[i]n Hawai'i, no mathematical formula exists for computing . . . punitive damages").

[244] Howell v. Associated Hotels, Ltd., 40 Haw. 492, 501 (1954) (citation omitted); Kang v. Harrington, 59 Haw. 652, 663, 587 P.2d 285, 293 (1978) (citation omitted).

[245] *See* Endo, *supra* note 243, at 664 ("The problem with th[e] rule is that it is too vague . . . . [It leaves the jury w]ith so little guidance . . . [and] very wide discretion to determine the punitive amount.").

[246] *See* Endo, *supra* note 243, at 673. These terms are not clearly defined, and do "not significantly help the trier of fact to determine punitive damage liability." *Id.* at 673 n.99

Unfortunately, it is unlikely that the *Gore* decision will remedy the infirmities inherent in Hawai'i's punitive damages standard, especially since the "guideposts" delineated in *Gore* contain the same shortcomings evident in Hawai'i's standard.[247] The "guideposts" set forth in the *Gore* decision do little to establish effective definitions for meaningful guidance in this area.[248] Furthermore, the Supreme Court significantly limited its opinion to the specific facts of the case, most notably *Gore*'s economic injury element, and accordingly the decision is easily distinguishable on this basis.[249]

Gore does however, elevate the prominence of grossly excessive punitive awards and in this respect may necessitate action by the states. Specifically, Hawai'i courts may thus interpret the *Gore* decision as a signal to take seriously their responsibility to constrain such jury-imposed punishments. Further, and perhaps more importantly, *Gore*'s message may serve as a red flag to Hawai'i legislators, a clear indication that legislative guidance in this area is needed.

VI. CONCLUSION

Although the Supreme Court in *Gore* attempted to provide nationally uniform, substantive standards to evaluate the appropriateness of damage awards, the resultant effect is not an increase in the certainty or the proportionality of such awards. Rather, the Court has created an illusory framework for evaluating punitive damages that only invites subjective and inconsistent interpretations in this area. Moreover, the less than adequate guidance provided by *Gore* does little to reassure the business community that punitive damages that have "run wild" have been contained.

The effect of the *Gore* decision is limited, particularly in light of the opinion's fact-specific nature and its confinement to *ex post facto* review. Ultimately, the message sent by the Supreme Court is that it is displeased with excessive punitive awards meant to punish corporations. However, such a sentiment is hardly a legal standard, and the dispute over what constitutes an "excessive" punitive damage award will continue to plague the courts.

Sandra Wilhide[250]

(citing J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 21.22 (1985)).

[247] *See supra* notes 183-211 and accompanying text.

[248] *See id.*

[249] *See supra* notes 215-17 and accompanying text

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Touchette v. Ganal: Reaffirming the Judicial Activism of the Hawai`i Supreme Court

I. INTRODUCTION

On August 25, 1991, Orlando T. Ganal, Sr. went on a deadly and destructive rampage.[1] Ganal fatally shot his wife's parents and set fire to the home of Wendy and Michael Touchette, killing Michael and their infant children, Kalah and Joshua.[2] Michael, Kalah, and Joshua died as a result of thermal burns and smoke inhalation, while Wendy was severely burned over approximately forty percent of her body scarring much of her face.[3] Immediately after starting the fire at the Touchette's home, Ganal poured gasoline in the second-floor office of Young Laundry and started another fire.[4] Fortunately, no one was injured in the second fire.[5]

In a civil action[6] brought by Wendy Touchette against Ganal and his wife, Mabel, the Hawai`i Supreme Court held that Mabel did not owe a legal duty to the Touchette family under sections 314A[7] and 315[8] of the Restatement (Second) of Torts because Mabel did not bear a "special relation" to either the

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[1] Touchette v. Ganal, 82 Hawai`i 293, 294, 922 P.2d 347, 348 (1996).

[2] *Id.* at 294, 922 P.2d at 348.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 295, 922 P.2d at 349.

[6] Wendy alleged that Mabel was negligent in flaunting her extramarital affair with David Touchette. *Id.* Her complaint also alleged that Mabel's negligence caused Ganal to suffer severe emotional distress and set fire to Touchette's home, seriously burning her and killing her husband and two young children. *Id.*

[7] RESTATEMENT (SECOND) OF TORTS § 314A (1965). It states:

> (1) A common carrier is under a duty to its passengers to take reasonable action (a) to protect them against unreasonable risk of physical harm, and (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to take care of them until they can be cared for by others. (2) An innkeeper is under a similar duty to his guests. (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation. (4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

Id.

[8] RESTATEMENT (SECOND) OF TORTS § 315 (1965) provides:

> There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other the right to protection.

Id.

Touchettes or Ganal.[9] However, the court held that Wendy's allegations did state a claim that could potentially warrant relief under a theory based on the duty set forth in sections 302,[10] 302A[11] and/or 302B[12] of the Restatement (Second) of Torts.[13] The *Touchette* court analyzed two issues in determining the presence of a legal duty in negligence cases involving the criminal acts of third persons: (1) whether Mabel's marital relationship with Ganal alone justified the imposition of a duty to control Ganal for the protection of the Touchette family under the Restatement section 315;[14] and (2) whether the distinction between misfeasance and nonfeasance was necessary in deciding whether a duty exists under the Restatement sections 302, 302A and 302B.[15]

This casenote addresses the Hawai'i Supreme Court's recent treatment of the imposition of a duty[16] in negligence cases involving criminal acts of third persons. Part II reviews the traditional "no-duty to rescue" rule in tort law and the judicially created "special relationship" and "affirmative act" exceptions to it. Part III of this note provides a summary of the relevant factual and procedural background of the decision in *Touchette v. Ganal*. Part IV analyzes the Hawai'i Supreme Court's interpretation of the "special relationship" and "affirmative act" exceptions in the context of one's legal duty to another involving criminal acts of third persons. Part V examines *Touchette*'s ambiguity and potential impact on future negligence claims.

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[9] *Touchette*, 82 Hawai'i at 301, 922 P.2d at 355.

[10] RESTATEMENT (SECOND) OF TORTS § 302 (1965) articulates:

> A negligent act or omission may be one which involves an unreasonable risk of harm to another through either (a) the continuous operation of a force started or continued by the act or omission, or (b) the foreseeable action of the other, a third person, an animal, or a force of nature.

Id.

[11] RESTATEMENT (SECOND) OF TORTS § 302A (1965) provides: "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the *negligent conduct or reckless conduct of the other or a third person*." *Id.* (emphasis added).

[12] RESTATEMENT (SECOND) OF TORTS § 302B (1965) states: "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the *conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal*." *Id.* (emphasis added).

[13] *Touchette*, 82 Hawai'i at 304, 922 P.2d at 358.

[14] *Id.* at 299, 922 P.2d at 353.

[15] *Id.* at 302, 922 P.2d at 356.

[16] "A prerequisite to any negligence action is the existence of a duty owed by the defendant to the plaintiff. Whether such a duty exists is a question of law." Cuba v. Fernandez, 71 Haw. 627, 631, 801 P.2d 1208, 1211 (1990) (citations omitted).

Finally, part VI of this note concludes that *Touchette* represents the Hawai'i Supreme Court's continued practice of judicial activism.[17]

II. HISTORY: STANDARD OF CARE

The following will review the traditional "no-duty to rescue" rule in negligence cases and Hawai'i case history regarding the "special relationship" and the "affirmative act" exceptions to the "no-duty to rescue" rule. Negligence is liability for conduct that falls below a standard of care established by law for the protection and safety of others against an unreasonable risk of harm.[18] To be liable for negligence, the defendant must have a duty to the plaintiff, and the plaintiff's harm must result from a breach of that duty.[19] However, in cases involving a defendant's failure to protect another from danger arising from the conduct of a third party, courts traditionally hold that no legal duty exists to aid a stranger.[20]

There is a "certain amount of negligence in the world."[21] Where the risk is relatively slight, one assumes that others will exercise proper care.[22] A duty to take precautions against the negligence of others only arises where a reasonable person would acknowledge the existence of an unreasonable risk of harm to others through the negligence of a third party.[23]

Generally, there is much less reason to expect and guard against acts by third persons that are malicious and intentionally damaging than those that are

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[17] Judicial activism is a philosophy that compels judges to depart from a strict adherence to precedent in favor of progressive social policies and ideas which are not always consistent with the restraint of appellate courts. BLACK'S LAW DICTIONARY 847 (6th ed. 1990). This philosophy also calls for social engineering and, at times, represents intrusions into the legislative and executive spheres. *Id.*

[18] W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 31, at 169 (5th ed. 1984) (citing RESTATEMENT (SECOND) OF TORTS § 282 (1965)).

[19] *Id.* § 30, at 164-65.

[20] *See* John Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867, 872 (1991) (recognizing "[t]he common law's reluctance to require one to render aid to a stranger . . . ."). Causal links between a bystander's inaction or nonfeasance and the plaintiff's injuries are said to be tenuous where the bystander did nothing to create the plaintiff's problem initially. *Id.* at 872 n.23 (citing Osterland v. Hill, 160 N.E. 301 (Mass. 1928); Buch v. Amory Mfg. Co., 44 A. 809 (N.H. 1898)).

[21] KEETON, *supra* note 18, § 33, at 198.

[22] *Id.*

[23] *Id.* at 199 n.62 (citing Numan v. Bennett, 212 S.W. 570 (Ky. 1919) (tenants leaving faucets on); McDonald v. Fryberger, 46 N.W.2d 260 (Minn. 1951) (employee standing on drawer of cabinet); Rosenberg v. Hartman, 46 N.E.2d 406 (Mass. 1943) (walking into glass door)).

merely negligent.[24] This is especially true where such acts are criminal. [25] Under ordinary circumstances, in the absence of any reason to expect the contrary, one may reasonably assume that others will obey the criminal law.[26] At common law, in the absence of a "special relationship" between the defendant and the injured person, a defendant had no legal duty to protect an injured party against the criminal acts of third parties.[27] Whether the law imposes a duty to guard against a third person's criminal acts is not simply a matter of whether the criminal event is foreseeable; rather the duty is ultimately a question of fairness that involves the weighing of the relationship of the parties, the nature of the risk, and the public interest in imposing the duty on the defendant.[28] These considerations are the foundations for the two exceptions to the general "no-duty" rule: "special relations" and "affirmative acts."

A. "Special Relations" Exception

The first exception to the general "no-duty to aid or protect third persons" rule[29] exists when one identifies a "special relationship"[30] between the actor and the third person whose conduct is negligent or criminal, or between the actor and the person seeking protection.[31] When the conduct of the actor has brought him into a human relationship with another of such character that social policy compels some affirmative action or precaution on his part to avoid harm, then the duty to act or take the precaution is imposed by law.[32] The "special relations" exception referred to in section 315 of the Restatement

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[24] *Id.* at 201.

[25] *Id.* "It would be unjust to require one to anticipate a crime will be committed unless there has been a warning or unless a previous criminal act occurred in the same premises." *Id.* at 201 n.78 (citing Brogan Cadillac-Oldsmobile Corp. v. Central Jersey Bank & Trust Co., 443 A.2d 1108, 1110 (N.J. 1981)).

[26] *Id.* at 201 nn.79 & 85 (citing Trice v. Chicago Housing Authority, 302 N.E.2d 207 (Ill. 1973) (unreasonable to expect a third person would hurl a television from an apartment building window); Kelley v. Retzer & Retzer, Inc., 417 So.2d 556 (Miss. 1982) (unreasonable to expect a third person would shoot a patron in the parking lot of a restaurant)).

[27] STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 9.19, at 1084 (1995).

[28] *Id.* at 1087 (citing Goldberg v. Housing Authority of Newark, 186 A.2d 291, 293 (N.J. 1962).

[29] *See* RESTATEMENT (SECOND) OF TORTS § 314 (1965) (stating: "The fact that the actor realizes or should realize that action on his [or her] part is necessary for another's aid or protection does not of itself impose upon him [or her] a duty to take such action.").

[30] *See supra* note 7.

[31] *See supra* note 8.

[32] Fowler V. Harper & Posey M. Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 887 (1934).

(Second) of Torts is not intended to be an exclusive or exhaustive list of relationships[33] as there may be other relations which impose a similar duty.

A limited number of "special relationships" that give rise to a duty to act affirmatively have been recognized. For example, courts have held that mental health professionals are responsible for exercising reasonable care to protect others from dangerous patients.[34] Residential care facilities have been required to take reasonable precautions to prevent residents from harming themselves.[35] Tavern keepers have been held responsible for the actions of their inebriated patrons who injure others.[36] Because it would be almost impossible to draft a general rule that could fairly balance the equities of both involved parties, modern jurisprudence favors such a list of limited exceptions over any synthesis into some general duty to act.[37]

Hawai`i courts have also been reluctant to liberally apply the Restatement principles to negligence claims involving the "special relations" exception and have rejected its application. For example, in *King v. Ilikai Properties, Inc.*,[38] the Intermediate Court of Appeals examined whether the "special relations" exception should be extended to the landlord-tenant relationship.[39] The plaintiffs were attacked by unidentified robbers in a private condominium unit located in the hotel tower.[40] They sued the Ilikai Hotel as landlord for failure to make the premises safe, alleging that "because hotels attract dangerous persons," the hotel should have posted warning signs and increased its

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[33] RESTATEMENT (SECOND) OF TORTS § 314A cmt. b (1965) states that "[t]he relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found." *See, e.g.*, Doe v. Grosvenor Properties Hawaii Ltd., 73 Haw. 158, 163, 829 P.2d 512, 515 (1992) ("Section 314A of the Restatement sets forth a non-exclusive list of special relationships upon which a court may find a duty to protect.").

[34] *See, e.g.*, Tarasoff v. Regents of Univ. of California, 551 P.2d 334, 353 (Cal. 1976) (holding that the plaintiffs could state a claim against a university therapist for failing to protect their daughter from an assailant who had threatened to harm her).

[35] *See, e.g.*, Klein v. BIA Hotel Corp., 49 Cal. Rptr.2d 60, 61 (1996) (holding that the residential care facility for the elderly assumed a "special relationship" with the resident who had committed suicide).

[36] *See, e.g.*, McFarlin v. Hall, 619 P.2d 729 (Ariz. 1980) (holding that a bar owner was negligent in allowing a patron to become intoxicated without taking appropriate steps to protect other patrons of the bar, when he knew that the inebriated patron posed a risk of physical harm to third parties).

[37] Michael D. Morrison and Gregory N. Woods, Note, *An Examination of the Duty Concept: Has it Evolved in Otis Engineering v. Clark?*, 36 BAYLOR L. REV. 375, 395 (1984).

[38] 2 Haw. App. 359, 632 P.2d 657 (1981).

[39] *Id.*

[40] *Id.* at 360, 632 P.2d at 659. Plaintiffs were lessees of the condominium unit and their guest. *Id.*

security.[41] The court held that there was no "special relationship" between the plaintiffs and any of the defendants.[42] The *King* court reasoned that the plaintiffs were not within the recognized illustrations of section 314A of the Restatement.[43]

The Hawai'i Supreme Court followed the narrow application of Restatement principles set out in *King* in two subsequent cases: *Moody v. Cawdrey and Associates, Inc.* [44] and *Wolsk v. State of Hawai'i.*[45] In *Moody*, a case factually similar to *King*, the guests of condominium owners were assaulted and robbed by two men who gained access to their unit through unknown means.[46] The plaintiffs sued the condominium association, and the trial court granted summary judgment in favor of the association.[47] The Intermediate Court of Appeals held that the condominium owners association and its managing agent owed a duty to protect condominium owners and their guests from foreseeable third party criminal acts.[48] The court reasoned that the landlord-tenant relationship was included within the "special relations" exception that imposes a duty to provide protection against criminal acts.[49] Without explanation, the Hawai'i Supreme Court reversed the decision of the Intermediate Court of Appeals and affirmed the trial court's order of summary judgment.[50]

In *Wolsk*, the Hawai'i Supreme Court analyzed the issue of whether the State owed a duty to warn or protect the plaintiffs from the criminal actions of unidentified third persons.[51] Two campers, Philip Wolsk and Judith Panko were brutally attacked by unknown assailants at MacKenzie State Park on the

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[41] *Id.* at 362, 632 P.2d at 661. Plaintiffs also sued the condominium association and the hotel operator for failure to make the premises safe. *Id.* at 360, 632 P.2d at 659.

[42] *Id.* at 362-63, 632 P.2d at 661. The court stressed that the plaintiffs were not "guests" of the hotel and affirmed the trial court's order granting summary judgment to all defendants. *Id.*

[43] *Id. See supra* note 7 for text of RESTATEMENT (SECOND) OF TORTS 314A.

[44] 6 Haw. App. 355, 721 P.2d 708, *rev'd*, 68 Haw. 527, 721 P.2d 707 (1986).

[45] 68 Haw. 527, 711 P.2d 1300 (1986).

[46] *Moody*, 6 Haw. App. at 357, 721 P.2d at 711.

[47] *Id.* at 357-58, 721 P.2d at 711. There had been prior burglaries, rapes, and break-ins in the condominium project that were reported to the attention of the condominium association. *Id.* at 365-66, 721 P.2d at 716.

[48] *Id.* at 361, 721 P.2d at 713.

[49] *Id.* The Intermediate Court of Appeals distinguished its decision in *King* from *Moody* by holding that a "special relationship" based on "mutual dependence" existed in *Moody* but not in *King*. *Id.* at 362-63, 721 P.2d at 714.

[50] Moody v. Cawdrey and Associates, Inc., 68 Haw. 527, 721 P.2d 707 (1986). Interestingly, the Hawai'i Supreme Court did not explain how it arrived at its decision beyond stating that "[o]n the basis of King v. Ilikai Properties, Inc., . . . the decision of the Intermediate Court of Appeals is reversed and the judgment of the trial court is accordingly affirmed." *Id.*

[51] Wolsk v. State of Hawai'i, 68 Haw. 299, 301, 711 P.2d 1300, 1301 (1986).

island of Hawai`i.[52] The estate of Wolsk and Panko sued the State for negligently failing to warn or provide protection for campers like Wolsk and Panko because MacKenzie Park had a history of violent criminal activity.[53]

The supreme court looked to Hawai`i case law, noting that the State, as owner of MacKenzie Park, owed a duty to exercise reasonable care to warn park visitors about dangerous conditions which are not known or reasonably discoverable by persons of ordinary intelligence.[54] However, the supreme court held that the reasoning of the *King* court was applicable to the facts of *Wolsk* and found that although MacKenzie Park had a tendency to attract dangerous persons, the State did not have a "special relationship" duty to warn or protect park visitors from those dangerous persons.[55] In the absence of a "special relationship" the State was not liable for dangerous conditions not under its control.[56]

In *Seibel v. City and County of Honolulu*,[57] the Hawai`i Supreme Court considered the "special relations" exceptions embodied in sections 314A and 315 of the Restatement. Paul Luiz, a convicted sex offender undergoing psychotherapy, was accused of kidnapping and sodomizing a prostitute while on conditional release.[58] Although the City and County of Honolulu Prosecutor's Office had information about the police investigation concerning

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[52] *Id.* at 300, 711 P.2d at 1301. These assailants killed Wolsk and severely injured Panko. *Id.* Other campers in the vicinity heard nothing, and the criminals were never apprehended or identified. *Id.*

[53] *Id.*

[54] *Id.* at 301, 711 P.2d at 1301. *See* Kaczmarczyk v. City and County of Honolulu, 65 Haw. 612, 656 P.2d 89 (1982) (dangerous conditions at beach park); Kaumau v. County of Hawai`i, 41 Haw. 527 (1957) (park employees failed to extinguish live coals covered by ash).

[55] Wolsk, 68 Haw. at 303, 711 P.2d at 1303. The court affirmed the trial court's granting of summary judgment to the State. *Id.* at 303-04, 711 P.2d at 1303. *See supra* notes 38-43 and accompanying text.

[56] *Wolsk*, 68 Haw. at 301, 711 P.2d at 1302. Because the State did not have control over the unknown assailants, there was no duty to warn campers or to protect them from harm. *Id.* *See* Carreira v. Territory, 40 Haw. 513 (1954) (operators of bathing beaches or pools owed a duty of reasonable care in the construction, supervision, and maintenance of the facilities and premises).

[57] 61 Haw. 253, 602 P.2d 532 (1979).

[58] *Id.* at 254-55, 602 P.2d at 534. Luiz had been charged with the rape, kidnapping and sodomy of several women. *Id.* at 255, 602 P.2d at 534. At the time he committed these offenses, he suffered from seriously diminished capacity to control his conduct. *Id.* at 255, 602 P.2d at 535. On August 1, 1974, the trial court, upon reconsideration, granted Luiz's motion for summary judgment of acquittal and for conditional release. *Id.* Less than a month after Luiz was on conditional release, he allegedly picked up a prostitute and threatened her with a steak knife and in the ensuing struggle, cut her up with the knife, tied her up, drove her to an unfamiliar area, and then sodomized her. *Id.* at 256, 602 P.2d 535.

the alleged kidnapping and sodomy, they did not order Luiz's arrest, nor inform his psychiatrist.[59]

While on conditional release, Luiz murdered the plaintiffs' daughter, who sued the City and County for negligence.[60] In affirming the summary judgment for the City and County, the supreme court ruled that, "unlike the parent, master or institutional custodian who has De Facto or De Jure custody or control over the child, servant or ward," the City did not have custody or control over Luiz.[61] Thus, the *Seibel* court held that no "special relationship" existed between the City and County and Luiz in the absence of control over Luiz.[62]

In *Knodle v. Waikiki Gateway Hotel*,[63] the Hawai'i Supreme Court departed from its conservative and cautious application of the "special relations" exception in past cases, such as *Moody* and *Wolsk*.[64] For the first time, the court recognized and imposed a duty on a hotel to protect its guests from an unreasonable risk of physical harm.[65] The *Knodle* court held that this duty extended to risks arising from acts of third persons because of the "special relationship" between the hotel and guest.[66] This was true for innocent, negligent, intentional, or even criminal acts.[67]

Linda Knodle, a guest of the Waikiki Gateway Hotel, was murdered by George Murphy in the hotel.[68] John Knodle, as administrator of her estate, brought a negligence action against the hotel owners and operators, alleging

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[59] *Id.* at 254-57, 602 P.2d at 534-36.

[60] *Id.* at 256-57, 602 P.2d at 535-36. The plaintiff's complaint alleged that the City was negligent in failing to press forward with the kidnapping and sodomy complaint against Luiz and its failure to inform Luiz's psychiatrist about the alleged incidents. *Id.*

[61] *Id.* at 260, 602 P.2d at 538.

[62] *Id.*

[63] 69 Haw. 376, 742 P.2d 377 (1987).

[64] Until *Knodle*, no Hawai'i decision had recognized a "special relationship" nor a corresponding duty in cases involving premises liability for third party criminal acts. Virgina Chock & Leslie Kondo, Note, *Knodle v. Waikiki Gateway Hotel, Inc.: Imposing a Duty to Protect Against Third Party Criminal Conduct on Premises*, 11 U. HAW. L. REV. 231, 247 (1989).

[65] *Knodle*, 69 Haw. at 393, 742 P.2d at 388. *Contra* King v. Ilikai Properties, Inc., 2 Haw. App. 359, 632 P.2d 657 (1981) (concluding that a hotel did not owe a person who was assaulted on its premises, but was not a guest, a duty to protect her from the criminal acts of third parties).

[66] *Knodle*, 69 Haw. at 393, 742 P.2d at 388.

[67] *Id.*

[68] *Id.* at 376, 742 P.2d at 380. Linda was a Continental Airlines flight attendant. *Id.* at 382, 742 P.2d at 381. She had obtained a key to the hotel room. *Id.* In the meantime, Murphy entered the hotel lobby and went into the elevator. *Id.* The hotel manager called for Murphy to hold the elevator for Linda, and Murphy held the door open while Linda boarded the elevator. *Id.* Her body was discovered in a fourth floor restroom, strangled to death by Murphy. *Id.* at 382, 742 P.2d at 382.

that they failed to provide safe accommodations for Linda and adequate security to protect her from an unreasonable risk of harm.[69] The jury returned a special verdict finding that the hotel owners and operators each had a legal duty to take reasonable precautions to safeguard Linda from the foreseeable criminal acts of third parties.[70] However, the jury determined that neither the owners nor operators had breached that duty.[71]

Although *Knodle* represented a sharp deviation from the Hawai`i courts' general unwillingness to apply the "special relations" exception to the "no-duty to aid" rule, problems with this exception remain in the difficulty in determining what relationship makes it appropriate for a court to find a duty to protect or aid.[72] Judges may have too much discretion in allowing negligence claims to pass summary judgment. Nonetheless, the threat of unlimited tort liability by extending one's legal duty to aid or protect another provided the courts with the necessary incentive to cautiously apply this exception, as seen in *Cuba v. Fernandez*.[73]

In *Cuba*, the Hawai`i Supreme Court affirmed the trial court's grant of summary judgment in favor of Defendant-Appellee Oahu Sugar.[74] Perla Cuba claimed that Oahu Sugar's negligence caused her husband's death.[75] While attending a cockfight organized by an Oahu Sugar employee, Perla's husband, Henry Cuba was shot four times by Jaime Fernandez on land leased to Oahu Sugar.[76] Oahu Sugar knew about the cockfights on its land and gave the police permission to enter its property to investigate and make arrests.[77]

Perla's complaint alleged that Oahu Sugar negligently held its property open to the public with the knowledge that illegal cockfight games were occurring, and that Oahu Sugar owed a duty of care to persons attending the cockfights.[78] Perla also asserted that the negligence of Oahu Sugar arose in

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[69] *Id.* at 383, 742 P.2d at 382.

[70] *Id.* at 380, 742 P.2d at 380.

[71] *Id.* at 380, 742 P.2d at 380-81. What is reasonable and unreasonable and whether the defendant's conduct was reasonable under the circumstances are for the jury to decide. *Id.* at 387, 742 P.2d at 384.

[72] Adler, *supra* note 20, at 899.

[73] 71 Haw. 627, 801 P.2d 1208 (1990).

[74] *Id.*

[75] *Id.* at 629, 801 P.2d at 1210.

[76] *Id.* at 630, 801 P.2d at 1210. Before Henry was killed, witnesses saw him engage in a series of fights with several men, including Fernandez. *Id.* At some point after his fight with Henry, Fernandez departed from the cockfight area and reappeared with a handgun, shooting Henry four times. *Id.*

[77] *Id.* On October 1984, the Honolulu Police Department sent a letter to Oahu Sugar's President, William Balfour, advising him of the cockfighting and requesting his aid to eliminate such activity. *Id.* Balfour gave permission to the police to enter Oahu Sugar's property and make arrests. *Id.*

[78] *Id.* at 631, 801 P.2d at 1211.

its failure, either to prevent cockfight games on its land, or to provide security during the illegal activity.[79] Oahu Sugar moved for summary judgment, arguing that it had no duty to protect Perla's husband from the criminal conduct of a third party.[80]

The Hawai'i Supreme Court was not persuaded by Perla's argument that Oahu Sugar's alleged indifference to the cockfighting encouraged the activities that attracted public attendance on its property.[81] The court held that this indifference did not invoke section 314A(3) of the Restatement which specifies that a "special relationship" arises between one who hold his land open to the public and those members of the public who enter in response to his invitation.[82] Moreover, the *Cuba* court ruled that Oahu Sugar had no duty to protect Henry because it had no control over Fernandez's behavior.[83] Finally, the court rejected the plaintiff's assertion that Oahu Sugar's control over the land on which the cockfight games were held invoked a "special relations" duty through the landlord-tenant relationship.[84]

B. The "Affirmative Act" Exception

Other than the "special relations" exception to the "no-duty to aid or protect" rule, the common law exception based on a defendant's initial creation of the risk is a variation on the "nonfeasance-misfeasance: or action-inaction" distinction.[85] This distinction involves the characterization of at least some part of the defendant's behavior as an affirmative act.[86] One owes a duty to use care in connection with his affirmative conduct, and one owes it to all who may foreseeably be injured if that conduct is negligently carried out.[87]

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[79] *Id.*

[80] *Id.* at 629, 801 P.2d at 1210.

[81] *Id.* at 633, 801 P.2d at 1211. The court was not persuaded that "indifference" may be equated with "invitation" and explained that holding one's land open to the public requires some affirmative action signaling that entry is desired rather than simply disregarded. *Id.*

[82] *Id.* at 633, 801 P.2d at 1211-12.

[83] *Id.* at 633, 801 P.2d at 1212. *See also* Wolsk v. State of Hawai'i, 68 Haw. 299, 711 P.2d 1300 (1986).

[84] *Cuba*, 71 Haw. at 634, 801 P.2d at 1212. The supreme court examined cases in which landholders could be said to have controlled their property, but found no "special relations" duty. *See e.g.*, Kau v. City and County of Honolulu, 6 Haw. App. 370, 722 P.2d 1043 (1986) (holding that the City had no duty to protect third persons where third persons were not under the City's control); *Wolsk*, 68 Haw. at 299, 711 P.2d at 1300; King v. Ilikai Properties, Inc., 2 Haw. App. 359, 632 P.2d 657 (1981).

[85] Adler, *supra* note 20, at 898.

[86] *Id.*

[87] HARPER AND JAMES, THE LAW OF TORTS § 18.6, at 1044 (1956).

Courts have distinguished between misfeasance, where the wrongful or negligent act of the defendant has injured the plaintiff, and nonfeasance, where a defendant's inaction, or failure to intervene affirmatively in the plaintiff's matters has left the plaintiff's situation unchanged.[88] This distinction between affirmative conduct and misfeasance, and the mere omission to act or nonfeasance, is essential in determining whether one has a duty to control the conduct of others.[89] The problems with the "affirmative act" exception arise as the court determines what type of conduct constitutes an affirmative act, sufficient to remove a defendant's behavior from the protection of the "no-duty" rules.[90] Section 302 of the Restatement sets out the general rule regarding a risk of direct or indirect harm.[91] Sections 302A and 302B are special applications of clause (b) of section 302, with 302A addressing the "risk of harm through the negligent conduct of others,"[92] and section 302B discussing the "risk of the intentional or criminal conduct of others."[93]

The Restatement illustrates certain situations in which the defendant will be held liable for his affirmative conduct that greatly increases the risk of harm to the plaintiff through the criminal acts of others.[94] The defendant may bring the plaintiff into contact or association with individuals who have known criminal tendencies which provide a peculiar opportunity for inappropriate conduct.[95] Moreover, the defendant may, by his affirmative conduct, defeat a protection which the plaintiff himself has built around his own person or property for the purpose of guarding him from intentional

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[88] *See* Otis Engineering Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983) (while a person is generally under no legal duty to come to the aid of a stranger in distress, he or she is under a duty to avoid any affirmative act that would worsen the situation).

[89] HARPER, *supra* note 87, § 18.7, at 1053-54. Nonfeasance requires the presence of exceptional circumstances, such as a "special relationship," whereby the defendant might be liable for his failure to act. Morrison, *supra* note 37, at 384.

[90] Adler, *supra* note 20, at 899.

[91] *See supra* note 10.

[92] *See supra* note 11.

[93] *See supra* note 12.

[94] This list is not an exclusive or exhaustive one, and there may be other situations in which one is required to take precautions. RESTATEMENT (SECOND) OF TORTS § 302B cmt. e (1965).

[95] RESTATEMENT (SECOND) OF TORTS § 302B cmt. e, para. D (1965). Defendant, who is a landlord of an apartment house, employs "B" as a janitor. RESTATEMENT (SECOND) OF TORTS § 302B cmt. e, para. D, illus. 9 (1965). Defendant knows that "B" is a man of violent and uncontrollable temper, and on past occasions has attacked those who argue with him. *Id.* Plaintiff, who is a tenant of one of the apartments, complains to "B" of inadequate heat. *Id.* "B" becomes angry and attacks the plaintiff, seriously injuring him. *Id.* The defendant may be found to be negligent toward the plaintiff. *Id.*

interferences.[96] Finally, the defendant may act with knowledge of certain peculiar conditions that create a considerable degree of risk to the plaintiff through the intentional misconduct of third parties.[97]

Hawai'i case law regarding the "affirmative act" exception is sparse. However, one case, *Haworth v. State of Hawaii*,[98] offers some insight into the Hawai'i Supreme Court's interpretation and analysis of section 302A of the Restatement. In *Haworth*, the plaintiff sought some damages for injuries incurred while he was a prisoner working at a minimum security prison on the island of Maui.[99] He had been assigned to the task of removing loose boulders and rocks from embankments adjacent to the public road when he fell from the embankment.[100] On the morning of the accident, the prison supervisor gave instructions to the plaintiff, which included a reminder of previously instructed safety precautions, as well as warnings about the dangers at the top of the embankment where a bulldozer was in operation.[101]

In a bench trial, the trial court determined that the State owed a duty to provide the plaintiff with proper safety equipment and was negligent in failing to do so.[102] However, the court held that the State's negligence was not the proximate cause of the plaintiff's injuries.[103] The Hawai'i Supreme Court vacated the trial court's judgment for the State and remanded the case for further proceedings.[104] The supreme court recognized that the danger resulted from the exercise of the State's authority over the plaintiff as a prisoner, and

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[96] RESTATEMENT (SECOND) OF TORTS § 302B cmt. e, para. C (1965). Defendant leases floor space in plaintiff's shop. RESTATEMENT (SECOND) OF TORTS § 302B cmt. e, para. C, illus. 6 (1965). On a holiday, defendant goes to the shop and forgets to take the key from the door when he departs. *Id.* A thief enters the shop through the door and steals the plaintiff's goods. *Id.* Defendant may be found to be negligent to the plaintiff. *Id.*

[97] RESTATEMENT (SECOND) OF TORTS § 302B cmt. e, para. H (1965). The employees of the defendant, who operates a railroad, are on strike. RESTATEMENT (SECOND) OF TORTS § 302B cmt. e, para. H, illus. 15 (1965). These employees or their sympathizers have torn up tracks, misplaced switches, and attempted to wreck trains. *Id.* Defendant fails to guard its switches and runs a train, which is derailed by an unguarded switch intentionally thrown by strikers in order to wreck the train. *Id.* Plaintiffs, a passenger on the train and a traveler upon an adjacent highway, are injured by the wreck. *Id.* Defendant may be found negligent toward the plaintiffs. *Id.*

[98] 60 Haw. 557, 592 P.2d 820 (1979).

[99] *Id.* at 557, 592 P.2d at 821.

[100] *Id.* at 557-58, 592 P.2d at 821.

[101] *Id.* at 558, 592 P.2d at 822.

[102] *Id.* at 559, 592 P.2d at 822.

[103] *Id.* The trial court concluded that the proximate cause of the plaintiff's injuries was his own negligence in placing himself in a dangerous condition and not exercising ordinary care in the performance of his work. *Id.*

[104] *Id.* at 566, 592 P.2d at 826.

not from the plaintiff exposing himself to a risk for personal reasons or benefits.[105]

After examining the Restatement, the *Haworth* court imposed a duty upon the State to exercise reasonable care to avoid exposure of the State's prisoners to unreasonable risks.[106] The court found affirmative conduct in the State's requirement that prisoners undertake work assignments and in the issuing of work instructions.[107] The supreme court concluded that the State could not suggest that prisoners will negligently misinterpret or disregard limitations contained in the instructions to excuse itself from its duty to its prisoners.[108]

The scarcity of Hawai`i tort cases that apply the "affirmative act" exception, embodied in sections 302, 302A and 302B of the Restatement indicates restraint on the part of most courts in applying this exception to tort claims. However, *Touchette* marked a significant departure from the cautious approach of Hawai`i courts, possibly negating the insulation, provided by prior case law, from liability arising from injuries sustained from the criminal acts of third persons. The supreme court felt compelled to apply the "affirmative act" to the sympathetic circumstances of *Touchette*.

III. THE CASE: *TOUCHETTE V. GANAL*

A. Facts

In early 1991, Orlando T. Ganal, Sr. became despondent over his inability to work and obtain workers' compensation.[109] At approximately the same time, Ganal's wife, Mabel, began an affair with David Touchette.[110] Eventually, Ganal became suspicious of Mabel's affair with David and confirmed his suspicions through investigation.[111]

Ganal's marriage steadily deterioriated.[112] Ganal would call David, often threatening him and his family with violence.[113] At roughly the same time, Mabel left Ganal to live with her parents, the Dela Cruzes, in Waipahu.[114]

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[105] *Id.* at 564-65, 592 P.2d at 825.

[106] *Id.* at 565, 592 P.2d at 825. This duty to exercise reasonable care applied to work instructions issued to the plaintiff and the supervision exercised over his performance. *Id.*

[107] *See id.*

[108] *Id.*

[109] State v. Ganal, 81 Hawai`i 358, 362, 917 P.2d 370, 374 (1996). Ganal testified at trial that he injured his back while working at his job at Young Laundry. *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

On August 24, 1991, Mabel was at Ganal's home, picking up their thirteen year old son, Jun Jun, when she and Ganal began to argue.[115] The argument escalated, culminating in Ganal aiming a gun at Mabel and pleading with her to move back with him.[116] When Mabel refused, Ganal aimed the gun at his own head and threatened suicide.[117] Mabel eventually persuaded Ganal not to kill himself.[118]

During the late evening of August 25, 1991, Ganal broke into the Dela Cruzes' home in Waipahu, shot and killed Mabel's parents,[119] and shot and injured Mabel and Jun Jun.[120] Immediately thereafter, Ganal drove to the home of Michael and Wendy Touchette, where Ganal knew David had resided.[121] Ganal blocked the outer doors, doused the living room area with gasoline, and set the house on fire.[122] Wendy, her husband Michael, and their two children were sleeping in the main bedroom when Wendy awoke to the sounds of Michael's screams.[123] She got up and saw her husband on fire.[124]

Wendy and Michael struggled to get out of the house but could not open the front door because it was locked from the outside.[125] Wendy managed to escape from the burning house alive.[126] However, Michael and their infant children, Kalah and Joshua eventually died of thermal burns and smoke inhalation.[127] Wendy was seriously burned over roughly forty percent of her body and suffered scarring over much of her face.[128] Ironically, David was not at the Touchettes' Kailua residence when Ganal set the deadly fire.[129] Immediately after starting the fire at the Touchette's home, Ganal drove to his

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[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.* Ganal was convicted in the First Circuit Court, City and County of Honolulu, of first-degree murder, attempted first-degree murder, property damage, using a firearm during the commission of a felony, and making terroristic threats. *Id.* at 358, 917 P.2d at 370.

[120] *Id.* at 362-63, 917 P.2d at 374-75. During his criminal trial, Ganal called Dr. Richard Trimillos, chair of the Asian Studies Program at the University of Hawai'i at Manoa, to testify about the concept of "amok" in Southeast Asia and the Phillipines, a culturally-based condition of great emotional disturbance in a person, under which an individual loses control and kills indiscriminately. *Id.* at 374 n.21, 917 P.2d at 386 n.21.

[121] Touchette v. Ganal, 82 Hawai'i 293, 294, 922 P.2d 347, 348 (1996). David Touchette was the brother-in-law of Wendy Touchette. *Id.*

[122] *Id.*

[123] *Ganal*, 81 Hawai'i at 362, 917 P.2d at 375.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] Touchette v. Ganal, 82 Hawai'i 293, 294, 922 P.2d 347, 348 (1996).

workplace at Young Laundry near the airport, poured gasoline in a second-floor office and began another fire.[130] Although employees of Young Laundry were on the premises, no one was injured.[131]

B. Procedural History

On July 7, 1993, Wendy Touchette individually and as special administratrix of the estates of Michael Touchette, Kalah Touchette and Joshua Touchette, brought a civil action against Ganal and Mabel.[132] Wendy alleged that Ganal, because of his severe and extreme emotional distress resulting from Mabel's flaunting of her extramarital affair with David, set fire to the Touchette residence in Kailua.[133] Wendy also alleged that Mabel knew or should have known of Ganal's severe mental depression and propensity to cause injury, even death to the plaintiffs.[134] Moreover, the complaint alleged that Mabel had the opportunity and ability to warn the plaintiffs of Ganal's severe mental depression and propensity to cause injury or death, but nevertheless negligently failed to do so.[135]

On January 26, 1994, Mabel filed a motion to dismiss pursuant to Hawai'i Rules of Civil Procedure Rule 12(b)(6), stating that Wendy's complaint failed to assert a claim upon which relief could be granted.[136] On April 15, 1994, the First Circuit Court granted Mabel's motion to dismiss.[137] The order stated that pursuant to Restatement (Second) of Torts section 315 and Hawai'i case law, Mabel had no duty to control the conduct of Ganal, as no required "special relationship" was alleged or shown at the hearing.[138] Wendy then filed a motion for reconsideration of the circuit court's order.[139] The motion was denied on March 14, 1994.[140]

On appeal, the Hawai'i Supreme Court vacated the circuit court's order and remanded the case for further proceedings.[141] The supreme court agreed with the circuit court's conclusion that Mabel did not owe the appellant a duty

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[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.* at 295, 922 P.2d at 349.

[134] *Id.*

[135] *Id.* Touchette's claim also alleged that Mabel knew or should have known that Ganal was in need of supervision for the protection of others, but Mabel failed to exercise reasonable care or take other precautions to prevent injury and death to the plaintiffs. *Id.*

[136] *Id.* at 297, 922 P.2d at 351.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.* at 294, 922 P.2d at 348.

pursuant to Restatement (Second) of Torts sections 314 and 315.[142] However, the *Touchette* court found that the circuit court erred in failing to consider the presence of a duty presented under Restatement (Second) of Torts sections 302, 302A and 302B.[143] The court held that Wendy's allegations stated a claim that could potentially warrant relief under a theory based on these sections.[144]

IV. ANALYSIS OF *TOUCHETTE*

A. Summary of the Opinion

Chief Justice Moon delivered the opinion of the court, concluding that Mabel may have owed a duty to the Touchette family to refrain from unreasonable conduct under Restatement (Second) of Torts sections 302, 302A and/or 302B.[145] The court's initial inquiry began with an analysis of duty under Restatement sections 314A and 315.[146] The *Touchette* court confronted two major issues: (1) whether the marital relationship falls within the scope of the "special relations" contemplated by section 315;[147] (2) whether Hawai'i recognizes the misfeasance and nonfeasance distinction contemplated by sections 302, 302A and 302B.[148]

In *Touchette*, the supreme court seemed to base its interpretation of the scope of Mabel's duty to Touchette and her family on two distinct sections of the Restatement. The duty depicted under sections 302, 302A and 302b differs from the duty analyzed in sections 314A and 315 in that the former sections posit a duty based on misfeasance or omissions, whereas the latter addresses only negligent omissions or nonfeasance.[149] The court held that Mabel's conduct, which involved taunting and humiliating Ganal by flaunting her extramarital affair with David Touchette, could constitute misfeasance or affirmative conduct, invoking the application of sections 302, 302A and/or 302B.[150]

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[142] *Id.* at 298, 922 P.2d at 352.

[143] *Id.* at 301, 922 P.2d at 355.

[144] *Id.* at 304, 922 P.2d at 358.

[145] *Id.* at 294, 922 P.2d at 348. The case was heard before the entire court (Chief Justice Moon, Justice Klein, Justice Levinson, Justice Nakayama, and Justice Ramil) with no concurring or dissenting opinion. *Id.*

[146] *Id.* at 298, 922 P.2d at 352.

[147] *Id.*

[148] *Id.* at 301, 922 P.2d at 355.

[149] *Id.*

[150] *Id.* at 304, 922 P.2d at 358.

1. The marital relationship as a "special relationship"

The issue of whether the marital relationship falls within the scope of the "special relations" exception was one of first impression in Hawai'i.[151] The court looked to courts in New Jersey and California for guidance in determining the issue.[152] The *Touchette* court first discussed the opinion in *Rozycki v. Peley*[153] in which the New Jersey Superior Court addressed the issue of whether a duty to warn should be imposed on a wife who has knowledge of her husband's likely instability and misconduct. The plaintiffs in *Rozycki* were a group of young boys, who were victims of a sexual and physical assault by the defendant, Arthur Peley.[154] A suit was brought by the boys' parents against Peley and his wife, Catherine, alleging that Catherine knew her husband had a history of pedophilia, and therefore had a duty to warn them of his pedophilia because her marriage constituted a "special relation" within the scope of section 315 of the Restatement.[155]

The parents' contention that Catherine had a duty to warn of the possible danger Peley posed to their kids was primarily based on compelling public policy considerations.[156] They argued that there is a broad public interest in preventing the sexual assault of young children and analogized their case to situations in which parents have been held responsible for the torts of their children and landowners who were liable for the dangerous conditions of their property.[157]

The *Rozycki* court held that the "special relations" exception should not be extended to the marital relationship because of equally compelling public policy considerations.[158] For example, the court noted the strong public interest in protecting the marital relationship from unnecessary intrusions.[159]

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[151] *Id.* at 299, 922 P.2d at 353.

[152] *Id.* at 300, 922 P.2d at 354.

[153] 489 A.2d 1272 (N.J. 1984).

[154] *Id.* The action was instituted by the boys' parents as guardians ad litem. *Id.* The incidents which form the basis of the civil action occurred over a period of time from May 17, 1981 to December 21, 1981. *Id.* at 1273. The police report stated that several parents living in Arthur's neighborhood had called the police to report that Arthur assaulted their children in the swimming pool of his home on various occasions. *Id.*

[155] *Id.* at 1272. In 1977, Peley was arrested on a charge of debasing the morals of a minor. *Id.* at 1273. He applied to a pretrial intervention program and was accepted. *Id.* As a condition of this acceptance, Peley, accompanied by Catherine, underwent psychiatric treatment. *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.* at 1276.

[159] *Id.* The court analogized the public interest in protecting the marital relationship with marital privileges. *Id.* The spouse of an accused in a criminal proceeding shall not testify except in limited circumstances. Trammel v. United States, 445 U.S. 40, 51 (1980). *See also In re* Vitabile, 455 A.2d 1151 (N.J. Super. Ct. App. Div. 1983).

The public policy of encouraging and fostering the marital relationship is violated by requiring a wife to report on her husband's actions and activities.[160] The court also reasoned that imposing a duty upon one spouse to inform on the other strikes at the very heart of the obligation of loyalty and would require a spouse to publicly label one's husband or wife as "unfit" or "dangerous."[161] In weighing the public policy of protecting young children from sexual assaults, the *Rozycki* court determined that the marital relationship must be protected.[162] The court was unwilling to require spouses to choose between either remaining in marriages subject to civil liability or warning a third party and possibly incurring their spouse's ire and disappointment.[163]

The Hawai'i Supreme Court then reviewed a California case, *Wise v. Superior Court*,[164] for further insight into whether the marital relationship should fall within the "special relations" exception. In *Wise*, the defendant's husband mounted a sniper attack from the roof of his home, severely injuring some passing motorists, including the plaintiffs, before taking his own life.[165] Plaintiffs contended that the sniper's wife had a duty to protect them from her husband's actions pursuant to section 315 of the Restatement.[166] The *Wise* court held that the plaintiffs did not state a cause of action on their negligence and negligent entrustment claim.[167] The court rejected the plaintiffs' assertion that the defendant's marital relationship fell within the "special relations" exception on three grounds: (1) no actual ability to control the defendant's behavior; (2) neither the injury nor the harm was foreseeable; and (3) public policy considerations.[168]

The *Wise* court emphasized that the ability to control the conduct of the third party was a necessary requirement for the application of the "special

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[160] *Rozycki*, 489 A.2d at 1276.

[161] *Id.* The court defined spousal duties to include being "loyal to their husband or wife and giving them the benefit of their companionship and society." *Id.* (citing Nashman v. Nashman, 111 A.2d 318 (N.J. Super. Ct. App. Div. 1955); Frank v. Frank, 76 A.2d 527 (N.J. Super. Ct. App. Div. 1950), *modified* 81 A.2d 172 (1950)).

[162] *Rozycki*, 489 A.2d at 1276.

[163] *Id.*

[164] 272 Cal. Rptr. 222 (1990).

[165] *Id.* at 223. The decedent had a long history of arrests for drug possession and robbery, alcoholism and heavy drug use, and psychiatric treatment for depression and criminal conduct. *Id.* at 223-24.

[166] *Id.* at 224. Plaintiffs also asserted misfeasance as the defendant negligently permitted her husband to "occupy the house with knowledge that he was a human time bomb, provided him access to the means to commit his rampage, set him off by leaving him alone and unsupervised, but did nothing to protect or warn others within the zone of danger thus created." *Id.*

[167] *Id.* at 223.

[168] *Id.* at 224-26.

relations" exception to the "no-duty" rule.[169] The court reasoned that the "natural relationship between the parties creates no inference of an ability to control, [and thus] the actual custodial ability must affirmatively appear."[170] The *Wise* court concluded that a "special relations" exception could not exist because neither the injury nor the harm was foreseeable.[171] Finally, the court acknowledged the public policy reasons for limiting the scope of the "special relations" exception, such as the belief that the responsibility for tortious acts should lie with the person who commits those acts.[172] In the absence of facts which clearly provide a legal duty, responsibility should not be shifted to a third party.[173]

In response to Touchette's "special relations" claim concerning the marital relationship between Mabel and Ganal, the Hawai'i Supreme Court echoed the same sentiments as the *Rozycki* and *Wise* courts.[174] The supreme court held that the marital relation alone did not constitute a "special relation" under section 315, so as to merit the imposition of a duty to warn other or control the actions of a spouse.[175] However, the *Touchette* court did not issue a complete rejection of the marital relationship as a "special relations" exception,[176] leaving this issue open for future litigation as to the types of marital relationships and policy considerations that the court would consider.[177] The supreme court might have found a "special relations" exception if Mabel had a special ability to control Ganal's conduct.[178] Moreover, a "special relations" exception argument could have been made if there was evidence of a unique relationship of dependence between Mabel and Ganal.[179]

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[169] *Id.* at 225. Special relationships, such as parent-child, master-servant, and possessor of land-licensee were analyzed. *Id.* "In all of the above relationships, the ability to control the third party is essential." *Id.*

[170] *Id.* As a consideration in determining no duty to aid or protect, the court noted that the husband's behavior was beyond the control of anyone, including himself. *Id.*

[171] *Id.* Despite the decedent's bizarre antics and behavior, his only violent threat was directed at a neighborhood cat which had killed one of his rabbits. *Id.* Further, assuming, arguendo, that the defendant was aware of her husband's potential for violence, plaintiffs have not alleged any facts which suggest the defendant knew or could have known that her husband would engage in the type of attack which occurred here. *Id.*

[172] *Id.* at 226.

[173] *Id.*

[174] Touchette v. Ganal, 82 Hawai'i 293, 301, 922 P.2d 347, 355 (1996).

[175] *Id.* at 301, 922 P.2d at 355.

[176] *Id.*

[177] *Cf.* Petersen v. Heflin, 413 N.W.2d 810, 812 (Mich. 1987) (there may be special facts and circumstances underlying some marital relationships which might give rise to a duty).

[178] *See supra* note 169 and accompanying text.

[179] "The law appears . . . to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence." RESTATEMENT (SECOND) OF TORTS § 314A cmt. b (1965).

2. The misfeasance and nonfeasance distinction

Although the *Touchette* court did not find a duty owed by Mabel to the Touchette family under the "special relations" exception and the Restatement (Second) of Torts sections 314A and 315, the court imposed a duty through the "affirmative acts" exception embodied in sections 302, 302A and 302B of the Restatement.[180] The court began its analysis with a discussion of the California Court of Appeal's decision in *Pamela L. v. Farmer*.[181]

In *Pamela L.*, three minor girls, allegedly sexually molested by the defendant, brought suit against the defendant, Richard Farmer, and his wife, Elsie Farmer.[182] The California Court of Appeals rejected Elsie's argument that she owed no legal duty to the plaintiffs and found a duty based on the principles embodied in section 302B of the Restatement.[183]

The *Pamela L.* court reasoned that the wife did not merely fail to prevent harm to the plaintiffs from her husband's criminal conduct, but by her own misfeasance, increased the risk of such harm occurring.[184] According to the plaintiffs' complaint, Elsie encouraged and invited the minor girls to play in her swimming pool and prepared refreshments to entice the children.[185] Elsie assured the girls' parents that it would be perfectly safe for the girls to swim when she was not there because her husband would be present.[186] Elsie also knew that her husband had molested women and children in the past, and so it was reasonably foreseeable he would do so again if left alone with children at the house.[187] The court concluded that the wife's misfeasance in encouraging and inviting the children to be alone with her husband, under circumstances where he would have a peculiar opportunity and temptation to commit such misconduct, unreasonably exposed the children to harm.[188]

The Hawai'i Supreme Court adopted the reasoning of the *Pamela L.* court.[189] Moreover, the court reiterated its recognition of the duty described

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[180] *Touchette*, 82 Hawai'i at 304, 922 P.2d at 358.

[181] 169 Cal. Rptr. 282 (1990).

[182] *Id.* at 283. Farmer answered the plaintiffs' complaint but Elsie demurred to it. *Id.* The Superior Court of California sustained Elsie's demurrer, and the plaintiffs appealed. *Id.*

[183] *See id.* at 284.

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.* at 284 n.2.

[189] Touchette v. Ganal, 82 Hawai'i 293, 303, 922 P.2d 347, 357 (1996).

in sections 302,[190] 302A[191] and 302B[192] for purposes of clarity.[193] Employing the misfeasance/nonfeasance distinction rationale of the *Pamela L.* court, the supreme court held that Touchette's complaint, alleging affirmative conduct or misfeasance by Mabel in flaunting her extramarital affair with David Touchette, implicated the duty described in sections 302, 302A and 302B.[194]

Interestingly, the *Touchette* court never provided any explanation as to why it followed the rationale of the *Pamela L.* court. There was no insight as to what elements of the *Pamela L.* decision the court found persuasive and compelling in relationship to the facts of *Touchette*. The supreme court's lack of discussion about *Pamela L.* and sections 302, 302A and 302B of the Restatement in *Touchette* will undoubtedly lead to debate as to the scope of one's legal duty and liability regarding criminal acts of third persons.

V. IMPACT

It seems quite evident that the Hawai`i Supreme Court stretched the legal envelope in crafting a legal duty based on sections 302, 302A and/or 302B. The court recognized the difficulty of extending liability to apply to one's nonfeasance or inaction in protecting another against the criminal acts of third persons.[195] Criminal acts are not reasonably to be anticipated and are so improbable "in any particular instance that the burden of guarding against such acts almost always exceeds the apparent risk."[196] Without any "special relations" exception to nonfeasance liability, the court needed to characterize Mabel's conduct as misfeasance. *Pamela L.* provided the perfect vehicle for the supreme court to justify their judicial activist tendencies and opinion in *Touchette*. The *Touchette* opinion, however, raises two problems: (1) the

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[190] *See supra* note 10.

[191] *See supra* note 11.

[192] *See supra* note 12.

[193] *Touchette*, 82 Hawai`i at 302, 922 P.2d at 356. The duty set out in sections 302, 302A and 302B has been briefly discussed in the past. *Id.* (citing Haworth v. State of Hawai`i, 60 Haw. 557, 592 P.2d 820 (1979); Brown v. Clark Equip. Co., 62 Haw. 530, 540, 618 P.2d 267, 274 (1980).

[194] *Touchette*, 82 Hawai`i at 304, 922 P.2d at 358.

[195] *Id.* at 302, 922 P.2d at 356. In the early law, "courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer serious harm because of his [or her] omission to act." *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 314 cmt. c (1965)). Thus, "liability for nonfeasance was slow to receive any recognition in the law . . . and is still largely confined to situations in which there was some special relation between the parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of another." *Id.*

[196] Maguire v. Hilton Hotels Corp., 79 Hawai`i 110, 113, 899 P.2d 393, 396 (1995) (citation omitted).

ambiguity as to whether one's negligent omission involving an unreasonable risk of harm to another (nonfeasance liability without any "special relations" exception) is recognized by the Hawai'i Supreme Court; and (2) the conflicting tension in denying a "special relations" exception to the marital relationship and, at the same time, characterizing Mabel's flaunting of her extramarital affair as misfeasance for purposes of creating a legal duty in this negligence action.

A. The Impact of Pamela L.

Although the *Touchette* court did not provide an explanation for adopting the reasoning of *Pamela L.*, there are several themes in both cases that may offer insight into why the *Touchette* court looked to *Pamela L.* for guidance. Both *Pamela L.* and *Touchette* involved compelling and sympathetic facts concerning the victimization of innocent children.[197] These victims and their loved ones should be compensated for their grief and pain as a matter of compassion and fairness. Moreover, the burden on Elsie and Mabel to avoid the harm seemed slight.[198] Finally, both cases involved a moral culpability on the part of Elsie and Mabel in that their conduct increased the risk of harm.[199] Despite these common themes, *Pamela L.* is clearly distinguishable from *Touchette*.

Pamela L. was a classic illustration of a defendant who brought the plaintiff-victim into contact with a third party, whom he or she knew, or should have known was peculiarly likely to commit intentional misconduct.[200] In *Pamela L.*, there was a direct link between the wife and the plaintiffs' children because she encouraged the children to play in her swimming pool.[201] There was no such link between Mabel Ganal and Wendy Touchette and her

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[197] "The victims were children entitled to more stringent precautions than necessary for an adult." Pamela L. v. Farmer, 169 Cal. Rptr. 282, 285 (1980). *See supra* note 2.

[198] Elsie could have simply suggested that she did not want the plaintiffs to come over to swim while she was not home. *Pamela L.*, 169 Cal. Rptr. at 285. The burden was minimal. *Id.* While the court did not evaluate the burden of Mabel refraining from flaunting her extramarital affair, it would seem minimal as well. *See Touchette*, 82 Hawai'i at 293, 922 P.2d at 347.

[199] *Pamela L.*, 169 Cal. Rptr. at 285. Mabel's infidelity may be considered as morally culpable conduct. *See Touchette*, 82 Hawai'i at 293, 922 P.2d at 347.

[200] *Pamela L.*, 169 Cal. Rptr. at 284. *See supra* note 95 and accompanying text.

[201] See *Pamela L.*, 169 Cal. Rptr. at 285. Although her husband's primary responsibility for the harm was irrefutable, nevertheless, there is a fairly close connection between the wife's invitation to the children and the ultimate harm. *Id.*

family.[202] Wendy's complaint did not allege that Mabel brought her family into contact with Ganal.[203]

Furthermore, in *Pamela L.*, both the victims (the young girls) and the harm (the sexual assault) were foreseeable.[204] Elsie expressly invited the minor girls to her home, knowing that her husband had molested women and children in the past.[205] In *Touchette*, the victims (the Touchette family) and the harm (murder and severe burns through arson) were clearly unforeseeable to Mabel.[206] Wendy did not allege any direct relationship between Mabel and the Touchette family (Wendy. Michael, Kalah and Joshua), nor did she specifically allege that Mabel had any knowledge of Ganal's tendency to cause injury or death through arson.[207]

Rather than adopting the reasoning in *Pamela L.*, a case easily distinguishable from *Touchette*, the Hawai`i Supreme Court could have considered the rationale of the Iowa Supreme Court in *Fiala v. Rains*.[208] Andy Fiala filed a negligence claim against Lori Rains for damages sustained when he was physically beaten by a third party in her home.[209] Rains's disgruntled boyfriend, Matthew Moeller, broke into her home and severely beat Fiala, who was her house guest.[210]

The pattern of violence that marked the relationship between Rains and Moeller culminated with Moeller threatening to commit suicide, as a frightened Rains locked herself in the bathroom.[211] The suicidal tendencies and dynamics of the Rains-Moeller relationship mirrored the turbulent marriage of Ganal and Mabel.[212] At a time when Rains and Moeller were apparently at a discordant phase of their relationship, Rains invited Fiala to her house.[213] Moeller, who felt that he had been stood up by Rains that night,

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[202] *Touchette*, 82 Hawai`i at 295-97, 922 P.2d at 349-51.

[203] *Id.*

[204] *Pamela L.*, 169 Cal. Rptr. at 284.

[205] *Id.*

[206] *See supra* notes 121-28.

[207] *See Touchette*, 82 Hawai`i at 295-97, 922 P.2d at 349-51.

[208] 519 N.W.2d 386 (Iowa 1994).

[209] *Id.* at 387.

[210] *Id.* "Rains and Moeller had a continuously stormy relationship as lovers with Moeller living off and on at Rains's house seventy percent of the time." *Id.* Typically, arguments would occur with Moeller becoming physically abusive toward Rains, such as slapping, shoving and strangling her. *Id.*

[211] *Id.* To prove his intentions, Moeller slashed himself with a knife and smeared blood underneath the bathroom door so Rains could observe it from inside the bathroom. *Id.* Rains finally called 911, and the heated argument ended. *Id.*

[212] *See supra* notes 112-13. *Compare* State v, Ganal, 81 Hawai`i 358, 362, 917 P.2d 370, 374 (1996) (Ganal aiming a gun at his head, threatening suicide).

[213] *Fiala*, 519 N.W.2d at 388. "Both Rains and Fiala testified that there was nothing intimate or sexual going on between them that evening." *Id.* It was merely a social outing. *Id.*

was lurking outside Rains's home.[214] An altercation between Fiala and Moeller ensued as Moeller forced Fiala to the floor and kicked him repeatedly in the head, knocking Fiala unconscious.[215]

In his petition against Rains, Fiala claimed damages for negligence based on the history of Rains's relationship with Moeller and her knowledge of his jealous and violent nature.[216] The *Fiala* court held that Rains did not have a legal duty to warn of a disgruntled boyfriend's violent propensities to avoid exposing him to the danger posed by her boyfriend.[217] Moeller's conduct did not meet the threshold level of foreseeability as no evidence was "presented of threats to Fiala by Moeller immediately preceding the assault that would alert Rains to a pending danger."[218] Although Fiala contended that section 302 and 302B of the Restatement and *Pamela L.* should be applied to the facts of the case, the *Fiala* court granted a directed verdict for Rains, emphasizing that the issue of foreseeability[219] was not submittable to the jury.[220]

Both *Touchette* and *Fiala* involved men consumed with jealousy, relationships replete with sexual tension and violent behavior, and innocent third parties who were unfortunately the targets of their criminal acts.[221] The *Fiala* court found no exception to the general rule that "a person has no duty to prevent a third person from causing harm to another."[222] In contrast, the *Touchette* court found a legal duty based on Mabel's affirmative conduct, despite the lack of any facts on the issue of foreseeability.[223]

The *Fiala* and *Wise* courts had the opportunity to characterize the defendant's conduct as misfeasance and apply the "affirmative act" exception,

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[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *See id.* at 389.

[218] *Id.*

[219] *Id.* Foreseeability is one of the most important considerations in establishing one's legal duty. Tarasoff v. Regents of Univ. of California, 551 P.2d 334, 342 (Cal. 1976). *See also* Megeff v. Doland, 176 Cal. Rptr. 467, 470 (1981) ("The most important of the enumerated factors in establishing a duty is foreseeability.").

[220] *Fiala*, 519 N.W.2d at 389. Fiala argued that Rains's invitation to come to her house, coupled with the knowledge of Moeller's violent nature, constituted misfeasance and an "affirmative act." *See id.* at 388-389.

[221] *See supra* notes 112-27 and accompanying text. *Compare supra* notes 213-15 and accompanying text.

[222] *Fiala*, 519 N.W.2d at 389.

[223] *See* Touchette v. Ganal, 82 Hawai'i 293, 304, 922 P.2d 347, 358 (1996). Wendy's complaint alleged no facts as to any threats to the Touchette family by Ganal or of any known actions by Ganal immediately preceding the burning of the Touchette residence that would alert Mabel to a pending danger. *Id.* at 295-297, 922 P.2d at 349-351.

but chose not to.[224] In contrast, the *Touchette* court held that a legal duty could be found based on misfeasance and emphasized that on appellate review the court had to "view the plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory" in a HRCP Rule 12(b)(6) motion to dismiss.[225] However, the court failed to balance this appellate review with a cautious perspective of the misfeasance/nonfeasance distinction. The misfeasance and nonfeasance dichotomy provides the perfect opportunity for obfuscation and manipulation through clever lawyering, "as any given set of facts can be compressed to come within the concept of nonfeasance or expanded to fit the mould of misfeasance."[226] Clearly, there was no close connection between the alleged misfeasance of Mabel flaunting her extramarital affair and the ultimate harm of the severe injury and the multiple murders of the Touchettes that would warrant a recognition of a legal duty under sections 302, 302A and/or 302B of the Restatement.[227]

B. The Ambiguity in Touchette

Although the holding in *Touchette*, recognizing a section 302, 302A and/or 302B duty, seemed to expand the scope of liability in negligence cases, a recent Hawai'i Supreme Court decision, *Lee v. Corregedore*,[228] indicates that the court felt it went too far in expanding the scope of a section 302, 302A and/or 302B duty in *Touchette* and wanted to revisit the issue of one's legal duty.[229] In *Lee*, the court analyzed the issue of whether the relationship

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[224] *See supra* note 220 and accompanying text. *Compare supra* note 166 and accompanying text.

[225] *Touchette*, 82 Hawai'i at 303, 922 P.2d at 357.

[226] Harper & Kime, *supra* note 32, at 886. Professors Harper and Kime suggest that the manipulation is a "simple one of selecting that point in the series of happenings from which the analysis is to start." *Id.* They offer this example: An accident at a level crossing may logically be regarded as the result of the failure of the engineer to sound a warning or make a timely application of his brakes; or it can be construed as the improper operation of the locomotive. *Id.*

[227] *Touchette*, 82 Hawai'i at 295, 922 P.2d at 349. *See also supra* note 203.

[228] 83 Hawai'i 154, 925 P.2d 324 (1996). Justice Nakayama wrote the majority opinion in which Chief Justice Moon and Justice Ramil joined. Justice Levinson wrote the dissent in which Justice Klein joined. *Id.*

[229] *See id.* at 162, 925 P.2d at 332. The *Touchette* court seemed to indicate a recognition of pure nonfeasance without any "special relationship" as creating a legal duty to protect or aid in its holding that a duty to act may arise out of a negligent omission (nonfeasance) that involves an unreasonable risk of harm to another. *See Touchette*, 82 Hawai'i at 304, 922 P.2d at 357.

between a Veteran Service Counselor and his client constituted a "special relations" exception to the "no-duty to aid or protect" rule.[230]

Anthony Perreira, a disabled Vietnam veteran who suffered from neurological and psychiatric problems sought help from Manuel Corregedore, a Veteran Service Counselor at the State of Hawai'i's Office of Veterans' Services.[231] Perreira threatened to commit suicide at least two times prior to his death.[232] On the morning of July 19, 1991, Perreira saw Corregedore and told him that he was going to kill himself at Hanapepe Bay Lookout.[233] Perreira also dictated his last request to Corregedore's secretary, Jocelyn.[234] As Perreira was leaving the office, Jocelyn showed Corregedore the last request that Perreira had dictated to her.[235] According to Corregedore, he showed the last request to Perreira's father, who had accompanied his son to the office, told him about the suicide threat, and urged him to keep any eye on Perreira.[236]

The special administratrix of Perreira's estate filed a complaint, alleging that Corregedore had a duty arising from his professional relationship as a counselor to prevent his client (Perreira) from "'causing and exposing himself to any serious injury and/or harm which was reasonably foreseeable,' and that he breached this duty by failing to warn the father that Perreira was suicidal."[237] The supreme court held that no "special relationship" existed under section 314A of the Restatement so as to impose a legal duty upon Corregedore to prevent Perreira's suicide.[238] The *Lee* court reiterated its recognition of a reasonable duty of care to prevent a suicide only on the part

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[230] *Lee*, 83 Hawai'i at 158, 925 P.2d at 328.

[231] *Id.* at 156, 925 P.2d at 326. In an affidavit, Corregedore described his work-related duties as not providing psychiatric services but consisting of listening to veterans and making arrangements for them to be seen by a mental health professional. *Id.* at 156-57, 925 P.2d at 326-27.

[232] *Id.* at 157, 925 P.2d at 327.

[233] *Id.*

[234] *Id.* Perreira's last request contained the following instructions: (1) all of his clothing was to be given to the Salvation Army; (2) his jewelry, army coat, camouflage baseball cap, and Virgin Mary statute were to be buried with him; (3) all his money was to be given to his parents; (4) his television and bed were to be left in his room. *Id.* Corregeodore attempted to call Perreira's social worker, but Perriera refused to remain in Corregedore's office. *Id.*

[235] *Id.*

[236] *Id.* Conversely, Perreira's father denied that he had any conversation with Corregedore. *Id.*

[237] *Id.* at 158, 925 P.2d at 328.

[238] *Id.* at 173, 925 P.2d at 343. The *Lee* court also disagreed with the plaintiff's assertion that foreseeability alone is sufficient to create a duty on the part of counselors to prevent suicides of their noncustodial clients. *Id.* at 167, 925 P.2d at 337.

of one who had actual custody of a suicidal person.[239] The court found that Corregedore "did not have custody, control, guardianship, or authority over Perreira."[240]

The supreme court also emphasized public policy considerations that weigh against imposing a duty on counselors to prevent suicides of noncustodial clients because the "imposition of such a broad duty could have a deleterious effect on counseling in general."[241] This broad duty would lead to a breach of the counselor-client confidentiality and disclose a client's suicidal tendencies to all of the client's immediate relatives, regardless of whether the client desired to keep such sensitive and potentially embarrassing facts confidential.[242] Moreover, the counselor would have to immediately pass on these facts to professional therapists, which would cause those people most in need of counseling to fear that their confidential disclosures could subject them to involuntary commitment in psychiatric hospitals.[243]

The most interesting aspect of the *Lee* decision is the heated exchanges between the majority and minority as to what the court held in *Touchette* concerning the scope of sections 302, 302A and 302B of the Restatement.[244] The majority distinguished *Lee* from *Touchette* in that the holding in *Touchette* was premised on the common law distinction between misfeasance and nonfeasance.[245] In contrast to Touchette's claim that misfeasance occurred through Mabel's flaunting of her extramarital affair,[246] no such claims of misfeasance were alleged in *Lee*; sections 302, 302A and 302B were not implicated.[247] Thus, the majority attempted to clarify the holding in *Touchette* suggesting that pure nonfeasance, without any "special relation" exception, did not establish a legal duty on one to aid or protect another based on sections 302, 302A and 302B of the Restatement.[248]

In his dissent, Justice Levinson responded by labeling the majority's retreat from its "expansive duty analysis in *Touchette* as baffling, unjustified, and

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[239] *Id.* at 161, 925 P.2d at 331. *Cf.* Figueroa v. State, 61 Haw. 369, 376-380, 604 P.2d 1198, 1202-1204 (1980) (holding that the State had a duty to exercise reasonable care to prevent the juvenile's suicide that arose from the existence of the custodial relationship between the Boys' Home and the juvenile).

[240] *Lee*, 83 Hawai'i at 161, 925 P.2d at 331.

[241] *Id.* at 167, 925 P.2d at 337.

[242] *Id.*

[243] *Id.*

[244] *See id.* at 161-162, 925 P.2d at 331-332.

[245] *Id.* at 162, 925 P.2d at 332. If Touchette's claim against Mabel had alleged only nonfeasance, such as Mabel's failure to warn Touchette or her failure to control Ganal's conduct, dismissal would have been appropriate. *Id.*

[246] *See supra* note 133.

[247] *Lee*, 83 Hawai'i at 162, 925 P.2d at 332.

[248] *See id.*

cruel to the plaintiffs in this case."[249] The dissent did not view the *Touchette* holding as premised on the distinction between misfeasance and nonfeasance.[250] Justice Levinson questioned why *Touchette* expressly held, *inter alia*, that liability based on the breach of a duty owed by an actor to another may arise out of the negligent omission which involves an unreasonable risk of harm to another through the foreseeable action of the other.[251] The majority referred to the dissent's citation to *Touchette* as "gratuitous" and stated that it "reflects a fundamental misunderstanding and misinterpretation of our analysis and holdings in that case."[252] The dissent seemed to indicate a willingness to find a duty based not only on misfeasance and nonfeasance ("special relations" exception) but also pure nonfeasance or a failure to act.[253]

C. Proper Scope of Sections 314 and 302 of the Restatement

As Richard Posner points out, negligence is an objective standard.[254] The rejection of moral standards as a basis for liability is best understood when one views the original design of the fault system, as in a claim for negligence, as a compensation scheme and nothing more.[255] In allowing the section 302 claim to possibly go to a jury trial, the *Touchette* court thrust infidelity and extramarital bliss into the jury inquiry on the issue of Mabel's negligence. Whether Mabel breached her duty of exercising reasonable care through her alleged extramarital affair with David Touchette, will be a question for the trier of fact.[256] Inevitably, the jury will be forced to confront the conflicting tensions of making a purely moral judgment regarding the extramarital affair and objectively judging the reasonableness of Mabel's conduct. Their

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[249] *Id.* at 174 n.1, 925 P.2d at 344 n.1 (Levinson, J., dissenting).

[250] *Id.*

[251] *Id. See Touchette*, 82 Hawai'i 293, 303, 922 P.2d 347, 357 (1996).

[252] *Lee*, 83 Hawai'i at 161, 925 P.2d at 331.

[253] *Id.* at 179, 925 P.2d at 349 (Levinson, J., dissenting). The dissent reasoned that the majority placed too much emphasis on the lack of a "custodial" relationship between Corregedore and Perreira. *Id.* at 174, 925 P.2d at 344 (Levinson, J., dissenting). Judge Levinson emphasized the clear foreseeability of Perreira's suicide and would have recognized a legally cognizable duty on Corregedore's part to take reasonable action to seek to prevent Perreira's foreseeable suicide. *Id.* at 179, 925 P.2d at 349 (Levinson, J., dissenting).

[254] Richard Posner, *A Theory of Negligence*, PERSPECTIVES ON TORT LAW 17 (Robert L. Rabin ed., 1985).

[255] Posner, *supra* note 254, at 17.

[256] *See supra* note 71 and accompanying text.

personal moral values concerning infidelity, and their compassion for the victim may play a significant role in determining a breach of duty.[257]

The *Touchette* court and the *Lee* majority properly limited the application of the "special relations" exception and sections 314 and 315 of the Restatement to limited situations.[258] Both reaffirmed the conservative approach of *Cuba* and Hawai'i cases prior to *Knodle*.[259] However, it is difficult to reconcile *Touchette*'s denial of a "special relations" exception to the marital relationship with the labeling of Mabel's flaunting of her extramarital affair as misfeasance. The public policies favoring the general protection and harmony of the marital relationship[260] seem to particularly apply to the facts of *Touchette*. *Touchette* may induce silence between a troubled married couple who need to examine and scrutinize their relationship. Potential civil liability may be one factor inhibiting much needed discourse between the spouses.

With the likelihood that personal morality will affect a jury in its deliberations, it would be unworkable, unfair and unreliable to impose a section 302, 302A and/or 302B duty on spouses who flaunt their extramarital affairs. The limits of liability would be extremely ambiguous, and the standard used for determining a breach of duty would be complex and unclear. Assuming one spouse had some knowledge of the jealous rage of the other spouse, would an innocent kiss on the cheek of a stranger, triggering a killing spree by the jealous spouse, constitute flaunting and possible misfeasance under *Touchette*? Where would the court draw the line in imposing a duty for negligence liability? As a matter of public policy, does the flaunting of an extramarital affair merit a court's intrusion into the private confines of the marital relationship to evaluate the presence of a section 302, 302A and/or 302B duty?

Moreover, the *Touchette* opinion fails to clearly delineate whether all extramarital affairs constitute an "affirmative act" exception to the "no-duty" rule. The court may have expanded this legal duty to at least a wife who has an extramarital affair coupled with the knowledge of her husband's emotional instability,[261] and, by implication, to the lover of the spouse (David Touchette).[262] Clearly, David's participation in the extramarital affair was an integral part of Mabels' alleged misfeasance of flaunting her illicit

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[257] *Contra* Morrison, *supra* note 37, at 382 (moral wrongs will not usually establish civil liability).

[258] *See supra* note 175. *Compare supra* note 241.

[259] *See supra* section II, subsection A for a discussion of the Hawai'i Supreme Court's treatment of the "special relations" exception.

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

[261] *See* Touchette v. Ganal, 82 Hawai'i 293, 304, 922 P.2d 347, 358 (1996).

[262] *See id.*

relationship.[263] According to the *Touchette* court's application of sections 302, 302A and 302B of the Restatement to the facts of the case, possible claims could be brought by the estate of the Dela Cruzes and Wendy Touchette against David Touchette for misfeasance and breach of a legal duty to protect or aid.[264] The only possible issue concerns whether David had knowledge of Ganal's fragile emotional state.[265]

VI. CONCLUSION

The Hawai'i Supreme Court's holding in *Touchette* represented a significant deviation from precedents and a history of reluctance in establishing a duty in negligence cases absent a "special relationship." The court found a legal duty based not upon sound principles of law, but upon ideals of fairness and compassion. *Touchette* seems to emphasize that one's legal duty is "not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[266] Whether a duty exists is a question of fairness, as the court assesses the nature of the risk, the magnitude of the burden of guarding the risk, and the public policies behind the solution.[267] Historically, the Hawai'i Supreme Court has been unwilling to impose a new duty upon members of our community without any logical, sound and compelling reasons.[268]

However, the *Touchette* court found a legal duty despite compelling legal and policy considerations. The scope of one's duty should be measured by the foreseeability of the risk and whether the danger created is sufficiently large to embrace the specific harm.[269] It seems highly improbable that the flaunting of an extramarital affair would create a foreseeable danger large enough to embrace Ganal's murders through arson. Moreover, as a matter of overall policy, responsibility for tortious acts should lie with the person who commits those acts, absent facts which clearly provide a legally cognizable duty.[270]

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[263] *See supra* note 110.

[264] *See Touchette*, 82 Hawai'i at 304, 922 P.2d at 358.

[265] *See id.* The court emphasized that Wendy's complaint alleged that Mabel knew or should have known of Ganal's severe emotional distress and instability prior to the Ganal's murder spree. *Id.*

[266] Cootey v. Sun Investment, Inc., 68 Haw. 480, 484, 718 P.2d 1086, 1090 (1986) (citations omitted).

[267] Hao v. Campbell Estate, 76 Hawai'i 77, 80, 869 P.2d 216, 219 (1994) (citations omitted).

[268] *See* Johnston v. KFC Nat'l Management Co., 71 Haw. 229, 232-233, 788 P.2d 159, 161 (1990).

[269] Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

[270] Wise v. Superior Court, 272 Cal. Rptr. 222, 226 (1990).

Touchette embodies the Hawai'i Supreme Court's judicial activist tendencies.[271] Judges are well situated to articulate the feelings of the community with respect to issues involving the duty to act.[272] Considerations of fairness, humanity and morality will undoubtedly be emphasized.[273] Rather than just interpreting the law as it arises from common law or statutes, the Hawai'i Supreme Court has "repeatedly made decisions based on their perception of what would be in the public's best interests" at the expense of predictability of the law.[274] The supreme court's analysis in *Touchette* centered on these humanitarian elements, which may have produced results that are more persuasive to the community, whose opinion is the ultimate one on matters of law as well as politics.[275]

Shaun Mukai[276]

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[271] *See* Daniel Case & Clinton Ashford, *No Order in State High Court*, HONOLULU ADVERTISER, August 4, 1996 at B3. The Hawai'i Supreme Court's judicial activist decisions have: (1) given beach property and water rights to "the people;" (2) recognized and honored Hawaiian traditions and customs; and (3) made big insurance companies liberally compensate people who have just suffered a loss. *Id.*

[272] MARSHALL SHAPO, THE DUTY TO ACT: TORT LAW, POWER AND PUBLIC POLICY XV (1977).

[273] *See id.* "I grant the majority's unwillingness to recognize any duty on Corregedore's part in the present case may not be revolting to any moral sense, although it is to mine." Lee v. Corregedore, 83 Hawai'i 154, 178, 925 P.2d 324, 349 (Levinson, J., dissenting) (1996).

[274] Case & Ashford, *supra* note 270, at B3. "Predictability of the law is necessary to the smooth and efficient functioning of any society. The lack of it eventually and inevitably will result in negative consequences to the public." *Id.*

[275] Shapo, *supra* note 271, at xv.

[276] Class of 1998, William S. Richardson School of Law.

Interspousal Torts: A Procedural Framework for Hawai`i

I. INTRODUCTION

In 1993, the Hawai`i State Legislature amended section 572-28 of the Hawai`i Revised Statutes to permit tort suits between spouses.[1] In doing so, Hawai`i became one of the last states in the nation to abolish interspousal tort immunity as a defense to a tort action.[2]

This article addresses the issues that will likely arise as a result of the abrogation of interspousal tort immunity in Hawai`i. Part II details the common law history of spousal immunity including its origins and the policies that have supported it. Part III discusses the history of interspousal tort immunity in Hawai`i including the recent adoption of section 572-28 of the Hawai`i Revised Statutes abolishing spousal immunity. Part IV considers some of the various tort actions available and how they apply in the marital context. And lastly, Part V addresses the considerations involved in bringing an interspousal tort action, in particular, the effect that res judicata, the statute of limitations, and various remedies may have on the order and manner in which claims are brought.

II. HISTORY OF INTERSPOUSAL TORT IMMUNITY

The common law doctrine of interspousal immunity was predicated on the concept of a husband and wife as one legal entity.[3] The wife's legal identity was merged with her husband's upon marriage.[4] As a result, married women

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[1] Act 70, § 2, 17th Leg., Reg. Sess. (1993), *reprinted in* 1993 Haw. Sess. Laws 87. HAW. REV. STAT. § 572-28 (1993) reads: "A married person may sue and be sued in the same manner as if the person were sole. This section shall be construed to authorize tort suits between spouses." *Id.*

[2] *See infra* notes 27-29.

[3] Peters v. Peters, 63 Haw. 653, 656, 634 P.2d 586, 588-89 (1981); Thompson v. Thompson, 218 U.S. 611, 614-15 (1910).

[4] *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442-43 (1809).

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law-french a *feme-covert*, *foemina viro co-operta*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage . . . . If the wife be injured in her person or her property, she can bring no action for redress

were unable to enter into contracts, own property, and sue or be sued.[5] The legal fiction of husband and wife as one entity precluded suit between spouses.[6]

With the passage of the Married Women's Acts[7] in the mid-1800s, the unity fiction was significantly weakened.[8] These Acts, passed in most states, gave women a separate legal identity with the right to contract, own property and maintain separate legal actions.[9] Although some courts interpreted their

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without her husband's concurrence, and in his name, as well as her own: neither can she be sued without making the husband a defendant.

Id.

[5] *Id.*

[6] *Id.*

[7] *See, e.g.*, Richard v. Richard, 300 A.2d 637, 640 (Vt. 1973), where the Vermont Supreme Court discussed Vermont's Married Woman's Act:

> The Married Woman's Act gives her the right to make contracts with persons other than her husband and sue or be sued on them, without the joinder of her husband. She may serve as executrix, administratrix, guardian or trustee. She may convey real estate which belongs to her as if she were unmarried, and all personal property or rights of action acquired by her before, or after, marriage are held to her own and separate use. In actions for divorce or separation she has at least equal rights to the custody of the children of the parties.

Id.

[8] *Peters* at 657, 634 P.2d at 589; *see also* Lansing C. Scriven, Article, *The Florida Legislature Tolls the Death Knell for Interspousal Immunity in Tort*, 13 FLA. ST. U. L. REV. 725, 726 (1985).

[9] Thompson v. Thompson, 218 U.S. 611, 615 (1910). In *Thompson*, the United States Supreme Court discussed Married Women's Acts:

> In pursuance of a more liberal policy in favor of the wife, statutes have been passed in many of the State[s] looking to the relief of a married woman from the disabilities imposed upon her as a femme covert by the common law. Under these laws she has been empowered to control and dispose of her own property free from the constraint of the husband, in many instances to carry on trade and business, and to deal with third persons as though she were a single woman. The wife has further been enabled by the passage of such statutes to sue for trespass upon her rights in property and to protect the security of her person against the wrongs and assaults of others.
>
> It is unnecessary to review these statutes in detail. Their obvious purpose is, in some respects, to treat the wife as a femme sole, and to a large extent to alter the common law theory of the unity of husband and wife. These statutes, passed in pursuance of the general policy of emancipation of the wife from the husband's control, differ in terms and are to be construed with a view to effectuate the legislative purpose which led to their enactment.

Id.

states' Married Women's Acts to allow interspousal tort suits,[10] many states,[11] including Hawai'i, did not.[12]

Similarly, in *Thompson v. Thompson*,[13] the United States Supreme Court held that the District of Columbia's Married Women's Act did not abrogate the common law doctrine of interspousal tort immunity.[14] The Court construed the Act to allow a married woman the right to sue for torts committed against her as if she were unmarried.[15] However, the Act was not interpreted to allow the wife to sue her husband because, according to the Court, there was no indication that the legislature intended the statute to allow tort suits between spouses.[16]

As the unity fiction weakened, courts began relying on now-discredited public policy rationales to support interspousal tort immunity.[17] An often-

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[10] *See, e.g.*, Johnson v. Johnson, 77 So. 335, 337-38 (Ala. 1917); Rains v. Rains, 46 P.2d 740, 743 (Colo. 1935).

[11] *See, e.g.*, Comstock v. Comstock, 169 A. 903 (Vt. 1934). For a listing of the states in which a Married Woman's Act did not abrogate interspousal tort immunity, *see* Wayne F. Foster, Annotation, *Modern Status of Interspousal Tort Immunity in Personal Injury and Wrongful Death Actions*, 92 A.L.R.3D 901 (1994).

[12] *See Peters* at 657, 634 P.2d at 589. In 1888, the Legislative Assembly passed Ch. XI of the Laws of His Majesty Kalakaua I. *Id.* It was a Married Woman's Act that granted married women the right to hold real and personal property, make contracts and sue and be sued as individuals. *Id.* However, a specific provision was included barring suits between husband and wife. *Id.* at 658, 634 P.2d at 590.

[13] 218 U.S. 611 (1910). In *Thompson*, a wife brought an assault and battery claim against her husband. *Id.* at 614.

[14] *Id.* at 617.

[15] *Id.* The District of Columbia statute in question read:

> SEC. 1155. Power of Wife to Trade and Sue and be Sued. —Married women shall have power to engage in any business, and to contract, whether engaged in business or not, and to sue separately upon their contracts, and also to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried; contracts may also be made with them, and they may also be sued separately upon their contracts, whether made before or during marriage, and for wrongs independent of contract committed by them before or during their marriage, as fully as if they were unmarried, and upon judgments recovered against them execution may be issued as if they were unmarried; nor shall any husband be liable upon any contract made by his wife in her own name and upon her own responsibility, nor for any tort committed separately by her out of his presence without his participation or sanction: Provided, That no married woman shall have power to make any contract as surety or guarantor, or as accommodation drawer, acceptor, maker, or indorser.

Id. at 615-16.

[16] *Id.* at 617-18. The Court reasoned that interspousal tort suits were unnecessary because other forms of relief like divorce, alimony and criminal proceedings were available. *Id.* at 619.

[17] *See* Heino v. Harper, 759 P.2d 253 (Or. 1988), for a discussion of the rationales supporting interspousal tort immunity. *See also* Foster, *supra* note 11, at 901; Lina Dyanne Johnson, Comment, *Interspousal Tort Immunity: The Rule Becoming the Exception*, 27 HOW.

cited justification for the immunity was preservation of marital harmony based on a belief that allowing spouses to sue each other in tort would destroy marriages.[18] Many courts rejected this rationale, concluding that with intentional torts there is no harmony to preserve.[19] And, with negligent torts, interspousal tort immunity may actually disrupt family harmony rather than preserve it.[20]

The immunity was also upheld because it was believed that allowing tort suits between spouses would encourage collusiveness and fraud to collect the proceeds of liability insurance.[21] Courts responded to this argument by indicating their reliance on the safeguards inherent in the judicial system and the ability of insurance companies to investigate and identify fraudulent claims.[22]

L.J. 995 (1984).

[18] Scriven, *supra* note 8, at 733.

[19] *Id.* The speciousness of the rationale of marital harmony can be illustrated in that it is based on:

> the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy — and this even though she has left him or divorced him for that very ground, and although the same courts refuse to find any disruption of domestic tranquility if she sues him for a tort to her property, or brings a criminal prosecution against him.

Id. (citing W. PROSSER, THE LAW OF TORTS § 122, at 863 (4th ed. 1971)).

[20] Beattie v. Beattie, 630 A.2d 1096, 1098-99 (Del. 1993). The Delaware Supreme Court, in abrogating interspousal immunity in the context of a negligence claim, noted that:

> Denying a person compensation for injuries arising from the negligence of his or her spouse can be very disruptive (e.g., large medical bills and loss of wages often result from serious accidents). Under the Doctrine, the married couple will have to pay these huge expenses, instead of relying on insurance proceeds. This added financial burden could well promote marital discord. Any destruction of family harmony that is prevented by the Doctrine is likely to be minimal due to the prevalence of liability insurance. In addition, the Doctrine may actually promote divorces because a person who suffers an injury at the hands of his or her spouse, but who has since divorced the spouse, may maintain a tort action against the former spouse. Accordingly, it is conceivable that spouses may decide to divorce solely to bypass the restrictions of a Doctrine which putatively is designed to preserve marital harmony.

Id.

[21] *See* Waite v. Waite, 618 So. 2d 1360, 1361 (Fla. 1993).

[22] *Id.* In *Waite*, the Florida Supreme Court concluded that the risk of collusion and fraud should not foreclose an otherwise meritorious claim "simply because a person is married to a wrongdoer." *Id.* The court's reasoning was as follows:

> The fact is that when couples collude in a fraud, many devices exist to detect the deception whether or not the couples are married. Insurance companies can and do hire their own lawyers and investigators to examine suspicious claims. When testifying, the claimants are subject to impeachment and discrediting because of their own financial stake in the outcome. They are subject to the court's contempt power, to the criminal

Moreover, interspousal tort immunity was upheld out of a concern that abrogating the immunity would spawn increased litigation over trivial marital claims;[23] a prediction which was never realized.[24] Further, courts upheld the immunity noting that, other remedies, such as divorce and criminal proceedings, were available to the injured spouse,[25] and many courts deferred to the legislatures in their respective states to abrogate the immunity.[26]

As a result of the rejection of the aforementioned rationales, the trend in the last two decades has been toward abrogation of interspousal tort immunity.[27] The immunity has been completely abrogated in forty-five states and the District of Columbia.[28] Five states abrogated the immunity in limited

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laws for perjury and various forms of fraud, to civil lawsuit, and even to the racketeering and forfeiture statutes authorizing (among other things) the seizure of property used to further their crimes. If these other devices are adequate for unmarried couples, then we believe they also must be equally adequate for those with a marriage license.

Id.

[23] *See, e.g.*, Rubalcava v. Gisseman, 384 P.2d 389 (Utah 1963).

[24] *See* Merenoff v. Merenoff, 388 A.2d 951, 960 (N.J. 1978). The weakness of the rationale is that, "one can hardly imagine that the legal system will break down with cases brought by spouses who have flung themselves down the cellar steps or permitted the other spouse to strike them with the family car in order to achieve the type of substantial injury that makes jury litigation worthwhile." *Id. See also* Richard v. Richard, 300 A.2d 637, 641 (Vt. 1973).

[25] *See* Thompson v. Thompson, 218 U.S. 611, 619 (1910).

[26] *See, e.g.*, Peters v. Peters, 63 Haw. 653, 634 P.2d 586 (1981). In *Peters*, the Hawai'i Supreme Court refused to abrogate interspousal tort immunity in Hawai'i, citing deference to the legislative branch. *Id.* at 659, 634 P.2d at 590. The court in *Peters* indicated that any change in the doctrine of interspousal immunity would have to come from the legislature. *Id.*

[27] *See infra* notes 28-29 and accompanying text.

[28] *See* Penton v. Penton, 135 So. 481 (Ala. 1931); Cramer v. Cramer, 379 P.2d 95 (Alaska 1963); Fernandez v. Romo, 646 P.2d 878 (Ariz. 1982); Leach v. Leach, 300 S.W.2d 15 (Ark. 1957); Klein v. Klein, 376 P.2d 70 (Cal. 1962); Rains v. Rains, 46 P.2d 740 (Colo. 1935); Brown v. Brown, 89 A. 889 (Conn. 1914) (intentional torts); Bushnell v. Bushnell, 131 A. 432 (Conn. 1925) (negligence); Beattie v. Beattie, 630 A.2d 1096 (Del. 1993); Waite v. Waite, 618 So. 2d 1360 (Fla. 1993); HAW. REV. STAT. § 572-28 (1993); Rogers v. Yellowstone Park Co., 539 P.2d 566 (Idaho 1974); ILL. ANN. STAT. ch. 40, para. 1001 (1993); Brooks v. Robinson, 284 N.E.2d 794 (Ind. 1972); Shook v. Crabb, 281 N.W.2d 616 (Iowa 1979); Flagg v. Loy, 734 P.2d 1183 (Kan. 1987); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); MacDonald v. MacDonald, 412 A.2d 71 (Me. 1980); Boblitz v. Boblitz, 462 A.2d 560 (Md. 1983); Hosko v. Hosko, 187 N.W.2d 236 (Mich. 1971); Beaudette v. Frana, 173 N.W.2d 416 (Minn. 1969); Burns v. Burns, 518 So. 2d 1205 (Miss. 1988); S.A.V. v. K.G.V., 708 S.W.2d 651 (Mo. 1986); Miller v. Fallon County, 721 P.2d 342 (Mont. 1986); Imig v. March, 279 N.W.2d 382 (Neb. 1979); Gilman v. Gilman, 95 A. 657 (N.H. 1915); Merenoff v. Merenoff, 388 A.2d 951 (N.J. 1978); Maestas v. Overton, 531 P.2d 947 (N.M. 1975); State Farm Mut. Auto Ins. Co. v. Westlake, 324 N.E.2d 137 (N.Y. 1974); Crowell v. Crowell, 105 S.E. 206 (N.C. 1920); Fitzmaurice v. Fitzmaurice, 242 N.W. 526 (N.D. 1932); Shearer v. Shearer, 480 N.E.2d 388 (Ohio 1985); Courtney v. Courtney, 87 P.2d 660 (Okla. 1938); Heino v. Harper, 759 P.2d 253 (Or. 1988); Hack v. Hack, 433 A.2d 859 (Pa. 1981); Pardue v. Pardue, 166 S.E. 101 (S.C. 1932); Scotvold v. Scotvold, 298 N.W. 266 (S.D. 1941); Davis v. Davis, 657 S.W.2d 753

circumstances.[29]

III. INTERSPOUSAL TORT IMMUNITY IN HAWAI'I

A. History

In Hawai'i, a woman was rendered "civilly dead" upon marriage.[30] This legal merger of a wife's identity with that of her husband was codified in the Statute Laws of His Majesty Kamehameha III and was reiterated in the Civil Code of the Hawaiian Islands, until 1888, when the state passed a Married Woman's Act.[31] This Act granted married women the right to hold real and personal property, make contracts and sue and be sued as individuals.[32]

(Tenn. 1983); Price v. Price, 732 S.W.2d 316 (Tex. 1987); Stoker v. Stoker, 616 P.2d 590 (Utah 1980); VA. CODE ANN. § 8.01-220.1 (Michie 1996); Freehe v. Freehe, 500 P.2d 771 (Wash. 1972); Coffindaffer v. Coffindaffer, 244 S.E.2d 338 (W. Va. 1978); Wait v. Pierce, 209 N.W. 475 (Wis. 1926); Tater v. Tater, 737 P.2d 1065 (Wyo. 1987); D.C. CODE ANN. § 30-201 (1981).

[29] *See* Harris v. Harris, 313 S.E.2d 88 (Ga. 1984) (husband and wife separated); LA. REV. STAT. ANN § 9:291 (1988) (specific causes of action); Jones v. Jones, 376 S.E.2d 674 (Ga. 1989) (wrongful death actions); Brown v. Brown, 409 N.E.2d 717 (Mass. 1980) (case-by-case basis); Rupert v. Stienne, 528 P.2d 1013 (Nev. 1974) (motor vehicle accidents); Digby v. Digby, 388 A.2d 1 (R.I. 1978) (automobile accidents); Asplin v. Amica Mut. Ins. Co., 394 A.2d 1353 (R.I. 1978) (inapplicable where one or both spouses have died); Richard v. Richard, 300 A.2d 637 (Vt. 1973) (motor vehicle accidents).

[30] *Peters v. Peters*, 63 Haw. 653, 657, 634 P.2d 586, 589 n.3 (1981) (citing Act 2, 1 Statute Laws of His Majesty Kamehameha III, Ch. IV, art. I, @ IV (1846)). It states:

> The wife, whether married in pursuance of this article or heretofore, or whether validly married in this kingdom or in some other country, and residing in this, shall be deemed for all civil purposes, to be merged in her husband, and civilly dead. She shall not, without his consent, unless otherwise stipulated by anterior contract, have legal power to make contracts, or to alienate and dispose of property — she shall not be civilly responsible in any court of justice, without joining her husband in the suit, and she shall in no case be liable to imprisonment in a civil action. The husband shall be personally responsible in damages, for all the tortuous (sic) acts of his wife; for assaults, for slanders, for libels and for consequential injuries done by her to any person or persons in this kingdom.

Id.

[31] *Id.* at 657, 634 P.2d at 589 (citing 1286 and 1287, Civil Code of the Hawaiian Islands, 1859).

[32] *Id.* at 657 n.5, 634 P.2d at 589 n.5 (1981) (citing Ch. XI, Laws of His Majesty Kalakaua I). It reads, in part:

> SECTION 1. The real and personal property of a woman shall, upon her marriage, remain her separate property, free from the management, control, debts and obligations of her husband; and a married woman may receive, receipt for, hold, manage and dispose of property, real and personal, in the same manner as if she were sole: Provided, however, that no sale or mortgage of her real estate shall be valid without the written consent of her husband.

However, a provision within the Laws of His Majesty Kalakaua I specifically barred suits between husband and wife.[33] This provision was codified as section 573-5 of the Hawai'i Revised Statutes.[34] In 1987, section 573-5 was amended and its provisions transferred to section 578-28 of the Hawai'i Revised Statutes.[35]

In *Peters v. Peters*,[36] the Hawai'i Supreme Court upheld the doctrine of interspousal tort immunity for domestic torts in Hawai'i.[37] *Peters* involved a husband and wife who were residents of New York who were injured in a collision with a truck.[38] Mrs. Peters brought a tort suit against her husband for negligence.[39] The Hawai'i Supreme Court reaffirmed the doctrine of interspousal tort immunity and indicated that any change must be initiated by the legislature.[40] According to the court, the legislature had shown a refusal to allow interspousal tort suits based on rationales of preserving marital harmony and preventing collusiveness and fraud.[41] As a result of the Hawai'i Supreme Court's decision in *Peters*, interspousal immunity largely prevented tort suits between spouses in Hawai'i.[42]

> SECTION 2. A married woman may make contracts, oral and written, sealed and unsealed, in the same manner as if she were sole, except that she shall not be authorized hereby to make contracts for personal service without the written consent of her husband, nor to contract with her husband.

Id.

[33] *Id.* at 658, 634 P.2d at 590 (citing Ch. XI, Laws of His Majesty Kalakaua I). It read in part, "SECTION 5. A married woman may sue and be sued in the same manner as if she were sole; but this section shall not be construed to authorize suits between husband and wife." *Id.*

[34] *Id.*

[35] SEN. STAND. COMM. REP. NO. 758, 14th Leg., Reg. Sess. (1987), *reprinted in* 1987 HAW. SEN. J. 1217, 1217.

[36] 63 Haw. 653, 634 P.2d 586 (1981).

[37] *Peters* at 655, 634 P.2d at 588.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 659, 634 P.2d at 590. The court in explaining its rationale said:

> The legislature has not been inactive where marital relations and responsibilities are concerned; it has displayed no disinclination to act when a need for statutory revision is perceived. Under the circumstances, deference to the legislative branch of government is the proper judicial stance. Where aspects of a legislatively adopted public policy statement have been examined and changed by the legislature, it would be presumptuous to believe an unamended aspect has been left for judicial alteration.

Id.

[41] *Id.* at 664, 634 P.2d at 593. The court said, "[o]ur legislature has indicated that interspousal tort actions should not be countenanced. We assume the rationale for maintaining this policy includes the preservation of marital harmony and the prevention of collusive suits." *Id.*

[42] Courts have been inclined to loosely define the parameters of interspousal tort immunity due to its stringent nature. *See, e.g.*, Campo v. Taboada, 68 Haw. 505, 720 P.2d 181 (1986). In *Campo*, the Hawai'i Supreme Court held that the doctrine of interspousal immunity did not

B. Hawai'i Revised Statutes Section 572-28

In 1993, the Hawai'i Legislature abolished interspousal tort immunity by amending section 572-28 of the Hawai'i Revised Statutes.[43] The amended statute reads:

> § 572-28. Suits by and against. A married person may sue and be sued in the same manner as if the person were sole. This section shall be construed to authorize tort suits between spouses.[44]

The Hawai'i State Legislature offered a number of reasons to explain its abolition of interspousal tort immunity.[45] The report of the House Committee on Judiciary indicated that the common law history of interspousal immunity was rooted in feudal concepts that "no longer serve an appropriate purpose in today's society."[46] The legislature referred to what it called "antiquated" concepts of husband and wife as one legal entity and the notion that the wife became the husband's property upon marriage.[47]

Section 572-28 was also amended to address the inequitable nature of interspousal immunity.[48] The legislature noted that interspousal immunity imposed a "discriminatory burden" on married people by prohibiting them from suing each other in tort.[49] Hawai'i law permitted intrafamily lawsuits

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bar suit between spouses by way of a third-party interpleader action. *Id.* at 508, 720 P.2d at 183. *See also* Allstate Ins. Co. v. Wyman, 807 F. Supp. 98 (D. Haw. 1992). In *Wyman*, a case dealing with insurance coverage, the court refused to give the doctrine of interspousal immunity an "expansive construction." *Id.* at 100. The federal district court reasoned that the immunity exists out of deference to legislative inaction despite a great deal of criticism from legal commentators. *Id.*

[43] Act 70, § 2, 17th Leg., Reg. Sess. (1993), *reprinted in* 1993 Haw. Sess. Laws 87.

[44] HAW. REV. STAT. § 572-28 (1993).

[45] *See infra* notes 46-57 and accompanying text.

[46] H.R. STAND. COMM. REP. NO. 1167, 17th Leg., Reg. Sess. (1993), *reprinted in* 1993 HAW. HOUSE J. 1467, 1467. It states:

> Your Committee finds that interspousal tort immunity is rooted in the common law legal fiction that "husband and wife are one person." Also, it is partially based upon the feudal concept that upon marriage a woman became her husband's property. Your Committee finds that the concept, that a wife's legal identity merges into her husband's identity, is antiquated and that it no longer serves an appropriate purpose in today's society.

Id.

[47] *Id.*

[48] *Id.*

[49] *Id.* The House Committee on Judiciary stated, "[y]our Committee believes that this bill will help to eliminate unfair bias, prejudice, and discrimination in the legal system. There is no longer a viable reason to discriminate against married people in this fashion. It is a bill whose time has come." *Id.*

between children and parents and between siblings.[50] Likewise, unmarried persons cohabiting together were able to file suit against one another.[51] Yet, a husband and wife were barred by interspousal tort immunity.[52]

Moreover, the legislature abolished the immunity because it rejected the underlying rationales supporting the immunity as invalid.[53] For example, the legislature singled out for criticism the justification that interspousal immunity is necessary to preserve marital harmony.[54] The legislature found that interspousal immunity does not preserve marital harmony because often when a spouse would like to bring a tort suit, as in situations of domestic violence, there is no marital tranquility to preserve.[55] The legislature also responded to the argument that spouses would engage in fraud and collusion to obtain insurance proceeds[56] by indicating its faith in the ability of the judiciary to deal with fraudulent claims.[57]

IV. TORT ACTIONS

Tort actions between spouses raise a number of issues not presented in suits between non-spouses. For instance, is there a lower standard of care for spouses because they are married and are acting within the marital context? In particular, should a husband who batters and abuses his wife be less accountable in tort than an unmarried batterer because marriage implicates some form of consent or privilege? Most agree that an abusive spouse should be held accountable both civilly and criminally under the same standard of

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[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *See supra* note 18 and accompanying text.

[55] H.R. STAND. COMM. REP. NO. 1167, 17th Leg., Reg. Sess. (1993), *reprinted in* 1993 HAW. HOUSE J. 1467, 1467. The committee report states, in part:

> Your Committee is aware of two primary arguments espoused by those who seek to retain interspousal immunity: (1) the possibility of collusion between spouses to obtain insurance proceeds; and (2) the disastrous effect it would have upon marital harmony. As to the first argument, your Committee believes that the present judicial system is well-equipped to detect and uncover cases of collusion. As to the second argument, your Committee believes that in many cases, such as spousal abuse, the existence of marital harmony is illusory. By allowing one spouse to sue the abusing spouse, we believe that a greater deterrent to spousal abuse will result. Additionally, in cases where one spouse is seeking to collect insurance proceeds on account of a tort by another spouse, we do not believe that the marital harmony will be greatly affected.

Id.

[56] *See supra* note 21 and accompanying text.

[57] *See supra* note 55.

care as an unmarried individual, notwithstanding the marital context.[58] The line is more difficult to draw with emotional abuse. Most jurisdictions recognize the tort of intentional infliction of emotional distress between spouses but impose liability only for conduct that is "outrageous."[59] Thus, if a wife engages in adultery, her husband generally does not have a cause of action for intentional infliction of emotional distress.[60] In addition, negligence issues arise. Most courts allow recovery for negligence in motor vehicle accidents between spouses,[61] but the scope of liability in household accidents is somewhat unclear. For instance, is a wife who waxes the floor and fails to warn her husband that it is slippery liable in a negligence action? And, if so, should the standard of care and the burden of proof be the same as that employed in a non-marital context?

The following sections identify those tort actions that are frequently utilized in suits between spouses, and discusses the manner in which traditional tort actions such as battery, negligence and intentional infliction of emotional distress have been defined in the context of an interspousal tort action.

A number of cases and commentators have suggested that tort actions between spouses should be considered within the marital context.[62] In effect, these cases and commentators suggest that the parties' marital status should influence the assessment of liability. In some circumstances, the marital context may be useful in determining whether the conduct falls within traditional tort standards of liability. However, this article argues that the marital context should not elevate the threshold of liability between spouses.

A. Assault and Battery

Assault and battery claims often arise in situations of domestic violence.[63] Although assault and battery claims comprise more than 75 percent of the

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[58] *See infra* notes 66-73 and accompanying text.

[59] *See infra* notes 80-81.

[60] *See infra* note 96.

[61] *See infra* note 98.

[62] *See, e.g.*, Lewis v. Lewis, 351 N.E.2d 526, 532 (Mass. 1976) (noting that abolition of interspousal immunity does not lead to liability in every "unwanted kiss" and "rolling pin" case because courts can "define or adjust the duty of care required between married persons to accomodate . . . married life"); S.A.V. v. K.G.V., 708 S.W.2d 651 (Mo. 1986); Boblitz v. Boblitz, 462 A.2d 506, 522 (Md. 1983); Robert G. Spector, *Marital Torts: Actions for Tortious Conduct Occurring During the Marriage*, 5 AM. J. FAM. L. 71, 72 (1991).

[63] *See infra* notes 68-73 and accompanying text.

total number of tort suits brought for injuries occurring during the marriage,[64] these claims are still underutilized.[65]

As discussed earlier, some courts have held that the parameters of liability in an interspousal tort action may be affected by the marital context. However, this is generally not the case with battery[66] and assault[67] claims. Courts often extend liability for battery[68] regardless of whether the parties are married, recognizing that physical abuse is not a part of the "ebb and flow of married life."[69]

In the context of an assault and battery claim, spouses have recovered for physical acts of violence and abuse.[70] In addition, intentional shootings[71] and

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[64] Spector, *supra* note 62, at 72-73.

[65] Douglas D. Scherer, *Tort Remedies for Victims of Domestic Abuse*, 43 S.C. L. REV. 543, 565 (1992). "Among approximately 2600 reported state cases of battery, assault, or both, from 1981 through 1990 only fifty-three involved adult parties in domestic relationships." *Id.* (citations omitted).

[66] Battery is "a harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent." W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 9, at 39 (5th ed. 1984) [hereinafter KEETON].

[67] Assault is the imminent apprehension of a harmful or offensive contact that protects an individual's interest in freedom from mental injury. KEETON, *supra* note 66, at 43-46. "That one who is aware that she is about to suffer a battery will have suffered an assault demonstrates the complementary nature [of assault and battery]." Scherer, *supra* note 65, at 543.

[68] For a listing of the assault and battery claims reported from 1981 through 1990 involving domestic abuse, *see* Scherer, *supra* note 65, at 556.

[69] *See* Spector, *supra* note 62, at 72; Henriksen v. Cameron, 622 A.2d 1135, 1138 (Me. 1993) (physical violence and verbal abuse is not privileged by virtue of the mutual concessions implicit in marriage). *But see* Blair v. Blair, 575 A.2d 191, 193 (Vt. 1990) (the trial court found that "the strangling with the hands and violence and threats that were described by [the wife] have been blown way out of proportion as evidenced by the fact that she stayed throughout the four years of marriage").

[70] *See, e.g.*, Cain v. McKinnon, 552 So. 2d 91 (Miss. 1989) (husband assaulted and beat his wife); Nash v. Overholser, 757 P.2d 1180 (Idaho 1988) (wife brought claims for assault and battery alleging that her former husband attacked her on five separate occasions); Catlett v. Catlett, 388 S.E.2d 14 (Ga. Ct. App. 1989) (husband dragged his wife down a stairway by her feet); Lord v. Shaw, 665 P.2d 1288 (Utah 1983) (husband struck, choked and raped his wife on numerous separate occasions but the claims were barred by the statute of limitations); Flores v. Flores, 506 P.2d 345 (N.M. Ct. App. 1973) (husband intentionally wounded wife with a knife).

[71] *See, e.g.*, Noble v. Noble, 761 P.2d 1369 (Utah 1988) (husband shot wife in the head); Aubert v. Aubert, 529 A.2d 909 (N.H. 1987) (wife shot husband in the face).

nonconsensual sexual intercourse[72] are bases for liability. Moreover, indirect force, intentionally caused, may be tortious as a form of battery.[73]

B. Intentional Infliction of Emotional Distress

Unlike assault and battery, recovery under a claim of intentional infliction of emotional distress[74] is often influenced by the marital context.[75] Hawai'i has adopted the definition of intentional infliction of emotional distress contained in the *Restatement (Second) of Torts*.[76] According to the *Restatement*, liability is imposed where: (1) the conduct is outrageous; (2) the defendant acted with the intent of causing distress or with reckless disregard of the probability of causing distress; (3) the plaintiff suffers extreme distress; and (4) there is a causal connection between the conduct and the emotional distress.[77] Accordingly, to recover on an intentional infliction of emotional

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[72] *See, e.g.*, Lusby v. Lusby, 390 A.2d 77 (Md. Ct. App. 1978) (wife could maintain an intentional tort action when husband forced her car off the road, raped her and then assisted two others in attempting to rape her).

[73] *See* Scherer, *supra* note 65, at 556. "A battery may be committed by indirect force, such as placing in motion a force or object that makes harmful or offensive contact with the victim." *Id. See, e.g.*, Hudson v. Hudson, 532 A.2d 620 (Del. Super. Ct.) (battery claim where a husband intentionally drove his car into a railroad sign), *appeal refused*, 527 A.2d 281 (Del. 1987); Palmer v. Palmer, 523 N.E.2d 1316, 1317 (Ill. App. Ct. 1988) (a wife recovered $150,000 in compensatory damages and $5,000 in punitive damages on a battery claim where her husband intentionally drove his car into a bridge abutment to injure her and then beat her after the collision).

[74] *See* Leonard Karp & Cheryl Karp, *Marital Torts: Beyond the Normal Ebb and Flow . . .*, 9 AM. J. FAM. L. 89, 95-96 (1995), for a listing of intentional infliction of emotional distress cases. Included are cases finding intentional infliction of emotional distress where there has been physical abuse, where there has been no physical abuse, where there has been interference with custodial rights and where sexually transmitted diseases were involved. *Id.*

[75] *See infra* notes 81-97 and accompanying text.

[76] *See* Dunlea v. Dappen, 83 Hawai'i 28, 38, 924 P.2d 196, 206 (1996).

[77] RESTATEMENT (SECOND) OF TORTS § 46 (1965). The section, in full, reads:

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

  (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

  (b) to any other person who is present at the time, if such distress results in bodily harm.

Id.

For a thorough discussion of the elements of an intentional infliction of emotional distress claim, *see* Richard R. Orsinger, *Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress in Connection With Divorce*, 8 AM. J. FAM. L. 141, 142-46 (1994).

distress claim, the plaintiff must prove, in part, that the tortfeasor's conduct was "outrageous."[78] For conduct to be considered outrageous it must be "so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[79]

Other jurisdictions also utilize the "outrageous" standard to assess liability in interspousal tort claims involving intentional infliction of emotional distress.[80] Often, there is mental distress in marriage and divorce, so the defendant's conduct must rise to a level of outrageousness beyond that normally found in the marital context.[81]

Although the marital context is important in determining whether the defendant's conduct was outrageous under the circumstances, the marital

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[78] In *Dunlea*, the Hawai'i Supreme Court refers to a comment to section 46 of the *Restatement (Second) of Torts* to explain the conduct necessary to make an intentional infliction of emotional distress claim actionable:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Dunlea at 38, 924 P.2d at 206 (citations omitted).

[79] RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965). *Cf.* Merle H. Weiner, Article, *Domestic Violence and the Per Se Standard of Outrage*, 54 MD. L. REV. 183, 189 (1995). Weiner argues for a "per se standard of outrage whereby the defendant's conduct would be outrageous as a matter of law if he violated an injunction issued for a woman's protection." *Id.*

[80] *See* Pyle v. Pyle, 463 N.E.2d 98 (Ohio Ct. App. 1983) (some degree of mental anguish is inherent in almost all domestic relations cases but intentional infliction of emotional distress may be shown if the conduct was outrageous). *See also* Twyman v. Twyman, 855 S.W.2d 619, 621-22 (Tex. 1993) (intentional infliction of emotional distress as defined in section 46 of the *Restatement* was adopted in forty seven states). The *Restatement* requirements "allow freedom of individual action while providing reasonable opportunity for redress for victims of conduct that is determined to be utterly intolerable in a civilized community." *Id.* at 622. Moreover, the Restatement definition of outrageous is "community-specific." Bradley A. Case, Note, *Turning Marital Misery Into Financial Fortune: Assertion of Intentional Infliction of Emotional Distress Claims By Divorcing Spouses*, 33 U. LOUISVILLE J. FAM. L. 101, 109 (1994). Therefore, conduct that is outrageous in one community may not be in another. *Id.*

[81] *See* Whelan v. Whelan, 588 A.2d 251 (Conn. Super. Ct. 1991). The Superior Court of Connecticut in *Whelan* held that the wife had a cognizable intentional infliction of emotional distress claim where the husband falsely told his wife he had tested positive for acquired immune deficiency syndrome ("AIDS"). *Id.* The court noted that "virtually all dissolutions of marriage involve the infliction of emotional distress." *Id.* Therefore, "the plaintiff must allege and prove conduct considerably more egregious than that experienced in the rough and tumble of everyday life or, for that matter, the everyday dissolution of marriage." *Id.*

context should not raise the threshold level of liability.[82] The *Restatement* sets out a sufficiently high threshold of liability, rendering a higher standard for actions asserted within the marital context unnecessary.[83] Furthermore, a higher standard of care for marital torts is contrary to public policy in that it may deprive married persons of civil redress for psychic wrongs committed against them.[84]

Cases involving physical injury resulting from actual physical violence are often considered outrageous.[85] Accordingly, situations of domestic abuse involving a pattern of physical and emotional abuse have been compensable.[86]

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[82] *See* Case, *supra* note 80, at 112-13. *Contra* Hakkila v. Hakkila, 812 P.2d 1320, 1325-26 (N.M. Ct. App.), *cert. denied*, 811 P.2d 575 (N.M. 1991). "[I]n determining when the tort of outrage should be recognized in the marital setting, the threshold of outrageousness should be set high enough—or the circumstances in which the tort is recognized should be described precisely enough, e.g. child snatching, that the social good from recognizing the tort will not be outweighed by unseemly and invasive litigation of meritless claims." *Id.* The New Mexico Court of Appeals in *Hakkila* was concerned with preventing burdensome litigation, protecting the privacy interest of the accused spouse, and "avoiding groundless allegations of causation." *Id.* at 1325.

[83] *See* Case, *supra* note 80, at 112-13. Any conduct that is ordinary and expected within the family context will not form a sufficient basis for liability under the *Restatement*'s definition of outrageous. *Id.* Therefore, it is unnecessary to set a higher standard of liability than what is asserted in the *Restatement* for claims that arise in the marital context. *Id.* Moreover, the *Restatement* definition of liability, which requires proof of outrageousness, prevents a flood of litigation and as a result intentional infliction of emotional distress claims are largely unsuccessful. *Id.* (citing Twyman v. Twyman, 855 S.W.2d 619, 631 (Tex. 1993) (Hecht, J., concurring and dissenting)).

[84] *See* Case, *supra* note 80, at 113. Creating a higher standard for interspousal tort actions conflicts with the rationale for abrogating the immunity because it discriminates against married people. *Id.* In addition, any conduct that would fall under the *Restatement* definition of "outrageous" is not conduct that the courts should be protecting. *Id.*

[85] *See, e.g.*, Simmons v. Simmons, 773 P.2d 602, 603 (Colo. Ct. App. 1988) (husband kicked, slapped, hit and threw coffee at his wife); McCoy v. Cooke, 419 N.W.2d 44 (Mich. Ct. App. 1988) (physical and mental abuse); *see also* Davis v. Bostick, 580 P.2d 544 (Or. 1978). The court in *Davis* reversed plaintiff's judgment for intentional infliction of emotional distress based on a statute of limitations bar but indicated her claim would have been actionable if timely brought. *Id.* at 547. The plaintiff's husband choked her, broke her nose, made threatening and abusive phone calls, told others she had had an abortion and a fatal mental illness, and threatened to kill her. *Id.* at 545. *Contra* Hakkila v. Hakkila, 812 P.2d 1320, 1321 (N.M. Ct. App. 1991), *cert. denied*, 811 P.2d 575 (N.M. 1991). In *Hakkila*, the court held that the following conduct by the husband was not sufficiently outrageous to warrant recovery under a claim of intentional infliction of emotional distress: battered wife on several occasions; insulted and screamed at her in the presence of others; locked wife out of the house in the dead of winter while she only had a robe on; made demeaning remarks; refused to allow her to pursue her schooling; repeatedly blamed wife for his sexual inadequacies and told her she was crazy; and refused to have sexual intercourse. *Id.*

[86] *See, e.g.*, *Simmons*, 773 P.2d at 603; McCoy v. Cooke, 419 N.W.2d 44 (Mich. Ct. App. 1988) (physical and mental abuse).

Courts have also allowed recovery for intentional infliction of emotional distress absent physical injury[87] so long as the conduct is outrageous.[88] For example, in *Massey v. Massey*,[89] a wife recovered $362,000 in damages for emotional distress based on her husband's frequent explosive outbursts. Physical abuse was not involved, but the husband was often angry and threatening.[90]

Courts have also allowed recovery for intentional infliction of emotional distress in certain circumstances that are particularly likely to arise in the marital context, such as cases involving the fear or the actual transmission of sexually transmitted diseases,[91] and interference with custodial rights.[92] On the other hand, courts have generally been reluctant to find intentional infliction of emotional distress in interspousal tort cases for conduct that is considered part and parcel of a marriage or divorce.[93] Recovery is denied

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[87] *See, e.g.*, Murphy v. Murphy, 486 N.Y.S.2d 457 (N.Y. App. Div. 1985). In *Murphy*, the plaintiff who had lived with the defendant for fourteen years but never married him, recovered on a claim for intentional infliction of emotional distress. *Id.* at 458. The court found that the defendant's conduct in killing the plaintiff's pet, destroying her belongings, and abusing her, was more than a "mere matrimonial dispute." *Id.* at 458-59. The court characterized the defendant's conduct as a "deliberate and malicious campaign of harassment vindictively conducted" and "outrageous beyond peradventure." *Id.* at 459.

[88] *See, e.g.*, Pyle v. Pyle, 463 N.E.2d 98 (Ohio Ct. App. 1983) (it was not outrageous for mother to allow her child to give the father peanuts knowing the father could not eat them).

[89] 867 S.W.2d 766, 766 (Tex. 1993).

[90] *Id.* (Hecht, J., dissenting).

[91] *See, e.g.*, Whelan v. Whelan, 588 A.2d 251 (Conn. Super. Ct. 1991) (husband falsely told his wife he had tested positive for acquired immune deficiency syndrome (AIDS)); Kathleen K. v. Robert B., 198 Cal. Rptr. 273 (Cal. Ct. App. 1984).

[92] *See, e.g.*, Pankratz v. Willis, 744 P.2d 1182 (Ariz. Ct. App. 1987) ("[c]ourts that have squarely faced the issue have concluded that the unilateral separation of a child from its parents can be extreme and outrageous conduct"); Sheltra v. Smith, 392 A.2d 431 (Vt. 1978) (prima facie intentional infliction of emotional distress claim where defendant made personal contact and communication between plaintiff and her daughter impossible); Bartanus v. Lis, 480 A.2d 1178 (Pa. Super. Ct. 1984) (plaintiff's family enticed plaintiff's son to stay away from his father, which stated a claim for intentional infliction of emotional distress); Kajtazi v. Kajtazi, 488 F. Supp. 15 (E.D.N.Y. 1978) ("[i]t is difficult to conceive of intentional conduct more calculated to cause severe emotional distress than the outrageous conduct of the defendant Fabian in surreptitiously abducting the infant, from his mother who had legal custody, and falsely imprisoning him in Yugoslavia").

[93] *See* Weicker v. Weicker, 237 N.E.2d 876, 877 (N.Y. 1968), where the court found no cause of action for intentional infliction of emotional distress where husband got an illegal divorce, remarried, and held another woman out as his wife. The court concluded that "strong policy considerations militate against judicially applying these recent developments in this area of the law to the factual context of a dispute arising out of matrimonial differences." *Id. See also* Pickering v. Pickering, 434 N.W.2d 758, 759-61 (S.D. 1989) (wife had an on-going sexual relationship with another man that produced a child that she held out as her husband's). The court in *Pickering* held that intentional infliction of emotional distress is unavailable for policy

where the conduct complained of is considered an ordinary occurrence between married couples.[94] For instance, in one case, the use of abusive language, staying away from the marital home and withdrawing control of the family budget were considered ordinary marital disputes insufficiently outrageous to warrant tort recovery.[95] Moreover, adultery and fraudulent conduct, in particular, generally are not sufficiently outrageous to assert a claim for intentional infliction of emotional distress.[96] Similarly, having an abortion is non-compensable, partly because it falls within the marital context and accordingly is usually not outrageous, but also because it is within the realm of what can be considered a protected liberty interest.[97]

C. Negligence

Most negligence actions between spouses involve motor vehicle accidents.[98]

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reasons when it is "predicated on conduct which leads to the dissolution of a marriage." *Id.* at 761 (citations omitted). *But see* Hakkila v. Hakkila, 812 P.2d 1320 (N.M. Ct. App. 1991) (*Pickering* is an example of instances where courts have "refused to recognize the tort by setting the threshold of outrageousness so high as to bar all suits"), *cert. denied*, 811 P.2d 575 (N.M. 1991).

[94] *See infra* notes 95-97 and accompanying text.

[95] Weiner v. Weiner, 444 N.Y.S.2d 130 (N.Y. App. Div. 1985).

[96] *See, e.g.*, Whittington v. Whittington, 766 S.W.2d 73, 73-74 (Ky. Ct. App. 1989) (no cause of action for intentional infliction of emotional distress where husband committed adultery, forged his wife's signature on checks in violation of a prejudgment attachment of marital assets and disposed of all the money in the family's as well as his children's bank accounts); Ruprecht v. Ruprecht, 599 A.2d 604, 605 (N.J. Super. Ct. Ch. Div. 1991) (no recovery for an eleven year extramarital affair); Browning v. Browning, 584 S.W.2d 406, 408 (Ky. Ct. App. 1979) (no cause of action for spouse's openly consorting with her paramour); Hakkila v. Hakkila, 812 P.2d 1320 (N.M. Ct. App. 1991) (courts have rejected a cause of action for intentional infliction of emotional distress by a person engaging in an extramarital affair because of an interest in personal autonomy), *cert. denied*, 811 P.2d 575 (N.M. 1991). *But see* Van Meter v. Van Meter, 328 N.W.2d 497 (Iowa 1983) (reversed grant of a motion to dismiss an intentional infliction of emotional distress claim for defendant's seduction of plaintiff's former husband).

[97] *See, e.g.*, Przybla v. Przybla, 275 N.W.2d 112, 115 (Wis. Ct. App. 1978) (a woman's intentional exercise of her constitutional right to terminate her pregnancy is not conduct that is so extreme and outrageous as to support recovery for intentional infliction of emotional distress).

[98] *See, e.g.*, Beattie v. Beattie, 630 A.2d 1096 (Del. 1993) (cognizable negligence action where husband struck the back of a slow moving truck leaving his wife, a passenger in the automobile, paralyzed); Boblitz v. Boblitz, 462 A.2d 506 (Md. 1983); Digby v. Digby, 388 A.2d 1 (R.I. 1978). *See also* THE ABOLITION OF INTERSPOUSAL IMMUNITY - A STUDY. PREPARED FOR THE HAWAII SUPREME COURT PERMANENT COMMITTEE ON GENDER AND OTHER FAIRNESS AND FOR THE LEGISLATURE OF THE STATE OF HAWAII 60-61 (Dec. 1991) [hereinafter IMMUNITY STUDY], for a discussion of negligence in the interspousal tort context.

The more difficult issue is the extent of interspousal tort liability in household accidents. A number of examples illustrate the issue:

> The wife negligently waxes the floor causing it to be slippery and giving no warning to the husband who returns home late at night, falls on the floor and injures himself; the wife negligently serves spoiled food to the husband causing sickness and loss of work to the husband; the husband negligently fails to maintain a garage door which falls, strikes the wife and renders her a quadriplegic.[99]

As in intentional infliction of emotional distress cases, the parameters of liability in an interspousal negligence action may be defined by virtue of the marital context. The implication is that "conduct, tortious between two strangers, may not be tortious between spouses."[100] Mutual concessions are implied in a familial relationship[101] as illustrated by the *Restatement (Second) of Torts*. It states:

> The intimacies of family life also involve intended physical contacts that would be actionable between strangers but may be commonplace and expected within the family. Family romping, even roughhouse play and momentary flares of temper not producing serious hurt, may be normal in many households, to the point that the privilege arising from consent becomes analogous.[102]

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[99] Rogers v. Yellowstone Park Co., 539 P.2d 566, 574 (Idaho 1974) (Shepard, C.J., dissenting).

[100] *See* Lewis v. Lewis, 351 N.E.2d 526, 532 (Mass. 1976); *see also* S.A.V. v. K.G.V., 708 S.W.2d 651 (Mo. 1986); Boblitz v. Boblitz, 462 A.2d 506, 522 (Md. 1983); Spector, *supra* note 62, at 72. The Utah Supreme Court in Stoker v. Stoker, 616 P.2d 590, 592 (Utah 1980), explained:

> This does not mean that a husband or wife can recover from the other for any unwanted caress, kiss, or other physical contact as sometimes claimed. The marriage relation is created by the consent of both of the parties; inherently within such relationship is the consent of both parties to physical contacts with the other, personal dealings and ways of living which would be unpermitted and in some cases unlawful as between other persons. The essential objects and purposes of marriage such as living together, creating a home and rearing a family are expected and consented to by husband and wife but would be unlawful and in some instances even criminal as between other persons. Under some circumstances such consent might be withdrawn and thereafter would not prevent civil liability occurring, but until that happens the ordinary dealings between husband and wife are with the consent of both and do not create liability between them. However, this does not mean that either husband or wife consents to intentionally inflicted serious personal injuries by the other.

Id.

[101] *Lewis*, 351 N.E.2d at 532.

[102] IMMUNITY STUDY, *supra* note 98, at 112 (citing RESTATEMENT (SECOND) OF TORTS § 895G, cmt. k (1965)).

The case law reveals that despite this language, spouses have recovered in interspousal negligence claims involving certain household accidents.[103] For example, *Merenoff v. Merenoff*[104] involved two cases that were consolidated. In one case, the husband carelessly amputated his wife's finger with a hedge clipper.[105] In the other case, the husband set his wife on fire by using flammable glue near a gas stove.[106] The New Jersey Supreme Court allowed recovery on the negligence claims in both those cases reasoning that the activity giving rise to the claim could not be characterized as "simple domestic negligence."[107] The court stated that there would be situations where a personal injury claim between married people would not justify recovery.[108] However, the cases before the court involved "a distinct element of special danger" and an "unusual risk of injury or harm if not performed with reasonable care and ordinary caution."[109] Furthermore, there was no indication that marital privilege, consent or the "acceptance of jointly shared risks special to the particular marriage" were implicated.[110]

On the issue of standard of care, the *Merenoff* court utilized the "ordinary standard of care applied in the marital context."[111] The court reasoned that this "should enable a trier of fact to differentiate qualitatively between the conduct of married and unmarried persons and to recognize that certain behavior as between a married couple is acceptable and reasonable, even though such conduct might well be considered unreasonable and result in liability if engaged in by unmarried persons."[112]

Moreover, the *Merenoff* court utilized the standard burden of proof applicable to negligence actions, preponderance of the evidence.[113] The court reasoned that it was acceptable to use the preponderance standard because it

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[103] *See, e.g.*, Brown v. Brown, 409 N.E.2d 717, 718 (Mass. 1980) (reversed summary judgment in wife's action alleging that husband was in control of the premises and responsible for salting and shoveling after a snowstorm and his failure to do so caused her to fall). Other cases where a spouse has recovered on a negligence claim include: Freehe v. Freehe, 500 P.2d 771 (Wash. 1972) (negligent maintenance of a tractor and failure to warn husband of tractor's unsafe condition); Klein v. Klein, 376 P.2d 70 (Cal. 1962) (slippery deck of pleasure boat).

[104] 388 A.2d 951 (N.J. 1978).

[105] *Id.* at 952-53.

[106] *Id.* at 953.

[107] *Id.* at 963.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

is utilized in other cases where the risk of fraud is high because of the relationship of the parties.[114]

D. Other Torts[115]

With the abolition of interspousal tort immunity in Hawai`i, all tort actions are presently potentially available to provide relief to the injured spouse.[116] However, some tort actions are more suited to the marital context and are often brought in jurisdictions that have abrogated the immunity.[117]

1. Fraud

The tort action of fraud[118] can be a basis for liability in the marital context in suits for fraudulent inducement of marriage,[119] fraudulently concealing

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[114] *Id.*

[115] A thorough discussion of available tort actions, including citations of cases that involve interspousal tort claims can be found in LEONARD KARP & CHERYL KARP, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE, § 1.20-.28, at 35-51 (1989) [hereinafter KARP].

[116] *See supra* notes 43-44 and accompanying text.

[117] *See infra* notes 118-29 and accompanying text.

[118] An action for fraud can be predicated on proof:

> (1) that a representation was made; (2) that the representation was false; (3) that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely on it; (5) that the plaintiff reasonably did so rely; and (6) that the plaintiff suffered damage as a result.

LeAnn Larson LaFave, *Fraud, in* SECTION OF FAMILY LAW, A.B.A., MARITAL & PARENTAL TORTS: A GUIDE TO CAUSES OF ACTION, ARGUMENTS AND DAMAGES 47 (1990) (citing Pawnee Co. Bank v. Droge, 411 N.W.2d 324, 330 (Neb. 1987)).

Hawai`i recognizes three forms of fraud: 1) "fraud in the inducement," 2) "constructive fraud," and 3) "fraud in the factum." *See* Adair v. Hustace, 64 Haw. 314, 320 n.4, 640 P.2d 294, 299 n.4 (1982); Silva v. Bisbee, 2 Haw. App. 188, 192, 628 P.2d 163, 214 (1986); Honolulu Federal Savings and Loan Ass'n v. Murphy, 7 Haw. App. 196, 201, 753 P.2d 807, 811 (1988). The elements of "fraud in the inducement" are: "1) representation of a material fact, 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." *Murphy* at 201, 753 P.2d at 811 (citations omitted).

[119] Most cases of fraudulent inducement of marriage involve "sham" marriages where the defendant, knowing he is married, represents that he is single, which results in the plaintiff marrying the defendant in reliance on this representation and suffering damages. Robert Spector, *Marital and Custodial Torts, in* SECTION OF FAMILY LAW, A.B.A., MARITAL & PARENTAL TORTS: A GUIDE TO CAUSES OF ACTION, ARGUMENTS AND DAMAGES 1 (1990) [hereinafter *Marital Torts*] (citations omitted). Other cases of fraudulent inducement of marriage have been predicated on situations where the "defendant's conduct in inducing the marriage invaded the economic interests of the plaintiff." *Id.* at 2-3. For example, in Tice v.

assets[120] and fraudulently transferring assets.[121] In addition, fraud can also be a ground for asserting a claim for transmission of a venereal disease.[122] Transmission of a venereal disease within the marital context may also be compensable under battery[123] and negligence[124] theories.

2. *Tortious interference with custody*

One tort that is often specific to the marital context is tortious interference with custody.[125] It is available to address situations where "the noncustodial

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Tice, 672 P.2d 1168 (Okla. 1983), the court allowed tort recovery when husband induced the wife to marry by promising to reimburse her for lost alimony she received from her first husband, in the event of a divorce. *Id.* *But see* Gubin v. Lodisev, 494 N.W.2d 782, 784-85 (Mich. Ct. App. 1993) (no cause of action for fraudulent inducement to marry because the tort action was related to the "existence of the marital relationship"), *appeal denied*, 503 N.W.2d 902 (Mich. 1993).

[120] LaFave, *supra* note 118, at 47-48.

[121] *Id.* at 48.

[122] *See* R.A.P. v. B.J.P., 428 N.W.2d 103 (Minn. Ct. App. 1988). In *R.A.P.*, the defendant had a "legal duty to take reasonable care to prevent the disease from spreading," given her knowledge that genital herpes is a "contagious, incurable, sexually transmissible disease." *Id.* at 109. *See also* Maharam v. Maharam, 510 N.Y.S.2d 104 (N.Y. App. Div. 1986). In *Maharam*, the court found that the plaintiff wife stated a cause of action for wrongful transmission of genital herpes based on fraud. *Id.* The court found that the husband had an affirmative "legal duty to speak" based on the parties' 31 years of marriage. *Id.* There was also a duty to speak based on a law that made it a misdemeanor for an individual to have sexual intercourse with another knowing that the individual had a sexually transmitted disease. *Id.* In addition, the wife stated a cause of action for wrongful transmission of a venereal disease based on a negligence theory. *Id.*

[123] *Marital Torts*, *supra* note 119, at 6.

[124] *See R.A.P.*, 428 N.W.2d at 106-08. In *R.A.P.*, the court held that people with dangerous contagious diseases have a duty to protect those who are at risk for infection. *Id.* at 106-07. It is foreseeable that intercourse with someone with a sexually transmittable disease creates a risk of infection, so a reasonable person with such a disease has a duty either to avoid contact with unaffected persons or to warn potential sex partners before contact occurs. *Id.* at 108. The *R.A.P.* court also noted that "society's interest in preventing the spread of a dangerous, incurable disease justifies some intrusion into personal privacy." *Id.* *See also* Meany v. Meany, 639 So. 2d 229, 234-35 (La. 1994) (husband had a duty to either abstain from sexual intercourse or to warn his wife that he may have a sexually transmitted disease); *Maharam*, 510 N.Y.S.2d at 170-71; G.L. v. M.L., 550 A.2d 525 (N.J. Super. Ct. Ch. Div. 1988); M.M.D. v. B.L.G., 467 N.W.2d 645 (Minn. Ct. App. 1991) (duty to warn of possibility of having genital herpes). *But cf.* J.T. v. M.J., 891 P.2d 729, 732 (Wash. 1995) (the court held there is no duty to disclose extramarital sexual relations to one's spouse in a case where a wife brought a tort action based on her fear that she had contracted HIV from her husband as a result of an extramarital affair he had).

[125] *Marital Torts*, *supra* note 119, at 15. The tort of tortious interference with custody has been adopted in every state that has considered the issue. *Id.* (citations omitted).

parent deliberately takes the child away from the custodial parent or induces the child to leave home."[126]

3. *Other torts*

Interspousal wiretaps,[127] false imprisonment,[128] and negligent infliction of emotional distress[129] are also bases for liability in tort. However, tortious

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[126] *Id.* The reasoning supporting a tort action for interference with custody was summarized in Kajtazi v. Kajtazi, 488 F. Supp. 15, 19 (E.D.N.Y. 1978):

> A parent who has the right to the custody, control and services of a minor child may maintain an action for damages against anyone who unlawfully takes or withholds such child. The right of action may be based not only on the loss of services but also on the parent's right to the care, custody and companionship of the child. The parent may recover though the child renders no services to him. The parent may recover damages for loss of services of the child, for the parent's wounded feelings, and for the expenses incurred in attempting to recover the child. In addition, the parent is entitled to recover punitive damages provided the defendant was actuated by malice.

Id. (citations omitted). In addition, tortious interference with custody may give rise to a cause of action for intentional infliction of emotional distress. *See supra* note 92 and accompanying text. Another basis for recovery in interference with custody situations is false imprisonment. *See, e.g., Kajtazi*, 488 F. Supp. at 18-19.

[127] *See, e.g.*, Collins v. Collins, 904 S.W.2d 792 (Tex. Ct. App. 1992). The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1982), allows damages for the unlawful interception of a wire, oral, or electronic communication. Most courts hold that the federal wiretap statute applies to interspousal wiretaps. *Collins*, 904 S.W.2d at 797 (citations omitted). Only two courts have held that the statute does not apply to spouses and those decisions were widely criticized. *Id.*

[128] *See, e.g.*, Catlett v. Catlett, 388 S.E.2d 14 (Ga. Ct. App. 1989) (husband struck his wife and prevented her from leaving his apartment until a neighbor intervened, physically restrained her from leaving his car until a stranger intervened and dragged his wife down a stairway by her feet because he thought it was "comical").

[129] In Hawai`i, recovery on a negligent infliction of emotional distress claim is available absent physical injury when "a reasonable man normally constituted, would be unable to adequately cope with the mental distress engendered by the circumstances of the case." Rodrigues v. State, 52 Haw. 156, 173, 472 P.2d 509, 520 (1970). The plaintiff may recover even in the absence of physical symptoms of mental distress and without witnessing the tortious event. *See* Campbell v. Animal Quarantine Station, 63 Haw. 557, 632 P.2d 1066 (1981); *see also* Masaki v. General Motors Corp., 71 Haw. 1, 780 P.2d 566 (1989). This tort can be asserted by one spouse when the other spouse abuses their child. KARP, *supra* note 115, § 1.28, at 51. *But see* Massey v. Massey, 867 S.W.2d 766 (Tex. 1993) (negligent infliction of emotional distress is not a viable ground for recovery).

interference with visitation,[130] alienation of affections[131] and loss of consortium[132] are not widely recognized.

In many ways, courts have limited tort actions based on the marital context. In doing so, the courts have applied what can be termed a common sense approach to managing tort liability in view of the marital relationship. However, an injured spouse still has a variety of potential tort actions available, many of which are particularly appropriate in the marital context and therefore offer opportunities for recovery.

V. SPECIAL CONSIDERATIONS IN AN INTERSPOUSAL TORT ACTION

Interspousal tort actions may be more complicated than ordinary tort actions between non-spouses. Often, an interspousal tort suit is brought in conjunction with or subsequent to a divorce.[133] In those situations, the timing of the divorce and the tort proceedings may be crucial because res judicata or the statute of limitations may bar the litigation of legitimate tort claims.[134] The remedies in tort actions and divorce proceedings are also different, which may affect the order and manner in which claims should be brought.[135]

A. Statute of Limitations

The statute of limitations[136] is a common defense to an interspousal tort action.[137] Thus section 657-7 of the Hawai`i Revised Statutes often may be implicated in an interspousal tort suit. Section 657-7 places a two-year statute

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[130] *See Marital Torts*, *supra* note 119, at 15-16.

[131] *See, e.g.*, Bartanus v. Lis, 480 A.2d 1178 (Pa. Super. Ct. 1984) (action for alienation of affections is not cognizable in Pennsylvania).

[132] *See* Cook v. Hanover Ins. Co., 592 N.E.2d 773, 775 (Mass. App. Ct.), *review denied*, 597 N.E.2d 444 (Mass. 1992). Currently, no jurisdictions allow one spouse to sue the other for loss of consortium. *Id.* A spouse's interest in consortium is a right to services that the uninjured spouse voluntarily provides and therefore the uninjured spouse cannot be liable for negligently denying consortium. *Id.*

[133] *See infra* notes 218-19 and accompanying text.

[134] *See infra* notes 136-216 and accompanying text.

[135] *See infra* notes 270-97 and accompanying text.

[136] The statute of limitations is a statutory requirement that a particular cause of action be brought within a certain set time period. KARP, *supra* note 115, § 1.31, at 53. Failure to do so will bar the action absent some exception. *See id.*

[137] *See, e.g.*, Plath v. Plath, 428 N.W.2d 392 (Minn. 1988) (battery claim was barred by the state's two-year statute of limitations); Davis v. Bostick, 580 P.2d 544 (Or. 1978) (intentional infliction of emotional distress claim was barred by the statute of limitations); Wright v. Wright, 654 So. 2d 542 (Ala. 1995) (assault and battery claim barred by statute of limitations).

of limitations on actions involving personal injury or damage to property.[138] According to section 657-7, the statute of limitations begins to run when the plaintiff's cause of action accrues.[139] In Hawai'i, under the discovery rule, "a cause of action accrues when the plaintiff discovers, or reasonably should have discovered, the elements giving rise to the claim."[140] Thus, in an action for negligent transmission of a venereal disease, the cause of action accrues when the plaintiff becomes aware that the defendant transmitted the disease to her.[141] Accrual of a cause of action is often an issue in states that have recently abrogated interspousal immunity.[142] Some plaintiffs have argued that their causes of action did not accrue until interspousal tort immunity was abolished.[143] However, this argument has been largely unsuccessful.[144]

1. Retroactivity

A statute of limitations bar may be defeated if the law under which the claim is raised applies retroactively.[145] Accordingly, the statute of limitations

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[138] HAW. REV. STAT. § 657-7 (1993). Section 657-7 reads, "[a]ctions for the recovery of compensation for damage or injury to persons or property shall be instituted within two years after the cause of action accrued, and not after, except as provided in section 657-13." *Id.* HAW. REV. STAT. § 657-13 (1993) reads:

> If any person entitled to bring any action specified in this part (excepting actions against the sheriff, chief of police or other officers) is, at the time the cause of action accrued, either:
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> (1) Within the age of eighteen years; or,
>
> (2) Insane; or,
>
> (3) Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than the person's natural life;
>
> such person shall be at liberty to bring such actions within the respective times limited in this part, after the disability is removed or at any time while the disability exists.

Id.

[139] *See* Yamaguchi v. Queen's Med. Ctr., 65 Haw. 84, 90, 648 P.2d 689, 693-94 (1982).

[140] Dunlea v. Dappen, 83 Hawai'i 28, 33, 924 P.2d 196, 201 (1996). *See Yamaguchi* at 90, 648 P.2d at 693-94. A cause of action accrues "the moment [the] plaintiff discovers or should have discovered the negligent act, the damage, and the causal connection between the former and the latter." *Id. See also* Yoshizaki v. Hilo Hospital, 50 Haw. 150, 154, 433 P.2d 220, 223 (1967) ("the limitation period of two years on actions for damages to persons or property did not begin to run 'until the plaintiff knew or should have known of the defendant's negligence'"). In *Yoshizaki*, the statute of limitations did not bar a medical malpractice action brought in 1963 for a negligent diagnosis in 1959 because plaintiff did not learn of the misdiagnosis until 1961. *Id.* at 154, 433 P.2d at 223.

[141] *See* Flores v. Lively, 818 S.W.2d 460, 462 (Tex. Ct. App. 1981).

[142] *See, e.g.*, Tevis v. Tevis, 400 A.2d 1189 (N.J. 1979); Flores v. Lively, 818 S.W.2d 460 (Tex. Ct. App. 1981); Lord v. Shaw, 665 P.2d 1288 (Utah 1983).

[143] *See infra* notes 156-63 and accompanying text.

[144] *Id.*

[145] *See* Sitzes v. Anchor Motor Freight, Inc., 289 S.E.2d 679 (W. Va. 1982).

would not bar an untimely interspousal tort action if the statute abolishing interspousal tort immunity (Haw. Rev. Stat § 572-28) was intended to operate retroactively. However, it is unlikely that section 572-28 will be given retrospective effect.

The retrospective operation of a statute is governed by section 1-3 of the Hawai'i Revised Statutes, which states, "no law has any retrospective operation, unless otherwise expressed or obviously intended."[146] Likewise, the Hawai'i Supreme Court has adopted the "well-established rule of construction forbidding the retrospective operation of statutes in the absence of clearly expressed contrary legislative intent."[147]

Section 572-28 will probably be found to operate only prospectively because the statutory language and the accompanying committee reports do not express a legislative intent that Act 70 operate retroactively.[148] In fact, the statute and the committee reports are silent on the issue of retroactivity. Furthermore, a non-retroactive construction of section 572-28 may be supported on public policy grounds:

> [S]tatutes of limitations are statutes of repose. They reflect a public policy and underlying legislative judgment that claims for redress resulting from the injurious acts of others shall be settled relatively soon, within a legislatively-specified period of time, notwithstanding the vagaries of human conduct and the uncertainties of human affairs. Limitation statutes are designed to induce the assertion of claims within a reasonable time so that the charged party has a fair

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[146] HAW. REV. STAT. § 1-3 (1993).

[147] Yamaguchi v. Queen's Med. Ctr., 65 Haw. 84, 89, 648 P.2d 689, 693 (1982); *see also* Clark v. Cassidy, 64 Haw. 74, 77, 636 P.2d 1344 (1981). The rule that a law should not operate retroactively unless a contrary legislative intent is indicated is "particularly applicable where the statute or amendment involves substantive rights." *Clark* at 77, 636 P.2d at 1346. There is some disagreement over whether abrogation of interspousal tort immunity involves a substantive or a procedural right. However, the issue is largely irrelevant because Hawai'i Supreme Court decisions can be read to rely on the statutory presumption without inquiry into the nature of the right. *Cf. Yamaguchi* at 89, 648 P.2d at 693 (the court applied the retroactivity presumption without inquiry into whether the right was substantive or procedural); *Clarke* at 89, 636 P.2d at 1346-47 (although the court inquired into the nature of the right, the court never said that all claims involving procedural rights operated retroactively, only that it was "particularly applicable" to substantive rights).

But see Sitzes, 289 S.E.2d at 702-03 (the West Virginia Supreme Court's prior decision in Coffindaffer v. Coffindaffer, 244 S.E.2d 338 (W. Va. 1978), abrogating interspousal immunity, should operate retroactively). According to the *Sitzes* court, the decision should be retroactive because: 1) abrogation of the immunity was foreshadowed by other decisions overruling other common law immunities and was not a traditionally settled area of the law; 2) although the decision was substantive rather than procedural, it only affected a limited class of people; and 3) it was not a substantial policy change or a departure from prior precedent. *Id.* at 683-84.

[148] *See* HAW. REV. STAT. § 572-28 (1993); *see also supra* notes 43-57 and accompanying text.

> opportunity to defend. These statutes spur diligence in the vindication of legal claims in order to avoid the unfairness and injustice which stem from litigation based on distant circumstances and faded memories.[149]

Given the public policy rationales supporting non-retroactivity and the absence of a clearly expressed legislative intent to the contrary, section 572-28 should operate prospectively.

2. Tolling

a. marriage

The statute of limitations will not bar an interspousal tort action if marriage tolls the statute of limitations.[150] However, the trend in the case law in other jurisdictions indicates that marriage will not toll the statute of limitations on an interspousal tort action.[151]

Historically, most jurisdictions have held that marriage tolls the statute of limitations.[152] This tolling provision has its roots in the common law fiction of unity between husband and wife, the concomitant disability of the wife to sue and contract, and the public policy of promoting marital harmony drawn from a concern that spouses would file tort claims out of fear that the statute of limitations would run on their claims.[153] However, the cases that held that coverture tolls the statute of limitations were decided prior to the abrogation of interspousal immunity and on "now-discredited arguments" in support of the immunity.[154] Therefore, the continuing validity of the tolling provision is questionable.[155]

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[149] *See* Tevis v. Tevis, 400 A.2d 1189, 1194-95 (N.J. 1979) (citations omitted).

[150] KARP, *supra* note 115, § 1.31, at 53. "Tolling" of the statute of limitations means that the limitations period will not run during the marriage. *See id.*

[151] *See, e.g.*, R.A.P. v. B.J.P., 428 N.W.2d 103, 109 (Minn. Ct. App. 1988) (marriage did not toll a two-year statute of limitations on battery and emotional distress claims); Green v. Green, 446 N.E.2d 837, 840 (Ohio Ct. App. 1982) (one-year statute of limitations on assault and battery was not tolled by marriage).

[152] KARP, *supra* note 115, § 1.31, at 53.

[153] *Id.*

[154] Linda Kroning, *Joinder of Tort and Divorce Claims*, *in* SECTION OF FAMILY LAW, A.B.A., MARITAL & PARENTAL TORTS: A GUIDE TO CAUSES OF ACTION, ARGUMENTS AND DAMAGES 91, 99 (1990) (listing the states that have held that the statute of limitations on interspousal tort actions is tolled during marriage and those that hold to the contrary).

[155] *Id.*

b. interspousal tort immunity

Another related issue is whether the doctrine of interspousal tort immunity tolls the statute of limitations on causes of action occurring prior to abrogation of the immunity. Generally, courts have been reluctant to toll the statute of limitations when interspousal immunity barred the tort claim at the time the tort cause of action arose.[156] The rationale is that abrogation of interspousal immunity did not create a cause of action, it merely abolished a defense that must be affirmatively pled.[157] Accordingly, the plaintiff apparently should have brought suit within the limitations period and challenged the validity of interspousal immunity as a bar to the suit.[158]

In *Tevis v. Tevis*,[159] the New Jersey Supreme Court determined that marriage should not toll the statute of limitations when interspousal immunity was in effect.[160] The court stressed public policy rationales supporting the statute of limitations in concluding that tolling the statute would "encourage the resurrection of old marital grievances."[161] However, the dissenting judge in *Tevis* responded that the plaintiff's cause of action should have been held to accrue on the date interspousal immunity was abrogated because equitable considerations spoke against a "strict and uncritical application of the statutory period."[162] The dissent concluded that the result of the majority's

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[156] *See* White v. White, 601 So. 2d 864 (Miss. 1992); Tevis v. Tevis, 400 A.2d 1189 (N.J. 1979); Flores v. Lively, 818 S.W.2d 460 (Tex. Ct. App. 1981); Lord v. Shaw, 665 P.2d 1288 (Utah 1983); Stephens v. Stephens, 534 P.2d 571 (Wash. 1975).

In *Lord*, the Utah Supreme Court held that the statute of limitations was not tolled by the fact that the doctrine of interspousal tort immunity had previously barred the plaintiff from suing. 665 P.2d at 1290. The immunity was not "statutorily delineated" and the wife had "access to the courts" to seek abolition of the immunity. *Id.* The court, as a matter of policy reasoned that tolling the limitations period might cause "prejudice" by "placing an intolerable burden on the defendant to now, three and four years later, defend against the plaintiff's claims when the facts concerning how each dispute arose, what ensued and the extent of the injury to the plaintiff, if any, have been blurred by the passing of time." *Id.* at 1291.

[157] *See Flores*, 818 S.W.2d at 461. In *Flores*, the Texas Court of Appeals reversed a substantial jury verdict for negligent transmission of a venereal disease because the statute of limitations barred the action. *Id.* at 462. The wife was diagnosed with genital herpes in 1983 but interspousal tort immunity was not abrogated until 1987 with the decision in Price v. Price, 732 S.W.2d 316 (Tex. 1987). *Id.* at 461. The *Flores* court rejected the wife's claim that her cause of action did not arise until *Price* when the Texas Supreme Court abrogated the immunity reasoning that *Price* did not create a new cause of action, but merely abolished a defense. *Id.* at 461.

[158] *See id.*; *White*, 601 So. 2d at 865. However, given the precedent upholding interspousal immunity, it is unlikely the plaintiff would have been successful.

[159] 400 A.2d 1189 (N.J. 1979).

[160] *Id.* at 1194.

[161] *Id.* at 1192-93.

[162] *Id.* at 1198 (Pashman, J., dissenting).

holding failed to advance the policy objectives of the statute of limitations and ignored the central objectives of the civil laws, which are to achieve justice and to redress wrongs.[163]

3. Continuing tort

Some plaintiffs have attempted to surmount a statute of limitations defense by combining the defendant's actions to assert a claim under the theory of a continuing tort. The concept of a continuing tort applies when no single incident in a chain of tortious activity can "fairly or realistically be identified as the cause of significant harm," making it appropriate to regard the cumulative effect of the course of conduct as actionable.[164] As a result, the "cause of action is not complete and does not accrue until the tortious acts have ceased."[165]

There is a clear division in the case law over whether to recognize a continuing tort to overcome a statute of limitations bar on an interspousal tort claim. The present case law suggests that a continuing tort may be acknowledged when the tortious activity amounts to a "continuing course of conduct" where no single incident can be fairly identified as the cause of harm such as in emotional distress claims unaccompanied by physical injury.[166] In contrast, tortious conduct such as battery, actionable in and of itself may not readily fit into the concept of a continuing tort.[167] However, one court has recognized that repeated instances of tortious conduct such as battery in the context of domestic violence warrant the extension of the concept of a continuing tort to overcome a statute of limitations bar.[168]

A continuing tort theory has been found applicable where the wife suffered from battered woman's syndrome. Battered woman's syndrome is a "recognized medical condition" involving repeated incidents of physical and emotional abuse that is "cyclical" in nature resulting in the inability of battered women to leave their abusers.[169] Moreover, the emotional and

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[163] *Id.* at 1198-99 (Pashman, J., dissenting).

[164] *See* Fowkes v. Pennsylvania R.R., 264 F.2d 397, 399 (3d Cir. 1959).

[165] Twyman v. Twyman, 790 S.W.2d 819, 821 (Tex. Ct. App. 1990) (citing 54 C.J.S. Limitations of Actions @ 177, at 231 (1987)), *rev'd on other grounds by*, 855 S.W.2d 619 (Tex. 1993).

[166] *See infra* notes 175-78 and accompanying text.

[167] *See infra* notes 179-85 and accompanying text.

[168] *See infra* notes 169-74 and accompanying text.

[169] One court has described battered woman's syndrome as follows:

> [Battered woman's syndrome is] a recognized medical condition. By definition, a battered woman is one who is repeatedly physically or emotionally abused by a man in an attempt to force her to do his bidding without regard for her rights. According to experts, in order to be a battered woman, the woman must go through the "battering

physical consequences of battered woman's syndrome cannot be fairly traceable to a single incident.[170] Given these facts, a New Jersey appellate court in *Giovine v. Giovine*,[171] permitted a wife diagnosed with battered woman's syndrome to sue her spouse in tort for the physical and emotional injuries she sustained by the continuous acts of battering she received during the course of her marriage.[172] The court recognized that for various reasons, women with battered women's syndrome, who face repeated instances of domestic violence are unable to leave the relationship.[173] Moreover, the court acknowledged the following public policy rationales supporting the extension of a continuing tort theory to situations of domestic violence:

> It would be contrary to the public policy of this State, not to mention cruel, to limit recovery to only those individual incidents of assault and battery for which the applicable statute of limitations has not yet run. The mate who is responsible for creating the condition suffered by the battered victim must be made to account for his actions—all of his actions. Failure to allow affirmative recovery under these circumstances would be tantamount to the courts condoning the

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cycle" at least twice.

The battering cycle consists of three stages. Stage one, the "tension-building stage," involves some minor physical and verbal abuse while the woman tries to prevent an escalation of the abuse by assuaging the abuser with her passivity. Stage two, the "acute battering incident," is characterized by more severe battering due to either a triggering event in the abuser's life or the woman's inability to control the anger and fear she experienced during stage one. During stage three, the abuser pleads for forgiveness and promises that he will not abuse again. This period of relative calm and normalcy eventually ends when the cycle begins anew.

"The cyclical nature of battering behavior helps explain why more women simply do not leave their abusers." The caring and attentive behavior of the abuser during stage three fuels the victim's hope that her partner has reformed and keeps her tied to the relationship. In addition, some women who grew up in violent families do not leave abusive relationships because they perceive their situations as normal. Others cannot face the reality of their situations. Some victims "become so demoralized and degraded by the fact that they cannot predict or control the violence that they sink into a state of psychological paralysis and become unable to take any action at all to improve or alter the situation." Victims are often afraid to seek help out of shame, fear that no one will believe them, or fear of retaliation by their abusers.

Giovine v. Giovine, 663 A.2d 109, 113 (N.J. Super. Ct. App. Div. 1995) (footnotes omitted).

[170] *Id.*

[171] 663 A.2d 109 (N.J. Super. Ct. App. Div. 1995). *Cf.* de la Croix de Lafayette v. de la Croix de Lafayette, 15 Fam. L. Rep. (BNA) 1502 (1989) (refused to recognize an independent tort for spouse abuse because of a need for "finality in the context of an unstable marital relationship").

[172] *Giovine*, 663 A.2d at 114. The wife was required to establish by medical, psychiatric, or psychological expert testimony that she was unable "to take any action to improve or alter the situation unilaterally." *Id.*

[173] *Id.*

> continued abusive treatment of women in the domestic sphere. This the courts cannot and will never do.[174]

Thus, the court tolled the statute of limitations based on evidence of battered women's syndrome.

Similarly, in *Twyman v. Twyman*,[175] the Texas Court of Appeals allowed recovery on the theory of a continuing tort and thus the statute of limitations did not bar a negligent infliction of emotional distress action based on the husband's abusive conduct over a period of more than ten years.[176] The court reasoned that "[t]his case does not involve acts that are 'complete in themselves,' but involves a continuing course of conduct which over a period of years caused injury."[177] The court reasoned that "no single incident in a continuous chain of tortious activity can fairly or realistically be identified as the cause of significant harm," accordingly, it was "proper to regard the cumulative effect of the conduct as actionable."[178]

In contrast, the Oregon Supreme Court in *Davis v. Bostick*,[179] rejected the theory of a continuing tort in an intentional infliction of emotional distress case. The plaintiff alleged ten separate incidents in an "intentional course of conduct designed to inflict emotional stress and mental anguish."[180] The court acknowledged that the defendant's actions were "continuous in that together they in fact made up a course of conduct capable of producing cumulative compensable harm, and they collectively had a common element of intent."[181] However, the court denied recovery because "[t]he acts were discontinuous in the sense that each had a beginning and an end, each was separated from the next by some period of relative quiescence, and each was capable of producing compensable harm."[182] The plaintiff could have asserted a separate cause of action after each of the defendant's acts.[183] Therefore, the plaintiff

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[174] *Id.* (citing Cusseaux v. Pickett, 652 A.2d 789 (N.J. Law. Div. 1994)).

[175] 790 S.W.2d 819 (Tex. Ct. App. 1990), *rev'd on other grounds by*, 855 S.W.2d 619 (Tex. 1993).

[176] *Id.* at 820-21. The plaintiff recovered on a claim for negligent infliction of emotional distress when her husband continued over a period of more than ten years to condition their marriage on participation in bondage activities knowing she had experienced a violent rape in the past. *Id.*

[177] *Id.* at 821 (citations omitted).

[178] *Id.*

[179] 580 P.2d 544 (Or. 1978).

[180] *Id.* at 545. The plaintiff alleged that the defendant on separate occasions had struck her, breaking her nose; engaged in a series of threatening and abusive phone calls to her home and place of business; choked her; threatened to kill her; destroyed some of her personal property; and told others she had had an abortion and had a fatal mental illness. *Id.* at 545-46.

[181] *Id.* at 548.

[182] *Id.*

[183] *Id.*

should not be "entitled to ride out the storm and lump sum her grievances."[184] However, the court stated that it would recognize a continuing tort where "the conduct has an identifiable total effect which is a product of the course of conduct, such as the suicide brought about by threats and accusations."[185]

Cases such as *Giovine* and *Twyman* suggest that the tolling effect of a continuing tort may be extended to situations of domestic violence at least in certain circumstances. The concept of a continuing tort aptly addresses the dynamics of battered woman's syndrome and is a realistic and equitable approach to interspousal tort law.

B. Res Judicata and Joinder

Tort actions arising out of the marital context often accompany divorce proceedings.[186] Accordingly, issues arise as to whether the tort action should be joined with the divorce proceeding and whether the final divorce decree will bar subsequent tort claims based on res judicata.

1. Res judicata

a. divorce proceeding

An issue yet to be resolved in Hawai'i is whether a divorce decree will bar a subsequent tort action arising out of conduct that occurred during the marriage. The term res judicata refers to a doctrine that "requires that all claims or issues which were, or could have been, litigated in a previous action between the same parties" be litigated together or thereafter be barred.[187]

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[184] *Id.* According to the court:

> The policy of the statute of limitations is to put at legal rest old claims. Designating a series of discrete acts, even if connected in design or intent, a "continuing tort" ought not to be a rationale by which the statute of limitations policy can be avoided, for surely the cause of action "accrued" at some time; or, to put it another way a cause of action does not reaccrue every time another distress is inflicted. It might be said that the cause of action accrued when the acts became continuous, and that question could be left to the jury. The defect in that is that all of the evidence, however remote in time, would still come in; the jury would be instructed to disregard anything which happened prior to the magic continuity date. That is not very realistic.

Id.

[185] *Id.*

[186] *See infra* notes 218-19 and accompanying text.

[187] Nash v. Overholser, 757 P.2d 1180, 1181 (Idaho 1988) (citing Compton v. Compton, 612 P.2d 1175 (Idaho 1980)).

In Hawai'i, res judicata is composed of two separate doctrines concerning the "preclusive effect of prior adjudication," "res judicata" and "collateral estoppel."[188] Under the doctrine of res judicata:

> The judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided.[189]

Accordingly, the doctrine bars not only the relitigation of claims which were actually litigated in the first suit, but those which could have been litigated.[190] Thus, the critical issue is whether a tort action is a claim that could be litigated with the divorce proceeding.

One commentator urges that this question should be answered by applying the "transactional approach" of the *Restatement (Second) of Judgments*, which "requires, absent extenuating circumstances, that all theories of claim and remedy arising from a single transaction be asserted in a single action."[191]

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[188] "Res judicata or claim preclusion bars another action by plaintiffs or their privies against defendants or their privies on the same claim or cause of action where there has been a valid and final judgment rendered on the merits by a court of competent jurisdiction." Cater v. Cater, 846 S.W.2d 173, 175 (Ark. 1993) (citation omitted). "Collateral estoppel or issue preclusion bars the relitigation of issues of law or fact actually litigated by the parties in the first suit." *Id.* at 176. For purposes of this note, the term "res judicata" will be used as a broad term referring to both "claim preclusion" and "issue preclusion." as some modern commentators have done. *See* 18 Charles A. Wright, et al., FEDERAL PRACTICE AND PROCEDURE § 4002, at 6 (1981).

[189] In the Matter of the Herbert M. Dowsett Trust, 7 Haw. App. 640, 644, 791 P.2d 398, 401 (citing *In re* Bishop Estate, 36 Haw. 403, 416 (1943)), *cert. denied*, 71 Haw. 667, 833 P.2d 900 (1990).

> [The doctrine of collateral estoppel] precludes the relitigation of a fact or issue which was previously determined in a prior suit in a different claim between the same parties or their privies[, or] . . . [the] relitigation of facts or issues previously determined when it is raised defensively by one not a party in a prior suit against one who was a party in that suit and who himself raised and litigated the fact or issue.

Id. at 644-45, 791 P.2d at 401-02 (citations omitted).

Collateral estoppel may be used offensively where, "a stranger relies upon a prior judgment as conclusively establishing in his favor an issue he must prove as an essential element of his claim, using the judgment as a 'sword.'" *Id.* at 645 n.3, 791 P.2d at 402 n.3 (citation omitted). An example of the offensive use of collateral estoppel is seen in Aubert v. Aubert, 529 A.2d 909, 913 (N.H. 1987), where the husband was entitled to use the wife's criminal conviction for attempted murder to avoid relitigating issues of liability and causation in the subsequent tort suit based on the same wrong.

[190] *See Dowsett Trust* at 644, 791 P.2d at 401.

[191] Andrew Schepard, *Divorce, Interspousal Torts, and Res Judicata*, 24 FAM. L. Q. 127, 138 (1990) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. c (1982)). Schepard defines a transaction as "a natural grouping or common nucleus of operative facts." *Id.* at 142

Under this approach, a tort claim that is not brought with the divorce action generally will be barred.[192] The argument is that the divorce action and the tort claim "evolve from a common factual nucleus and raise interrelated economic issues which should be resolved in a single proceeding," and therefore, "the parties and their marital relationship" are the "appropriate basic unit of litigation."[193]

New Jersey has utilized a similar approach to divorce/tort cases, the entire controversy doctrine, requiring joinder of all claims between the same parties "arising out of or relating to the same transactional circumstances."[194] This is to prevent one party from "withholding from the action for separate and later litigation a constituent component of the controversy even where that component is a separate and legally cognizable cause of action."[195]

Unlike New Jersey, most courts hold that res judicata does not bar a tort action brought subsequent to a divorce.[196] In some instances, courts so hold regardless of whether the injuries resulting from the tort were raised in the divorce.[197] These courts reason that res judicata does not bar a subsequent tort

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(citing RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. b (1982)). To decide whether a grouping constitutes a transaction, the following factors are considered: "(1) whether the facts are closely connected in time, space, origin, or motivation; (2) whether they form a convenient litigation unit; and (3) whether treating them as a single transaction conforms with the parties' expectations." *Id.* (citation omitted). *Contra* Aubert v. Aubert, 529 A.2d 909, 911-12 (N.H. 1987) (a prior divorce action did not bar a subsequent tort suit under the *Restatement (Second) of Judgment*'s definition of res judicata).

[192] *See* Schepard, *supra* note 191, at 131.

[193] *Id. Contra* Janet W. Steverson, *Interspousal Tort Claims In A Divorce Action in Oregon*, 31 WILLAMETTE L. REV. 757, 771-72 (1995) (Schepard's argument is not persuasive because it is not the marital relationship that gives rise to the tort and divorce actions, it is the breakdown of the marriage that gives rise to the divorce and the injurious conduct that gives rise to the tort action).

[194] Brown v. Brown, 506 A.2d 29, 32 (N.J. 1986). The applicability of the doctrine to the divorce/tort context was first announced in *dicta* in Tevis v. Tevis, 400 A.2d 1189 (N.J. 1979). *Brown*, 506 A.2d at 32. In *Tevis*, the court said, "[s]ince the circumstances of the marital tort and its potential for money damages were relevant in the matrimonial proceedings, the claim should not have been held in abeyance; it should under the 'single controversy' doctrine, have been presented in conjunction with . . . [the divorce] action as part of the overall dispute between the parties in order to lay at rest all their legal differences in one proceeding and avoid the prolongation and fractionalization of litigation." *Tevis*, 400 A.2d at 1196.

[195] *Brown*, 506 A.2d at 32. However, the court in *Brown* recognized that in exceptional cases, application of the entire controversy doctrine may be unfair and equitable considerations may warrant a departure from the doctrine. *Id.* at 30.

[196] *See, e.g.*, Vance v. Chandler, 597 N.E.2d 233 (Ill. App. Ct. 1992); Heacock v. Heacock, 520 N.E.2d 151, 153 (Mass. 1988); Aubert v. Aubert, 529 A.2d 909 (N.H. 1987); Noble v. Noble, 761 P.2d 1369, 1371 (Utah 1988).

[197] *See Noble*, 761 P.2d at 1374 (res judicata would not bar a subsequent tort action even when the judge in the divorce action had expressly considered the wife's increased living expenses and decreased earning ability resulting from disabilities caused by husband's

suit because the underlying claims in tort and divorce actions are too different.[198] This is so even in jurisdictions that construe the doctrine of res judicata liberally.[199] The purpose of a tort action is to "redress a legal wrong in damages," while the purpose of a divorce action is to "sever the marital relationship between the parties, and, where appropriate, to fix the parties' respective rights and obligations with regard to alimony and support, and to divide the marital estate."[200] Ultimately, civil tort actions are adversarial in nature, in contrast to divorce actions, where the objective is to dissolve a legal entity and obtain an amicable settlement.[201]

Moreover, even if the judge in a divorce action had considered the parties' conduct in awarding alimony[202] and in equitably dividing the property, the

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intentionally shooting her); *Heacock*, 520 N.E.2d at 153 (res judicata did not bar a subsequent tort suit even though the wife presented evidence of husband's assault on her in the divorce proceeding because the record was silent as to whether the assault was considered in dividing property or awarding alimony). *But see* Smith v. Smith, 530 So. 2d 1389 (Ala. 1988) (barred plaintiff from bringing a subsequent tort suit because she made the injuries she received from the tort an issue in her divorce proceeding).

[198] *See, e.g.*, *Vance*, 597 N.E.2d at 237 (divorced woman's claims against her spouse for intentional infliction of emotional distress and civil conspiracy were not barred by res judicata because although the parties were the same, the causes of action were not); Cater v. Cater, 846 S.W.2d 173, 176 (Ark. 1993) (wife's tort action for assault and battery not barred by res judicata by her receipt of alimony and a division of property in a divorce proceeding because the tort claim was not litigated in the prior divorce action); *Heacock*, 520 N.E.2d at 153 (wife's assault claim not barred by res judicata because tort claim is not based on same underlying claim as action for divorce); *Aubert*, 529 A.2d at 911-12 (husband's claim not barred because action in tort is different from divorce); Slansky v. Slansky, 553 A.2d 152 (Vt. 1988) (prior divorce decree precludes relitigation of property division, but decree does not bar subsequent tort claim that is separate from divorce decree).

[199] *See, e.g.*, *Aubert*, 529 A.2d at 911-12. In *Aubert*, the court looked at New Hampshire law, which had adopted the *Restatement (Second) of Judgments*' definition of cause of action for res judicata purposes. *Id.* A cause of action referred to "all theories on which relief could be claimed on the basis of the factual transaction in question," so "a subsequent suit based upon the same cause of action . . . is barred 'even though the plaintiff is prepared in the second action (1) to present evidence or grounds or theories of the case not presented in the first action, or (2) to seek remedies or forms of relief not demanded in the first action.'" *Id.* (citation omitted). The court then looked to the type of relief available and decided that because the available relief in the tort and divorce actions were different, "res judicata does not operate in this situation, notwithstanding our liberal approach to the question of what constitutes a cause of action." *Id.* at 912.

[200] *Heacock*, 520 N.E.2d at 153; *see also Aubert*, 529 A.2d at 912.

[201] Simmons v. Simmons, 773 P.2d 602, 604 (Colo. Ct. App. 1988).

[202] The factors that a court must consider in awarding spousal support are set out in HAW. REV. STAT. § 580-47 (1993). It reads, in part:

> In addition to any other relevant factors considered, the court, in ordering spousal support and maintenance, shall consider the following factors:
>
> (1) Financial resources of the parties;

resulting decree should not bar a later tort action.[203] Unlike a tort award, the divorce action is neither intended to compensate the party in damages for injuries suffered nor to punish the tortfeasor spouse.[204] Whereas, the purpose of alimony is to provide "economic support" to a dependent spouse and the division of marital property is to "recognize and equitably recompense the parties' respective contributions to the marital partnership."[205] Therefore, the injured spouse could not have recovered tort damages in the divorce action even if the tortfeasor's conduct was considered and as such res judicata should not bar the subsequent tort claim.

For res judicata purposes, the distinction between a divorce proceeding and a tort action is amplified in no-fault divorce states, where the issue of fault is never adjudicated or even considered. In states where fault is a ground for divorce, by contrast, there is a stronger argument for a preclusive effect because the facts tending to show fault for purposes of the divorce action are often the same facts that support a tort action.[206] However, in no-fault divorce

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(2) Ability of the party seeking support and maintenance to meet his or her needs independently;

(3) Duration of the marriage;

(4) Standard of living established during the marriage;

(5) Age of the parties;

(6) Physical and emotional condition of the parties;

(7) Usual occupation of the parties during the marriage;

(8) Vocational skills and employability of the party seeking support and maintenance;

(9) Needs of the parties;

(10) Custodial and child support responsibilities;

(11) Ability of the party from whom support and maintenance is sought to meet his or her own needs while meeting the needs of the party seeking support and maintenance;

(12) Other factors which measure the financial condition in which the parties will be left as the result of the action under which the determination of maintenance is made;

(13) Probable duration of the need of the party seeking support and maintenance.

Id. For a discussion of alimony in Hawai'i, *see* Amy H. Kastely, Article, *An Essay in Family Law: Property Division, Alimony, Child Support, and Child Custody*, 6 U. HAW. L. REV. 381 (1984).

[203] Although if the trial court in the divorce action had found that the tortious act had in fact occurred, the tortfeasor spouse may be collaterally estopped from challenging that finding in a subsequent tort action if the tortfeasor spouse had a full and fair opportunity to litigate the issue. *See e.g.*, Noble v. Noble, 761 P.2d 1369, 1374-75 (Utah 1988) (husband was precluded from litigating in a subsequent tort action the divorce court's finding that he intentionally shot his wife). *See supra* note 189.

[204] *See Heacock*, 520 N.E.2d at 153.

[205] *Id.*

[206] *See* Schepard, *supra* note 191, at 143. In fault divorce states, there is a factual overlap between the tort and the divorce actions and an overlap in terms of the economic awards available in both actions. *Id.* at 143-47. *Cf.* Simmons v. Simmons, 773 P.2d 602, 604 (Colo. Ct. App. 1988).

states, like Hawai'i,[207] there is no such comparable argument; the individual behavior of the parties is irrelevant to the outcome in the divorce action.[208] Accordingly, a divorce decree should not have a res judicata effect on a subsequent interspousal tort action.

In addition, Hawai'i case law prohibits a res judicata bar when manifest injustice will result.[209] Res judicata would arguably result in manifest injustice if injured spouses were prevented from bringing their tort actions by virtue of an intervening dissolution proceeding. The vast majority of interspousal tort claimants are abused spouses who make their litigation choices during divorce "as emotional, even irrational, actors."[210] A res judicata bar would force an abused spouse to make an unconscionable choice: The spouse can "[c]ommence a tort action during the marriage and possibly endure additional abuse"; "join a tort claim in a divorce action and waive the right to a jury trial on the tort claim"; or "commence an action to terminate the marriage, forego the tort claim, and surrender the right to recover damages

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[207] *See* HAW. REV. STAT. § 580-42 (1993). Hawai'i, as a no-fault divorce state, has statutorily adopted the "irretrievable breakdown" standard for adjudicating a divorce petition. HAW. REV. STAT. § 580-42 (1993). This section reads:

> (a) If both of the parties by complaint or otherwise have stated under oath or affirmation that the marriage is irretrievably broken, or one of the parties has so stated and the other has not denied it, the court, after hearing, shall make a finding whether the marriage is irretrievably broken. The court, in its discretion, may waive a hearing on an uncontested divorce complaint and admit proof by affidavit.
>
> (b) If one of the parties has denied under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the complaint and the prospect of reconciliation, and shall:
>
> (1) Make a finding whether the marriage is irretrievably broken, or
>
> (2) Continue the matter for further hearing not less than thirty or more than sixty days later, or as soon thereafter as the matter may be reached on the court's calendar and may suggest to the parties that they seek counseling. At the adjourned hearing, the court shall make a finding whether the marriage is irretrievably broken.

Id. The threshold finding for the court is whether the marriage is irretrievably broken. *Id.* The consent of both parties to a divorce is unnecessary and dissolution is obtainable by a unilateral declaration that the marriage is irretrievably broken. *See id.*

[208] *See* Henriksen v. Cameron, 622 A.2d 1135, 1141 (Me. 1993). In *Henriksen*, the Supreme Judicial Court of Maine rejected a res judicata bar on a subsequent tort suit, in part, because of Maine's status as a no-fault divorce state. *Id.* The court reasoned that "[r]equiring a party to raise tort claims in a divorce action would inject a detailed examination of fault into the litigation; a result the legislature clearly did not intend." *Id.*

[209] *See* Yarnell v. City Roofing, Inc., 8 Haw. App. 543, 556-57, 812 P.2d 1199, 1206, *aff'd*, 72 Haw. 272, 813 P.2d 1386 (1991).

[210] Barbara Glesner Fines, *Joinder of Tort Claims in Divorce Actions*, J. AM. ACAD. MATRIMONIAL L. 285, 286 (1994).

arising from spousal abuse."[211] Accordingly, a res judicata bar that precludes a subsequent tort suit will result in injustice.

b. settlement agreement

Although a divorce proceeding will not preclude a subsequent tort action, a settlement agreement pursuant to a divorce may.[212] Settlement agreements purporting to be a "full settlement of all claims,"[213] or releasing the other party from all claims arising out of the marital context[214] have been held to preclude spouses from suing for pre-divorce tortious conduct.[215] The rationale is that a settlement agreement is a contract and absent fraud or duress, it will be enforced.[216] Accordingly, to preserve a subsequent tort claim, the settlement agreement should expressly reserve the right to bring the tort claim.[217]

2. Joinder

Jurisdictions are divided on the issue of whether the tort action must be joined with the divorce. A few states require joinder of the tort action with the divorce proceeding.[218] However, a majority of states have rejected mandatory

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[211] *See* Stuart v. Stuart, 410 N.W.2d 632, 638 (Wis. Ct. App. 1987), *vacated in part on other grounds*, 421 N.W.2d 505 (Wis. 1988).

[212] *See, e.g.*, Overberg v. Lusby, 727 F. Supp. 1091, 1093 (E.D. Ky. 1990) (absent fraud, a general release of claims provision in a separation agreement barred wife's tort claim for infliction of a venereal disease even though she was unaware of the existence of her claim when she entered into the agreement), *aff'd*, 921 F.2d 90 (6th Cir. 1990); Coleman v. Coleman, 566 So. 2d 482 (Ala. 1990) (wife's claim for transmission of a venereal disease was barred by a mutual release in a settlement agreement); Henry v. Henry, 534 N.W.2d 844 (S.D. 1995) (a release in a settlement agreement precluded wife from suing husband for pre-divorce tortious conduct); Jackson v. Hall, 460 So. 2d 1290 (Ala. 1984). *But see* McNevin v. McNevin, 447 N.E.2d 611, 618 (Ind. Ct. App. 1983) (the court held that a dissolution decree incorporating a settlement agreement did not preclude an independent tort action because an unliquidated tort claim could not have been considered in the divorce proceeding even if it had been made known); Slansky v. Slansky, 553 A.2d 152 (Vt. 1988) (husband entered into a settlement agreement with his wife purporting to resolve all property disputes between the parties but he was still permitted to bring a tort action for wrongful conversion of an insurance policy in a subsequent tort suit).

[213] *See Jackson*, 460 So. 2d at 1292.

[214] *See* Henry v. Henry, 534 N.W.2d 844, 845 (S.D. 1995).

[215] *See id.* at 847.

[216] *See* Gramer v. Gramer, 523 N.W.2d 861, 862 (Mich. Ct. App. 1994).

[217] *See* Coleman v. Coleman, 566 So. 2d 482, 485 (Ala. 1990); Slansky v. Slansky, 553 A.2d 152, 154 (Vt. 1988).

[218] *See* Weil v. Lammon, 503 So. 2d 830 (Ala. 1987); Mize v. Mize, 56 S.E.2d 121 (Ga. Ct. App. 1949); Brown v. Brown, 506 A.2d 29 (N.J. 1986); Kemp v. Kemp, 723 S.W.2d 138 (Tenn. Ct. App. 1986); Mogford v. Mogford, 616 S.W.2d 936 (Tex. Ct. App. 1981).

joinder and have opted to either permit or prohibit joinder of the tort and divorce actions.[219]

The case law suggests that mandatory joinder is a rigid and inflexible option often resulting in procedurally complicated and unfair outcomes.[220] Courts that have rejected mandatory joinder have cited a variety of drawbacks to joinder of divorce and tort proceedings.[221]

As discussed earlier,[222] tort and divorce actions are very different. Tort actions redress a legal wrong in damages while a divorce proceeding dissolves a marriage, divides property and awards spousal support.[223]

Joinder of the tort and divorce actions may also unduly complicate property division in the divorce proceeding or result in an inequitable division of property.[224] If the dissolution proceeding and tort action are not heard separately, the injured spouse may not receive a full and fair recovery.[225] Although there is an interest in guarding against a double recovery by the injured spouse, there is also a valid interest in providing the injured spouse with full compensation for his or her injuries; as recognized by the *Clemente* court, damages resulting from the tort must be paid from the tortfeasor's separate assets to effectuate this interest.[226] Mandating joinder of the proceedings may jeopardize this goal.

Furthermore, joinder may unnecessarily complicate the litigation of the tort and divorce actions.[227] Tort claims are actions at law that are often tried by a jury, while divorce proceedings are considered equitable in nature and are

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[219] *See* Windauer v. O'Connor, 485 P.2d 1157 (Ariz. 1971); Cater v. Cater, 846 S.W.2d 173 (Ark. 1993); Simmons v. Simmons, 773 P.2d 602 (Colo. Ct. App. 1988); Nash v. Overholser, 757 P.2d 1180 (Idaho 1988); McNevin v. McNevin, 447 N.E.2d 611 (Ind. Ct. App. 1983); McCoy v. Cooke, 419 N.W.2d 44 (Mich. Ct. App. 1988); R.A.P. v. B.J.P., 428 N.W.2d 103 (Minn. Ct. App. 1988); S.A.V. v. K.G.V., 708 S.W.2d 651 (Mo. 1986); Aubert v. Aubert, 529 A.2d 909 (N.H. 1987); Roesler v. Roesler, 641 P.2d 550 (Okla. 1982); Walther v. Walther, 709 P.2d 387 (Utah 1985); Ward v. Ward, 583 A.2d 577 (Vt. 1990); Slansky v. Slansky, 553 A.2d 152 (Vt. 1988); Stuart v. Stuart, 421 N.W.2d 505 (Wis. 1988).

[220] *See infra* notes 222-32 and accompanying text.

[221] *Id.*

[222] *See supra* notes 198-208 and accompanying text.

[223] *See supra* notes 198-201 and accompanying text.

[224] *See infra* notes 225-26 and accompanying text.

[225] *See* Clemente v. Clemente, 19 Fam. L. Rep. (BNA) 1156, 1156 (1993), where a wife brought a tort claim for assault and battery. The court held that the tort action must be severed from the dissolution proceeding because if the husband is found liable in tort, the wife's damages should be paid from his separate assets rather than the marital pot. *Id.* Thus, it was necessary to separate the parties' assets according to principles of equitable distribution before an award for tort damages. *Id.*

[226] *See id.*

[227] Stuart v. Stuart, 410 N.W.2d 632, 638 (Wis. Ct. App. 1987), *aff'd*, 421 N.W.2d 505 (Wis. 1988).

decided without a jury.[228] Also, joinder may involve a number of witnesses and other parties such as joint tortfeasors and insurance carriers thereby delaying the divorce,[229] and child custody and support determinations.[230] Furthermore, contingent fees arrangements are permitted in tort actions but not in divorce actions, which raises difficulties in representation for the parties.[231]

Other public policy rationales cut against mandatory joinder. For example, a joinder requirement would force victims of domestic violence to make unacceptable choices to preserve the viability of their tort claim. As noted by the Wisconsin Supreme Court:

> If an abused spouse cannot commence a tort action subsequent to a divorce, the spouse will be forced to elect between three equally unacceptable alternatives: (1) Commence a tort action during the marriage and possibly endure additional abuse; (2) join a tort claim in a divorce action and waive the right to a jury trial on the tort claim; or (3) commence an action to terminate the marriage, forego the tort claim, and surrender the right to recover damages arising from spousal abuse. To enforce such an election would require an abused spouse to surrender both the constitutional right to a jury trial and valuable property rights to preserve his or her well-being. This the law will not do.[232]

Although there are a number of reasons to hear tort and divorce actions separately, a number of states continue to mandate joinder.[233] Some courts mandate joinder because they reason that res judicata will bar the subsequent

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[228] *Id.*; *see also* Noble v. Noble, 761 P.2d 1369, 1374 (Utah 1988). The court in *Noble* said that if the parties have tort claims that may impact the divorce action then the tort claims should be resolved prior to the divorce proceeding. *Id.* To do otherwise will raise a fact question when a party who has requested a jury and is entitled to "a jury verdict is first decided by a judge in an equitable proceeding." *Id.* at 1371 n.4 (citations omitted). *See also* Ward v. Ward, 583 A.2d 577 (Vt. 1990) (adopting the rule of Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), which requires that related legal and equitable claims be tried first to a jury on the legal claims to protect the right to jury trial).

For a discussion of whether there is a right to a jury trial in marital tort claims, *see* Tweedley v. Tweedley, 649 A.2d 630 (N.J. Super. Ct. Ch. Div. 1994).

[229] *Stuart*, 410 N.W.2d at 638. *But see* Schepard, *supra* note 191, at 152 (noting that courts have the power to deny joinder of third parties and claims if they will "complicate and delay the action because of the marginal issues they interject").

[230] *Stuart*, 410 N.W.2d at 638. *But see* Schepard, *supra* note 191, at 152 (Schepard notes that any delay in custody or support determinations can be addressed by the courts through interim decisions).

[231] Simmons v. Simmons, 773 P.2d 602, 605 (Colo. Ct. App. 1988). *But see* Schepard, *supra* note 191, at 151-52 (noting that plaintiff's attorney can enter into separate retainer agreements, one for the tort and the other for the divorce).

[232] *Stuart*, 410 N.W.2d at 637-38. The Wisconsin Supreme Court adopted the lower court's analysis in Stuart v. Stuart, 421 N.W.2d 505 (Wis. 1988).

[233] *See supra* note 218.

tort suit.[234] Other courts mandate joinder based on the liberal joinder rules in their respective state rules of civil procedure, on the general jurisdictional nature of divorce courts, and on the courts' authority to hear both the divorce and the tort claims simultaneously.[235]

Courts that require mandatory joinder cite a number of public policy rationales for support. For example, the Texas Court of Civil Appeals in *Mogford v. Mogford*[236] explained that if litigants are required to raise all their claims in one proceeding, scarce judicial resources are more effectively allocated, thereby promoting judicial economy and avoiding multiple lawsuits.[237] Also, mandatory joinder has been cited as promoting the social interest in reducing "private transaction costs," most of which are in the form of attorneys fees, which increase when the tort action and the divorce are litigated separately.[238] Lastly, it is argued that joinder promotes the finality of judgments[239] and fairness to the tortfeasor spouse.[240]

As previously discussed, joinder has many advantages as well as drawbacks. Thus, a policy of permissive joinder allows courts the best of both worlds: it "secure[s] the efficiencies of joinder and preserve[s] [the] injured spouse's property rights in their tort claims, while avoiding the difficulties of mandatory joinder."[241] Permissive joinder allows the parties to determine

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[234] *See, e.g.*, Brown v. Brown, 506 A.2d 29, 32 (N.J. 1986).

[235] *See, e.g.*, Weil v. Lammon, 503 So. 2d 830 (Ala. 1987). In *Weil*, a spouse's fraud was made an issue in the divorce action, so the spouse's subsequent tort claim based on fraud was barred. *Id.* at 831-32. The court said, "[w]ith the merger of law and equity, and given the liberal joinder allowed by the Alabama Rules of Civil Procedure, there is no reason why all known claims between spouses in a divorce action should not be settled in that litigation." *Id.* at 832.

[236] 616 S.W.2d 936, 940 (Tex. Civ. App. 1981).

[237] *See id.*

[238] Schepard, *supra* note 191, at 132.

[239] *Id.* The argument that mandatory joinder promotes the finality of judgments is flawed because "while the legal dispute may comprise the whole of two individuals' interactions in most tort cases, in an ongoing relationship a legal divorce does not necessarily mean psychological repose for the parties, or even an end to legal disputes." Fines, *supra* note 210, at 300. Often, disputes will continue over child custody and visitation and payment of maintenance, so much so that courts of equity retain jurisdiction over their decrees. *Id.*

[240] *Id.* at 301. The fairness to the tortfeasor argument implies that bringing a subsequent tort claim is a "planned strategy" to "maximize economic return." *Id.* However, there may be legitimate, non-economic reasons for bringing the tort action separately, for example, an abused spouse may delay a tort action until after the divorce out of a fear of retaliation. *Id.* at 301-02. Furthermore, psychological studies indicate that many abused spouses either feel they deserve the abuse or do not recognize that the conduct was abusive. *Id.* at 302. Therefore, many abused spouses may not immediately recognize that they have been wrongfully harmed and as a result may forego a tort claim. *Id.*

[241] *Id.* at 306.

whether joinder is more efficient and worthwhile in their particular dispute.[242] For example, it may be more efficient and less costly to join the actions in a minor dispute.[243] However, if delay or complexity is a concern, the actions may be heard separately.[244] Moreover, the outright prohibition of all consolidated tort and divorce actions may have an unintended negative impact by deterring battered women from seeking redress in tort.[245] "A separate action will require the expenditure of additional resources, financial as well as emotional, which the battered woman may not have."[246] The trauma of the divorce may make it unlikely that an abused spouse will proceed with another trial after the divorce.[247]

Hawai'i should adopt an approach of permissive joinder for interspousal tort suits, thus allowing the parties to decide whether the benefits of consolidation of the tort and divorce proceedings outweigh the costs in their case.[248] At the present time, the Hawai'i Family Court has not implemented a written policy regarding the joinder of tort and divorce actions.[249] In practice, however, the Family Court has adopted a policy that appears to prohibit joinder.[250] As a result, tort and divorce actions are brought separately, with the tort action heard in Circuit Court, and the divorce action in Family Court.[251]

Nevertheless, a statutory mechanism exists for consolidating the two actions. The actions may be joined by consolidating them in Family Court

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[242] *Id.* at 307. "A fundamental value of civil litigation in the United States is plaintiff control of his or her claim." *Id.*

[243] *Id.* at 306.

[244] *Id.*

[245] Rhonda L. Kohler, *The Battered Women and Tort Law: A New Approach To Fighting Domestic Violence*, 25 LOY. L.A. L. REV. 1025 (1992).

[246] *Id.*

[247] *Id.*

[248] A policy of prohibited joinder may be more acceptable if the goal of the Family Court in Hawai'i is to "reduce the hostility and adversarial nature of divorce through unified family court structures and the increased use of alternative dispute resolution." Fines, *supra* note 210, at 305. If the court's aim is to "consolidate all family disputes — from juvenile or criminal actions to dissolution actions — into one court with a specially trained judge, heavily utilizing social services resources to provide consistent, comprehensive assistance to families in crisis" then it may be "difficult, if not impossible, to fit the inherently legal and adversarial nature of tort actions into the equitable and conciliatory approach contemplated by these family court structures." *Id.* at 305-06. As explained *supra* notes 245-47 and accompanying text, however, there are significant negative consequences to a policy of prohibited joinder.

[249] *See* Charles Kleintop, Address at the Hawai'i State Bar Association's Annual Divorce Law Update (Dec. 2, 1994).

[250] *See id.*

[251] *Id.*

with one judge hearing both proceedings; Family Court judges have jurisdiction to hear both claims pursuant to Family Court Rule 42(a).[252]

If the tort and divorce actions are heard separately, as is the Hawai'i Family Court's current practice, the parties should inform the respective courts of any potential tort claims in order to guard against dismissal of the tort claim on res judicata grounds. By placing the respective courts on notice of the other action, the possibility of a res judicata bar and a double recovery should be foreclosed.[253] In addition, in situations where the tort is brought after the dissolution proceeding, the tortfeasor spouse may be able to adjust the amount of tort damages awarded if the injuries received as a result of the tort were made an express consideration in apportioning the marital property and/or allocating spousal support.[254]

C. Property Division

1. Tort award

Precedent in Hawai'i suggests that, in some instances, a tort judgment obtained by one spouse may be considered marital property.[255] However, that case should be readily distinguishable. In *Collier v. Collier*, the Intermediate Court of Appeals held that tort compensation that can be directly attributed to "damages suffered or predicted to be suffered during marriage" is marital property unless it can be shown that that it was separately acquired by gift or inheritance.[256] The burden of proof is on the spouse who asserts that that property should not be considered marital property.[257] On the other hand, "tort damages suffered or predicted to be suffered" after the date of completion of the evidentiary portion of the divorce trial are not subject to division by the

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[252] *Id.* Under Rule 42(a) of the Hawai'i Family Court Rules, "[t]he court may order actions between the same parties consolidated for hearing; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

[253] *See* Cater v. Cater, 846 S.W.2d 173, 176 (Ark. 1993) (res judicata does not bar a subsequent action where a court has made an "express reservation of rights as to future litigation").

[254] *See* Noble v. Noble, 761 P.2d 1369, 1373 (Utah 1988).

[255] *See* Collier v. Collier, 8 Haw. App. 28, 791 P.2d 725, *cert. denied*, 71 Haw. 667, 833 P.2d 900 (1990).

[256] *Collier* at 36, 791 P.2d at 725. The court held that "in divorce cases, the net market value (NMV) on the date of the conclusion of the evidentiary part of the trial (DOCOEPOT) that is directly attributable to the compensation paid or payable for tort damages suffered or predicted to be suffered during marriage is a category 5 NMV, unless it is a category 3 or 4 NMV." *Id.* at 36, 791 P.2d at 725.

[257] *Id.* at 36-37, 791 P.2d at 725.

family court unless it can be shown it is property that was gifted or inherited and as such is separate property.[258]

Collier should not apply to future cases involving interspousal tort judgments. First, *Collier* was decided prior to Hawai'i's abrogation of interspousal tort immunity. Second, *Collier* was decided in the context of a tort judgment obtained from a third party, rather than to a tort judgment obtained from the other spouse where concerns of full recovery out of the tortfeasor's separate assets are implicated. Finally, if the damages obtained from an interspousal tort suit are considered marital property and therefore possibly subject to equal division, the injured spouse would derive little or no benefit from the tort action which would allow the tortfeasor spouse to profit from his wrong.[259]

At least one court has held that the tort award should not be considered marital property for property division purposes. In *Clemente v. Clemente*,[260] a wife brought a tort claim for assault and battery. The court held that the tort action must be severed from the dissolution proceeding because if the husband were found liable in tort, the wife's damages should be paid from his separate assets rather than the marital pot.[261] Thus, it was necessary to separate the parties assets according to principles of equitable distribution before determining an award of tort damages.[262]

2. *Property Division*

The division of property upon divorce in Hawai'i is based on the principle of equitable distribution.[263] Family courts have statutory discretion to divide property according to what is "just and equitable."[264] This principle confers

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[258] *Id.* at 37, 791 P.2d at 725. The court said, "in divorce cases, the DOCOEPOT NMV directly attributable to the compensation paid or payable for tort damages suffered or predicted to be suffered post-DOCOEPOT is not subject to the family court's jurisdiction in the divorce case unless it is a category 3 or 4 NMV." *Id.*

[259] Barbara H. Young, *Interspousal Torts and Divorce: Problems, Policies, Procedures*, 27 J. FAM. L. 489, 511 (1988/1989).

[260] 19 Fam. L. Rep. (BNA) 1156, 1156 (1993).

[261] *Id.*

[262] *Id.*

[263] *See* Gussin v. Gussin, 73 Haw. 470, 836 P.2d 484 (1992). For the most part, the Hawai'i Supreme Court has rejected the use of general rules and uniform starting points to govern the division of property. *See id.* at 479-82, 716 P.2d at 489-90 (citations omitted). Instead, the court has embraced partnership principles to guide property division. *Id.* at 483, 716 P.2d at 491 (citations omitted). Thus, unless the spouse can prove property is marital separate property, it will be divided as marital partnership property and will be subject to an equal division between spouses. *See id.*

[264] HAW. REV. STAT. § 580-47(a) (1993). It reads, in part:

Upon granting a divorce, or thereafter if, in addition to the powers granted in subsections

broad discretion on the trial court in dividing marital property and necessitates an analysis of the facts and circumstances of each case.[265]

In cases where the divorce and tort actions are consolidated, the trial court may be inclined to use its discretion in dividing property to allow the tortfeasor spouse to receive an undeserved division of property; by dividing the property in a manner that would leave the tortfeasor spouse with some assets even though a property division coupled with a tort judgment should have left a tortfeasor spouse with no assets.[266] Instead, the trial court in actions where the tort and divorce claims are consolidated, should utilize its discretion to afford the injured spouse a full and fair recovery in both actions. To do otherwise would undermine the legislature's intent in abrogating interspousal tort immunity and reinstate the discriminatory treatment of married persons.[267] If the tortfeasor spouse had injured a third-party, the third-party would have been entitled to receive full compensation for the tort, notwithstanding the tortfeasor's assets. The injured spouse should receive no less. The tort and divorce actions effect different purposes: the divorce action divides the assets and obligations of marriage while the interspousal tort action's purpose is to "impose on married parties accountability for their actions to the same extent imposed on other members of society."[268] As a result, the injured spouse should be adequately compensated in both proceedings, for the injuries received as a result of the tort and for his or her contributions to the marriage. Some are concerned that a tort judgment would be a windfall for one spouse at the expense of the other, but "[a] tort judgment against one's spouse does not create new resources for the tort victim," it "merely restores the [injured] party to status ante."[269]

D. Remedies

Tort actions and dissolution proceedings are intended to effect different purposes.[270] Consequently, the remedies for each action are necessarily different and may affect an attorney's strategy in pursuing the client's interests. One commentator suggests that an attorney dealing with a domestic

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(c) and (d) of this section, jurisdiction of such matters is reserved under the decree by agreement of both parties or by order of court after finding that good cause exists, the court may make such further orders as shall appear just and equitable.

Id.

[265] *See Gussin* at 479, 836 P.2d at 489 (citations omitted).

[266] Young, *supra* note 259, at 512.

[267] *See supra* notes 49-52 and accompanying text.

[268] Young, *supra* note 259, at 512.

[269] *Id.* at 513.

[270] *See supra* notes 200-01 and accompanying text.

tort claim brought in conjunction with a divorce should plan his or her strategy based on the enforceability of the remedy.[271] She provides this example:

> If the client's spouse has ample assets, and the client is not likely to qualify for maintenance, then a tort judgment is desirable, particularly since one can execute it against both the tortfeasor's marital and nonmarital estate. If the client's spouse has few assets but a steady income, particularly an income that is otherwise exempt from creditors, an award for maintenance may be preferable and a tort judgment useless.[272]

The primary purpose of a tort award is to compensate, and, in limited circumstances, to punish.[273] An injured spouse can recover compensatory damages designed to restore the plaintiff to her pre-injury condition.[274] Compensatory damages include proven past and future medical expenses, lost earnings, and impairment of earning capacity.[275] Compensation for noneconomic losses may be obtained in the form of damages for pain and suffering, mental anguish, disfigurement and loss of enjoyment of life.[276] Punitive damages are also available.[277] In contrast, the compensation available in a dissolution proceeding includes spousal support, a division of property, child support and attorney fees.[278]

The tort judgment offers the injured spouse the possibility of a larger recovery, because it is "limited neither by the size of the marital estate nor by the spouse's income, but only by the quality of the wrong itself and the

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[271] Young, *supra* note 259, at 514.

[272] *Id.*

[273] KEETON, *supra* note 66, at 25; *see also* Masaki v. General Motors Corp., 71 Haw. 1, 6, 780 P.2d 566, 570 (1989).

[274] *See* KEETON, *supra* note 66, at 25.

[275] *See* Collier v. Collier, 8 Haw. App. 28, 33-34, 791 P.2d 725, 726, *cert. denied*, 71 Haw. 667, 833 P.2d 900 (1990).

[276] HAW. REV. STAT. § 663-8.5 (1993) allows noneconomic damages for "pain and suffering, mental anguish, disfigurement, loss of enjoyment of life, loss of consortium and all other nonpecuniary losses or claims." The damages recoverable for pain and suffering are limited to a maximum award of $375,000. HAW. REV. STAT. § 663-8.7 (1993).

[277] *See, e.g.*, Cater v. Cater, 846 S.W.2d 173 (Ark. 1993) (upholding wife's $350,000 punitive damages award for a severe beating inflicted by husband).

> [In Hawai'i, punitive damages are proven] by clear and convincing evidence that the defendant has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations, or where there has been some willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences.

Masaki v. General Motors, Corp., 71 Haw. 1, 16-17, 780 P.2d 566, 575 (1989).

[278] Young, *supra* note 259, at 505 (citation omitted).

quantity of damages."[279] Further, the availability of punitive damages can make a tort action very lucrative.

On the other hand, "a maintenance award can be a collection device superior to a tort judgment" especially when "a tortfeasor lacks property against which to execute, but has a retirement fund or similar exempt income source."[280] Spousal support enjoys the protection of the Uniform Reciprocal Enforcement of Support Act.[281] Also, a spousal support order may attach certain retirement funds that a judgment creditor could not have reached.[282] And, if the tortfeasor spouse is an employee of the federal government, his wages may be garnished to pay maintenance and child support.[283] However, spousal support terminates on the payor's death while "a tort judgment may be levied against the decedent's estate."[284]

Other considerations in assessing the viability of the remedies available in divorce and tort claims are the potential tax and bankruptcy consequences. In terms of taxable income, spousal support is taxable to the payee[285] and deductible by the payor.[286] In contrast, tort damages are not taxable as gross income when they are received on account of "personal injuries or sickness."[287] However, tort relief in the form of punitive damages is still taxable.[288]

If bankruptcy is a consideration, spousal support obligations[289] and judgments resulting from intentional tort claims[290] are nondischargeable in

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[279] *Id.* (citing *Ex parte* Harrington, 450 So. 2d 99, 101 (Ala. 1987)).

[280] *Id.*

[281] This act has been adopted in every state, including Hawai'i. Kastely, *supra* note 202, at 423 (citation omitted). Hawai'i's version of the Uniform Reciprocal Enforcement of Support Act is codified in Chapter 576 of the Hawai'i Revised Statutes. HAW. REV. STAT. ch. 576 (1993).

[282] Young, *supra* note 259, at 505 (citing Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984) (codified as amended at 29 U.S.C. § 1056 (d)(3)(B)(ii) (Supp. III 1985)) (noting that the Act also applies to child support and property division).

[283] *Id.* (citing Pub. L. No. 98-21, 97 Stat. 130 (1983) (codified as amended at 42 U.S.C. § 659 (a) (Supp. III 1985) (garnishment of federal employees' wages, both military and civilian, is allowed for alimony and child support) (other citations omitted).

[284] *Id.* (citations omitted).

[285] I.R.C. § 71(a) (West 1996).

[286] *Id.* § 215(a).

[287] *Id.* § 104(a)(2).

[288] O'gilvie v. U.S., 117 S. Ct. 452 (1996).

[289] Young, *supra* note 259, at 505 (citing 11 U.S.C. § 523(a)(5)(1982 & Supp. IV 1986); 11 U.S.C. § 1328(a)(2)(1982)).

[290] *Id.* (citing 11 U.S.C. §§ 523(a)(6), 1328(a), (c) (1982)). Young notes that the record in the tort suit or divorce proceeding is "critical to discharge avoidance" in that it must demonstrate that the elements of the claims litigated in the divorce and/or tort actions were the same as the elements of nondischargeable claims of fraud or willful or malicious injury so that the bankruptcy trustee will be collaterally estopped from denying them. *Id.* at 506-07

bankruptcy proceedings. However, property divisions, settlements and tort judgments grounded in negligence are dischargeable.[291]

Thus, the attorney must consider not only the role res judicata and the statute of limitations may play in barring the claim, but also which remedy is more viable and obtainable in pursuing a divorce and a tort claim for an injured spouse. Consider *Murphy v. Murphy*,[292] where a wife was awarded $1.00 per year in maintenance, which she did not appeal.[293] Subsequent to the divorce, she obtained a $40,000 tort judgment against her former husband for the loss of her eye.[294] However, she was unable to enforce her tort judgment against him because he had sold or encumbered all of his assets.[295] The Arizona Court of Appeals rejected her petition to modify her spousal support because she was not able to demonstrate a change in circumstances to warrant modification.[296] One way the result in *Murphy* might have been avoided is if the wife's attorney had negotiated a more favorable divorce settlement in terms of a larger distribution of property and higher alimony in exchange for foregoing the tort claim.[297]

Murphy highlights the importance of careful consideration of the remedies available to the injured spouse. The most effective remedies necessarily will be those that create the highest likelihood of enforceability. After all, an unenforceable judgment is a hollow victory for the injured spouse.

VII. CONCLUSION

Domestic tort suits can be a powerful litigation tool for an injured spouse. They can encourage favorable settlements and facilitate a more equitable distribution of property. In addition, they can positively affect one of society's most pervasive ills, domestic violence.

In order to have this impact, however, an interspousal tort action must be properly raised. Therefore, it is important to recognize the defenses and

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[291] *Id.* at 505 (citing Spilman v. Harley, 656 F.2d 224, 226 (6th Cir. 1981)).

[292] 547 P.2d 1102, 1103 (Ariz. Ct. App. 1976).

[293] *Id.*

[294] *Id.*

[295] *Id.*

[296] *Id.* at 1104. A petition to modify a divorce decree to increase the amount of spousal support must show substantial and continuing changed circumstances. *Id.* The court reasoned that the only changed circumstance was the existence of the tort judgment. *Id.* The wife did not show why she could not have petitioned for more than $1 per year in support in the divorce proceeding. *Id.*

[297] The threat of tort suit may give one spouse "leverage to coerce a more favorable property settlement." Young, *supra* note 259, at 504. This may sound wrongful but any claim may be a "coercive force" in an adversarial system of justice. *Id.* Thus, using a tort claim to coerce a settlement is wrongful only if undue influence or fraud is involved. *Id.*

RCRA's Criminal Sanctions: A Deterrent Strong Enough to Compel Compliance?

I. INTRODUCTION

> "To the businessman . . . prison is the inferno, and conventional risk-reward analysis breaks down when the risk is jail."[1]

Corporate executives in businesses regulated by environmental statutes sit up and take notice when they learn about the criminal prosecution of other executives found guilty of violating environmental laws.[2] Previously, enforcement of environmental regulations that resulted in community service and/or fines was seen by many in the business community as merely another cost of doing business and such penalties were not effective deterrents.[3] But the dramatically increasing threat of criminal sanctions against both corporations and their employees[4] is not just another cost to be added to the balance sheet. For most executives the risk of jail is too great a cost to ever pay, and by comparison, the costs of compliance begin to look much more reasonable.[5] The "inferno" or even the possibility of the "inferno" is an effective deterrent to those who might otherwise consider violating environmental regulations.[6]

Increasing use of toxic and hazardous chemicals and other materials by industry and increasing knowledge of the long-term harm to public health and the environment from such substances have led to the realization that wastes,

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[1] Arthur L. Liman, *The Paper Label Sentences: Critiques*, 86 YALE L.J. 630, 630-631 (1977).

[2] *Criminal Enforcement of Environmental Laws Seeks Deterrence Amid Need for Increased Coordination, Training, Public Awareness, A Special Analysis by the Bureau of National Affairs*, 17 ENV'T REP 800, 802 (Sept. 26, 1986).

[3] Daniel Riesel, *Criminal Prosecution and Defense of Environmental Wrongs*, 15 ENVTL. L. REP. 10,065, 10,072 (1985).

[4] Frederick W. Addison, III & Elizabeth E. Mack, *Creating an Environmental Ethic in Corporate America: The Big Stick of Jail Time*, 44 SMU L. REV. 1427, 1428 (1991).

[5] *See supra* note 2, at 801 (quoting F. Henry Habicht II, then Assistant Attorney General and Chief of the Land and Natural Resources Division of the Department of Justice who stated that the perception in some parts of the business community of the low risks of committing environmental crimes and the weak incentives for complying with environmental law "will be dramatically changed by a strong enforcement presence.").

[6] *Id.* at 802, (quoting E. Dennis Muchnicki, then Ohio Assistant Attorney General and Chief of the Environmental Enforcement Section). The business community attaches a "strong stigma" to a criminal prosecution and that criminal prosecution provides a greater deterrent value than civil enforcement. *Id.*

especially hazardous wastes, need to be highly regulated.[7] Consequently, Congress enacted the Resource Conservation and Recovery Act ("RCRA").[8] Its overriding concern was to establish a national system to insure the safe management of hazardous waste.[9] This regulatory program is frequently described as a comprehensive "cradle to grave" program because it regulates the handling of hazardous waste from the moment it is generated through all the various stages of treatment, storage and transportation until its ultimate disposal.[10] But no amount of regulation is effective without compliance.

Criminal sanctions that lead to imprisonment are an effective means to achieve compliance. For the deterrent to change behavior and ensure strict compliance, those at the highest levels of decision-making within a corporation must feel threatened.[11] The government has used the "responsible corporate officer" doctrine[12] as a prosecutorial tool to reach the highest levels of management.

The deterrent effect of criminal sanctions has led to industry use of self-auditing programs to ensure compliance and to give protection against prosecution.[13] The threat of prison is an effective deterrent to non-compliance and provides an incentive for industry to set up self-enforcement programs, ensuring a higher level of protection for human health and the environment.

Part II of this paper will show the progression in the enforcement of RCRA's regulations from civil penalties to criminal prosecutions. Part III will analyze how the courts have construed the knowledge element necessary to bring a RCRA prosecution and how this affects the prosecution's burden. Part IV will discuss the use and modification of the responsible corporate officer doctrine as an aid in the successful prosecution of corporate officials. Part V will discuss a response to the threat of criminal sanctions; the institution of self-auditing programs. These programs will be assessed as a

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[7] U.S. ENVIRONMENTAL PROTECTION AGENCY, MEETING THE ENVIRONMENTAL CHALLENGE: EPA'S REVIEW OF PROGRESS AND NEW DIRECTIONS IN ENVIRONMENTAL PROTECTION (1990).

[8] 42 U.S.C. § 6901-6987 (1982 & Supp. 1988).

[9] 42 U.S.C. § 6902(b) (stating national policy).

[10] 42 U.S.C. § 6902(a) (stating objectives).

[11] David Stipp, *Toxic Turpitude: Environmental Crime Can Land Executives in Prison These Days*, WALL STREET JOURNAL, Sept. 10, 1990, at 1, col. 1.

[12] *See* OTTO G. OBERMAIER & ROBERT G. MORVILLO, WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES § 5.04[1] - 5.04[2](1994) (discussing the responsible corporate officer doctrine. This doctrine allows criminal liability to be imposed not only on the individual employees who performed the acts in question, and their immediate supervisors, but also on the corporate officers who direct, or fail to direct, the policy involved).

[13] Collen C. Murnane, Comment, *Criminal Sanctions for Deterrence are a Needed Weapon, but Self-Initiated Auditing is Even Better: Keeping the Environment Clean and Responsible Corporate Officers Out of Jail*, 55 OHIO ST. L. J. 1181 (1994).

viable method for ensuring compliance with environmental regulations. Part VI concludes that self-auditing programs can be a very effective method of ensuring regulatory compliance, but that the threat of criminal sanctions is necessary to provide the impetus for rigorous self-regulation. Criminal sanctions were necessary to make corporate executives sit up and take notice of RCRA's regulations and the threat of criminal sanctions must remain to ensure regulatory compliance.

II. FROM CIVIL TO CRIMINAL SANCTIONS

When Congress enacted major legislation aimed at protecting the environment[14] it also decided to establish an organization dedicated to the environment - the Environmental Protection Agency ("EPA").[15] The task for the EPA was to devise a way to administer the new environmental laws.[16] The EPA had to build a totally new administrative structure and also establish standards that were based on complex scientific judgments.[17] The newness of the statutes, the agency, and even the scientific technology involved combined to create a situation that required civil and administrative enforcement to be fair to those businesses being regulated.[18] For these reasons the EPA used civil and administrative methods to enforce compliance.[19] But these methods were not always successful.

Businesses were not complying because the costs associated with violation of environmental laws were often seen as a small price to pay compared with the cost of compliance.[20] Instead of developing methods of compliance, corporate decision-makers were calculating the cost of compliance versus the fine likely to be imposed for non-compliance.[21]

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[14] Pub. L. No. 92-500, 86 Stat. 816 (1972). In 1972, Congress amended the Federal Water Pollution Control Act to become the Clean Water Act. *Id.* Pub. L. No. 91-604, §§ 4(a), 113(c), 84 Stat. 1676, 1686 (1970). The Clean Air Act was amended in 1970 to include criminal penalties for violations. *Id.* *See* Dick Thornburgh, *Criminal Enforcement of Environmental Laws—A National Priority*, 59 GEO. WASH. L. REV. 775, 776 n.3 (1991).

[15] Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (1970), *reprinted in* 5 U.S.C. app. at 1132 (1982); 84 Stat. 2086 (1970). The EPA was created under the Reorganization Plan No. 3 of 1970. *Id.* The plan consolidated duties from other divisions and transferred them into one agency. *Id.* *See* F. Henry Habicht II, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 ENVTL. L. REP. 10,478 n.2 (1987).

[16] F. Henry Habicht II, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 ENVTL. L. REP. 10,478, 10,479 (1987).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Thornburgh, *supra* note 14, at 775.

[21] James P. Calve, *Environmental Crimes: Upping the Ante for Noncompliance with Environmental Laws*, 133 MIL. L. REV. 279, 284 (1991).

Criminal sanctions for environmental violations were a necessary response to corporate attitudes towards compliance.[22] The deterrent effect of criminal punishment can be effective in shaping corporate behavior.[23] Criminal sanctions, especially jail terms, are significantly more effective deterrents than civil penalties for two major reasons: (1) civil fines can be passed on to the consumer by simply raising the cost of the company's product or service, while jail time cannot,[24] and (2) criminal penalties make very clear the fact that noncompliance is a crime rather than a business decision.[25] Criminal prosecution with the threat of jail time is a very strong deterrent.

> Jail for the "white collar" defendant is the only real deterrent. It carries a social obloquy that brands the offender for what he is. . . . My experience at the bar was that one jail sentence was worth 100 consent decrees and that fines are meaningless because the defendant in the end is always reimbursed by the proceeds of his wrongdoing or by the company down the line.[26]

The stigma[27] and adverse publicity that accompany criminal convictions also provide strong incentives for compliance.[28] Corporate executives want to avoid negative publicity because it may significantly hurt business and the economic loss may outweigh the cost of compliance.[29]

Compliance with environmental regulations such as those in RCRA will only be successful if matched with a strong deterrent to compel compliance.[30] Environmental crimes must be prosecuted vigorously so that the very real threat of jail time acts as a strong and effective deterrent.[31]

III. THE KNOWLEDGE ELEMENT UNDER RCRA

Successful enforcement of environmental laws such as RCRA depends upon the conviction of those who violate the statute.[32] In general, to obtain a RCRA conviction the government must prove that: (1) a person, (2)

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[22] *Id.* at 284-85.

[23] *See supra* note 2, at 802.

[24] *Id.*

[25] *Id.*

[26] Charles B. Renfrew, *The Paper Label Sentences: An Evaluation*, 86 YALE L.J. 590, 613 (1977).

[27] United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979). Unlike a civil suit, the mere presentment of an indictment "will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo." *Id.*

[28] Calve, *supra* note 21, at 284.

[29] *Id.*

[30] Addison & Mack, *supra* note 4, at 1430.

[31] *Id.*

[32] *Id.*

knowingly disposes or treats or stores, (3) a hazardous waste, (4) without a permit or in violation of a permit.[33] The issue of what *mens rea* (intent) is required for an individual to be held criminally responsible raises several questions. What exactly does a person have to "intend" to be convicted? What conduct or actions put a person at risk and expose him to criminal prosecution? Can a manager or corporate official be held criminally responsible for the actions of his subordinates if he had no knowledge of the criminal conduct? To resolve these issues it is necessary to examine the *mens rea* requirement set forth in § 6928(d) of RCRA, the criminal penalties section of the statute, and also to examine interpretation of this requirement by the courts.

Historically, criminal laws have required that to secure a conviction, there must be, to use Blackstone's term, "vicious will", that is, the mental state to support criminality.[34] In *Morissette v. United States*,[35] the Supreme Court cast doubt on the validity of any imposition of felony sanctions without proof of *mens rea*.[36] The Court concluded that even where Congress was silent on

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[33] 42 U.S.C. § 6928 (1988) provides as follows:

(d) Criminal penalties

Any person who—

(1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter, or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. 1411 et seq.],

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter—

(A) without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. 1411 et seq.]; or

(B) in knowing violation of any material condition or requirement of such permit; or

(C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;

(3) knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter; ...shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1)or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

[34] United States v. U.S. Gypsum Co., 438 U.S. 422, 436-37 (1978).

[35] 342 U.S. 246 (1952).

[36] *Id.*

mens rea such an element was an aspect of federal crimes that was incorporated from the common law.[37] In *Dennis v. United States*[38] the Supreme Court again recognized that the proof of criminal intent is central to the American criminal justice system, noting that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."[39]

Statutory concepts of *mens rea* identified with the requirement of a "knowing" commission of a crime have been further refined to determine whether Congress required what at common law has been referred to as a general intent or a specific intent.[40] Where only a general intent is required as an element of proof, the government need prove only that the defendant knew or was conscious of his actions. However, where a requirement of a special intent is mandated, the government must prove that the defendant not only intended his acts but also knew that the consequences of his acts would be illegal.[41]

RCRA requires proof that the defendant "knowingly" violated the law.[42] Using the "public welfare offense" doctrine,[43] the Supreme Court has interpreted "knowingly" to require only general awareness that the defendant was dealing with a substance likely to be regulated.[44] Thus, even if a defendant does not have actual knowledge of the applicable federal laws or regulations, most courts are willing to impose liability[45] and hold that knowledge of environmental crimes can be proved by circumstantial

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[37] *Id.* at 262.

[38] 341 U.S. 494 (1951).

[39] *Id.* at 500.

[40] United States v. Bailey, 444 U.S. 394, 403 (1980).

[41] Liparota v. United States, 471 U.S. 419, 425 n.9 (1985).

[42] 42 U.S.C. § 6928(d) (1988).

[43] United States v. International Minerals & Chem. Corp., 402 U.S. 558 (1971). The "public welfare offense" doctrine applies when the substance involved is so inherently dangerous that the defendant's knowledge of the legal issues involved can be presumed. The doctrine originated with substances such as drugs and munitions and was first extended to the environmental area in *International Minerals*. This case involved a prosecution for a knowing violation of an Interstate Commerce Commission rule that required a shipper to disclose the presence of hazardous chemicals on a container's label. The Supreme Court upheld the validity of a criminal indictment that failed to allege that the defendant had actual knowledge of the rule it allegedly violated. The Court stated that when dangerous devices or products or obnoxious waste materials are involved, "the probability of regulation is so great that anyone who is aware that he is in possession of them . . . must be presumed to be aware of the regulation." *Id.* at 565.

[44] United States v. International Minerals & Chem. Corp., 402 U.S. 588 (1971).

[45] Kenneth A. Hodson et al., *The Prosecution of Corporations and Corporate Officers for Environmental Crimes: Limiting One's Exposure for Environmental Criminal Liability*, 34 ARIZ. L. REV. 553, 560 (1992).

evidence.[46] For example in *United States v. Hayes International Corp.*,[47] the 11th Circuit Court of Appeals examined the issue of whether the word "knowingly", as used in § 6928(d) (RCRA's criminal penalties section) refers exclusively to the acts of treating, storing, or disposing (in violation of certain provisions), or whether the person must also have express knowledge that the waste material is hazardous.[48] In this case, an airplane refurbishing company and one of its employees were charged with knowingly transporting hazardous waste to a facility that did not have a RCRA permit.[49] The defendants had arranged for a private hauler to dispose of the waste the company was generating.[50] Under the regulations effective at the time of the illegal disposal, the type of waste generated by the corporation required that a hauler with a valid permit dispose of the waste, unless it was being recycled.[51] The hauler used by Hayes did not have such a permit and did not recycle the waste.[52] The jury returned a guilty verdict against both the corporation and the officer who made the arrangement.[53] The district court, however, granted the defendants' motion for a judgment notwithstanding the verdict because the corporate officer did not "know" that the hauler lacked a permit.[54]

The Eleventh Circuit reversed and remanded, holding that RCRA was "not drafted in a manner which makes knowledge of legality an element of the offense."[55] Reading the statute in this light, the court explained that it would not be a defense to claim that the defendants did not know that the paint waste was a hazardous waste within the meaning of the regulations.[56] Nor would it be a defense to argue ignorance of the permit requirement.[57] In *Hayes*, the court concluded that because RCRA qualified as a "public welfare statute, involving a heavily regulated area with great ramification for the public health and safety, . . . it is completely fair and reasonable to charge those who choose

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[46] John F. Cooney et al., *Criminal Enforcement of Environmental Laws: Part II—The Knowledge Element in Environmental Crimes*, 25 ENVTL. L. REP. 10525, 10532 (Sept. 1995).

[47] 786 F.2d 1499 (11th Cir. 1986).

[48] *Id.* at 1501.

[49] *Id.* at 1500-01.

[50] *Id.* at 1500.

[51] *Hayes International Corporation*, 786 F.2d at 1501. Hazardous waste was not subject to regulation if it was "beneficially used or re-used [sic] or legitimately recycled or reclaimed." *Id.* (quoting 40 C.F.R. § 261.6(a)(1), superseded effective July 5, 1985, 50 Fed. Reg. 665).

[52] *Id.* at 1501.

[53] *Id.* at 1500.

[54] *Id.* The district court held that the government failed to present sufficient evidence to support the knowledge element. *Id.* The court of appeals, noting that a district court order setting aside a jury verdict deserves no deferential value, conducted its own review of the evidence. *Id.*

[55] *Id.* at 1503.

[56] *Id.*

[57] *Id.*

to operate in such areas with knowledge of the regulatory provisions."[58] With *Hayes*, the Eleventh Circuit appears to have created a presumption that those who generate and dispose of hazardous waste possess knowledge of all relevant regulatory provisions.[59] This case also allowed the jury to infer guilty knowledge from the defendant's deviation from prescribed procedures of which he was presumed to be aware.[60] Such an inference reduces the government's burden of proof for successful prosecution, and so acts as a powerful deterrent to others in the industry who are made aware of their own risk of prosecution if they fail to strictly comply with procedures mandated by RCRA's regulatory scheme.

But not all courts are willing to interpret "knowingly" so liberally. In *United States v. Johnson and Towers, Inc.*,[61] the government charged a corporation and two of its employees with unlawful disposal of hazardous waste in violation of RCRA.[62] The company, Johnson and Towers Inc., was in the business of repairing and overhauling large motor vehicles.[63] The employee defendants were the foreman of the plant and a service manager.[64] According to the indictment, waste chemicals from the cleaning operations were drained into a holding tank. When the tank was full, it was pumped into a trench that flowed into a tributary of the Delaware River.[65] The indictment charged that under RCRA the defendants treated, stored and disposed of hazardous wastes without having obtained a permit.[66]

The district court concluded that the RCRA criminal provisions did not apply to employees, but only to those obligated under the statute to obtain a permit. The Third Circuit rejected this narrow interpretation and held that § 6928(d)(2)(A) covers employees as well as the actual owners and operators of a facility.[67] However, the court opined that to be liable under this section a defendant must have knowledge that a permit was required.[68] The court stated that Congress would not want individuals criminally prosecuted who

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[58] *Id.*

[59] *Id.* at 1504 (stating that the statute at issue "sets forth certain procedures transporters must follow to ensure that wastes are sent only to permitted facilities. Transporters of waste presumably are aware of these procedures, and if a transporter does not follow the procedures, a juror may draw certain inferences.").

[60] *Id.*

[61] 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

[62] *Id.* at 664.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 663-4.

[66] *Id.* at 664.

[67] *Id.* at 664-65.

[68] *Id.* at 665.

acted without knowledge of a permit's existence;[69] therefore the government must prove that the defendant knew he had no permit or that any permit that he did have was inapplicable.[70]

Imposing the knowledge requirement upon all elements of the offense would make § 6928(d) a specific intent crime and increase the burden of proof on the prosecutor. However the Third Circuit noted that proving a defendant acted knowingly is not a difficult burden, since the jury can infer knowledge, even knowledge about permit status, especially for people who hold responsible positions within the business.[71] Allowing the jury to infer knowledge of either the existence or need for a permit when dealing with hazardous waste, from circumstantial evidence such as a person's position and responsibilities within a company, imposes the same burden of proof as the presumption of knowledge allowed by the 11th Circuit. The court's willingness to interpret the knowledge requirement so liberally lightens the government's burden to secure a conviction, which, in turn, increases the deterrent effect of RCRA's criminal sanctions, leading to stricter compliance with the statute's regulations.

The Ninth Circuit addressed the knowledge requirement as it applied to the permit status of a facility in *United States v. Hoflin*.[72] The defendant, director of a municipal public works department, was convicted of aiding and abetting the disposal of hazardous waste in violation of § 6928(d)(2)(A) of RCRA.[73] The defendant appealed his conviction, arguing that the government should have been required to prove that he knew there was no RCRA permit for the disposal site he used.[74] The Ninth Circuit rejected this interpretation.[75] The court compared the language of § 6928(d)(2)(A) (lack of permit) with that of § 6928(d)(2)(B) (violation of condition or requirement of permit),[76] concluding that if Congress had intended that knowledge of the lack of a

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[69] *Id.*

[70] *Id.* at 669.

[71] *Id.*

[72] 880 F.2d 1033 (9th Cir. 1989), *cert* denied, 493 U.S. 1083 (1990).

[73] *Id.* at 1036.

[74] *Id.* at 1035. The criminal prosecution in this case arose from the disposal of paint left over from road maintenance. *Id.* Hoflin instructed an employee to haul 14 55-gallon drums of leftover paint to the sewage plant and bury them. *Id.* Two years later the incident was reported to state authorities who referred the matter to the Environmental Protection Agency (EPA). *Id.* Paint from the drums had leaked into the soil. *Id.* The EPA tested samples taken from the drums and found the highest flash point for the samples to be 65 Fahrenheit. *Id.* Under RCRA, substances with flash points of f140 Fahrenheit or less are deemed to be hazardous. *Id.* Such hazardous materials can only be disposed of at facilities with EPA permits. *Id.* No such permit had been obtained for the sewage treatment plant. *Id.*

[75] *Id.* at 1038.

[76] *See supra* note 33.

permit be an element under subsection (A) it could have easily said so. The fact that "in knowing violation" is specifically added to subsection (B) and (C) in spite of the fact that "knowingly" introduces subsection (2), but no knowledge element is added to subsection (A) clearly shows Congress' intention not to make knowledge of lack of a permit to be an element under subsection (A). The court stated that it could not write into the statute something that Congress had plainly left out.[77] The court added that the Third Circuit's interpretation of subsection (A) in *Johnson & Tower*, would make the word "knowing" in subsection (B) "mere surplusage."[78]

The court thus held that proof that a defendant knew the disposal facility was not permitted is not an element of the offense set forth in § 6928(d)(2)(A).[79] The *Hoflin* court reasoned that a major concern of RCRA is knowledge of the location of hazardous waste, from its generation through its disposal.[80] Those who handle such waste are required to provide information to the EPA in order to secure permits; by placing this burden on those handling hazardous waste, it is possible for the EPA to monitor their activities and enforce compliance with the statute.[81] Those who handle hazardous waste without a permit inhibit the agency from performing its regulatory tasks.[82] The government therefore does not need to prove either the defendant's knowledge of the permit status of a facility nor the defendant's knowledge that RCRA requires treatment, disposal, and storage facilities to be permitted.

One year later, in *United States v. Baytank, Inc.*, the 5th Circuit declined to follow *Johnson & Towers* to the extent that it would require knowledge of RCRA's regulations for a defendant to be convicted of a RCRA violation.[83] The government prosecuted Baytank and three individual defendants for various environmental offenses under several statutes.[84] Two counts of the

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[77] United States v. Hoflin, 880 F.2d 1033, 1038 (9th Cir. 1989).

[78] *Id.* The court stated that"[H]ad Congress intended knowledge for the lack of a permit to be an element under subsection (A) it easily could have said so. It specifically inserted a knowledge element in subsection (B), and it did so notwithstanding the 'knowingly' modifier which introduces subsection (2). In the face of such obvious congressional action we will not write something into the statute which Congress so plainly left out. . . To adopt the Third Circuit's interpretation of subsection (A) [in *Johnson & Tower*] would render the word 'knowing' in subsection (B) mere surplusage." *Id.*

[79] *Id.* at 1039.

[80] *Id.* at 1038.

[81] *Id.*

[82] *Id.* at 1039.

[83] United States v. Baytank, Inc., 934 F.2d 599 (5th Cir. 1991).

[84] *Id.* at 602. Two corporations and nineteen individuals were indicted on 37 counts for violations of federal environmental laws in the operation of a chemical transfer and storage facility. *Id.*

indictment charged two of the individual defendants, Baytank's executive vice president and its operation manager, with knowingly storing hazardous wastes in drums and tanks without a permit in violation of RCRA § 6928(d)(2)(A). The jury found that these two individuals had knowingly committed the offenses and convicted them of the RCRA violations.[85] However, the trial judge entered judgments of acquittal in favor of these two defendants and granted them conditional new trials, if their judgments of acquittal were reversed on appeal.[86]

The Government appealed, and the U.S. Court of Appeals for the Fifth Circuit reversed.[87] To satisfy the knowledge element, the court relied on the two individuals' familiarity with Baytank's operations and their involvement with the company's environmental compliance efforts.[88] The court stated that from this evidence the jury could have inferred that the defendants' violations were committed knowingly.[89] The court's reliance on the defendants' familiarity with the company's operations is an expansive interpretation of the reach of federal criminal culpability with regards to enforcing RCRA's criminal penalties and puts officials in positions of responsibility on notice of their need for a full understanding of, and strict compliance with, RCRA's regulatory scheme.

IV. THE RESPONSIBLE CORPORATE OFFICER DOCTRINE

Although it may be relatively easy to assign knowledge and blame to the low-level employee who dumped or buried hazardous waste, or to prove that a foreman or plant manager personally directed the employee's actions, it can be much more difficult to assign knowledge and blame to higher level executives and to be able to prove that an executive had knowledge of a RCRA violation.[90] When the environmental violations are the result of corporate decision-making or policy, however, prosecution of only low-level employees fails to serve the deterrent function that is the goal of

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[85] *Id.*

[86] *Id.* at 616-17.

[87] *Id.*

[88] *Id.* The court stated that there was evidence that both individuals were "intimately versed in and responsible for" Baytank's operations. *Id.* at 616. The court held that the testimony was sufficient to allow the conclusion that both individuals knew of the storage of hazardous wastes in violation of the requirements for storage without a permit. Given the evidence of their detailed knowledge of and control over the storage operations at Baytank the court found that the jury was entitled to conclude that they had both participated in the illegal storage that was charged. *Id.* at 617.

[89] *Id.* at 618.

[90] Jane F. Barrett & Veronica M. Clark, *Perspectives on the Knowledge Requirement of Section 6928(d) of RCRA After United States v. Dee*, 59 GEO. WASH. L. REV. 862, 882 (1991).

environmental criminal enforcement.[91] To reach into the highest corporate levels the government has used a prosecutorial theory known as the "responsible corporate officer" doctrine. Under this doctrine a corporate officer who knew that improper activity was occurring may be held criminally liable for a subordinate's conduct if that corporate officer was directly responsible in the corporate management scheme for the conduct in question.[92]

The responsible corporate officer (RCO) doctrine developed from two Supreme Court cases[93] decided under the Federal Food, Drug, and Cosmetic Act,[94] a strict liability statute whose violation is subject to misdemeanor penalties. As early as 1943 in *United States v. Dotterweich*,[95] the U.S. Supreme Court, finding that the president of a company could be convicted of illegally distributing adulterated drugs through acts committed by his subordinates, held that no showing of *mens rea* was necessary to establish culpability under this public welfare statute.[96] The Court recognized that when applied to individuals acting on behalf of a company, the statute might be read to "sweep[ ] . . . within its condemnation any person however remotely entangled in the proscribed shipment."[97] The Court, however, narrowed the range of individuals subject to liability by finding that the offense is only committed by those who share in the responsibility of furthering the transaction that is outlawed by the statute.[98] But the Court declined to define the class of employees who could be said to have a "responsible share," leaving this definition to the "good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries."[99]

Thirty two years later, in *United States v. Park*,[100] the chief executive officer (CEO) of a large national retail food operation was convicted of illegally distributing rodent-infested food that was discovered at a corporate warehouse.[101] The evidence showed that the Food and Drug Administration had previously notified the officer of a similar problem at a different warehouse, and that he had notice of the problem at the warehouse where the contaminated food was found.[102] The government also showed that one vice

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[91] *Id.*

[92] OBERMAIER & MORVILLO, *supra* note 12, at § 5.04.

[93] United States v. Dotterweich, 320 U.S. 277 (1943) and United States v. Park, 421 U.S. 658 (1975).

[94] 21 U.S.C. §§ 301-392 (1938).

[95] 320 U.S. 277 (1943).

[96] *Id.* at 281.

[97] *Id.* at 284.

[98] *Id.*

[99] *Id.*

[100] 421 U.S. 658 (1975).

[101] *Id.* at 660.

[102] *Id.* at 662.

president was in charge of sanitation for both facilities, and that the defendant had previously conferred with that subordinate and other officers to ensure that corrective action would be taken.[103]

The CEO did not participate in the acts causing the violation, but was convicted under the RCO provision.[104] On appeal, he claimed that he was convicted without proof of wrongful action on his part.[105] The Court held that the government could establish liability by demonstrating "that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct the violation complained of, and that he failed to do so."[106] The Court found that the conviction was proper because the defendant was aware that the company's internal system for ensuring the sanitary conditions was not working, yet failed to restructure that system once notified that similar sanitary problems had arisen at two warehouses.[107] The Court did recognize, however, that the CEO could have raised an affirmative defense that he was powerless to prevent the violation, and that he could have sought a jury instruction requiring the government to prove beyond a reasonable doubt that he was capable of preventing the violation.[108]

The development of the RCO doctrine indicates that the Supreme Court considers certain public welfare offenses to be so serious that it is necessary to impose an affirmative duty on corporate officers to prevent or remedy the violations.[109] The Supreme Court has found that corporate officers have a duty to know about the violations within their control, and that lack of knowledge is no defense.[110] Because it is not usually a heavy burden to provide evidence that corporate officers, by reason of their position within the corporation, have responbibility and authority to prevent the violations complained of, it is not too difficult to convict corporate officers under a strict liability statute by invoking the RCO doctrine.[111]

Convicting a corporate officer for violations under RCRA is far more difficult, however, because under the statute, the government must prove that

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[103] *Id.* at 664.

[104] *Id.* at 666.

[105] *Id.*

[106] *Id.* at 673-74.

[107] *Id.* at 678.

[108] *Id.* at 676-77.

[109] *Id.* at 672.

[110] United States v. Dotterweich, 320 U.S. 277 (1943). In *Dotterweich* the Supreme Court stated, "Such legislation dispenses with the conventional requirement of criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting upon a person otherwise innocent but standing in a responsible relation to public danger." *Id.* at 281.

[111] Barrett & Clark, *supra* note 90, at 882-83.

the officer knowingly committed the offense.[112] Because of the knowledge element in RCRA's criminal penalties, it is not possible to apply the RCO doctrine as a strict liability theory of vicarious culpability.[113] Yet, in RCRA prosecutions the goal of the RCO doctrine, holding corporate officers liable for offenses that endanger the public welfare, can be achieved without abandoning the knowledge requirement.[114] In *Johnson & Towers*,[115] the Third Circuit suggested that "knowledge . . . may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant."[116]

Although the position taken by the Third Circuit does not relieve the government of its burden of establishing a corporate officer's knowledge under RCRA, it does provide a method that can be used to prove such knowledge.[117] The RCO doctrine can be used to set out certain factors from which a jury may infer that a defendant had the necessary intent under RCRA.[118] These factors include showing that a RCRA violation occurred within an officer's area of supervision and control; that the officer had the authority or power to prevent or correct the violation; and that the officer knowingly failed to do so.[119]

The third factor, that the defendant knowingly failed to prevent or correct the violation, is the vital link of the application of the RCO doctrine to a RCRA offense. Before the jury can infer that a corporate officer had knowledge of the violation he is alleged to have committed, the government must establish that the officer was aware of a preexisting violation or potential violation.[120] If it can be proved that the corporate officer failed to act on the violation he is charged with, in spite of prior notice, the "knowing" requirement under § 6928(d) of RCRA would be satisfied.[121]

Use of the RCO doctrine is a developing area of the law and two more recent decisions are helpful in defining the limits of the doctrine in cases brought under RCRA. In *United States v. White*,[122] a company and several employees were indicted under RCRA and the Federal Insecticide, Fungicide, and Rodenticide Act[123] for loading a truck with pesticide-contaminated water

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[112] *See supra* note 33.
[113] Barrett & Clark, *supra* note 90, at 883.
[114] *Id.*
[115] 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).
[116] *Id.* at 670.
[117] Barrett & Clark, *supra* note 90, at 884.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] 766 F. Supp. 873 (E.D. Wash. 1991).
[123] 7 U.S.C.A. § 136(f)(1947).

and then spraying the material on a field.[124] One defendant, the corporate officer responsible for environmental safety, was indicted under the RCO doctrine on the grounds that he had direct responsibility to supervise the handling of hazardous wastes by employees.[125] The indictment stated that he was liable for the acts of all other agents and employees of the company in handling the hazardous waste at its facilities "which he knew of or should have known of."[126] The defendant moved to strike this charge, claiming that it would improperly permit the government to obtain a conviction based solely on a theory of *respondeat superior*.[127] The court agreed and granted the motion to strike.[128] The court distinguished *Dotterweich* and *Park* on the basis that the statute at issue in those cases contained no *mens rea* requirement.[129] The court also considered language in *United States v. Johnson & Towers, Inc.*,[130] where the Third Circuit stated that knowledge may be inferred as to those who hold positions of responsibility within the company.[131] The court in *White* found that this statement was "clearly" dictum, and held that inclusion of the responsible corporate officer doctrine in the charge would improperly allow a conviction without the requisite intent.[132]

In *United States v. MacDonald & Watson Waste Oil Co.*,[133] the president of MacDonald & Watson appealed his conviction, on two counts, of knowingly transporting hazardous waste to a facility that did not have a permit.[134] The evidence showed that, under the supervision of a corporate employee,

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[124] *White*, 766 F. Supp. at 877. The indictment alleged a conspiracy to violate RCRA by storing, transporting, and disposing of hazardous waste without a permit. *Id.* The prosecutor also alleged a knowing endangerment under RCRA with respect to hazardous waste, specifically 1, 3-Dichloropropene. *Id.*

[125] *Id.* at 894.

[126] *Id.*

[127] BLACK'S LAW DICTIONARY 909 (6th ed. 1991). Under the doctrine of *respondeat superior*, a master is liable in certain cases for the wrongful acts of his servant. A master is responsible for want of care on the servant's part toward those to whom the master owes a duty to use care, provided failure of the servant to use such care occurred in the course of his employment. *Id.*

[128] United States v. White, 766 F. Supp 873, 895 (E.D. Wash. 1991).

[129] *Id.* at 894-95.

[130] 741 F.2d 662 (3d Cir. 1984), *cert.denied*, 469 U.S. 1208 (1985).

[131] *Id.* at 670.

[132] White, 766 F.Supp. at 895.

[133] 933 F.2d 35 (1st Cir. 1991).

[134] *Id.* at 39. McDonald & Watson, a company in the business of transporting and disposing of waste oils and contaminated soil, operated a disposal facility on land in Providence, Rhode Island. This facility was operated under a RCRA permit which authorized the disposal of liquid hazardous wastes and soils contaminated with non-hazardous wastes such as petroleum products. MacDonald & Watson did not have a RCRA permit authorizing them to dispose of solid hazardous wastes such as toluene-contaminated soil at this facility. *Id.*

hazardous waste had been illegally transported to an unpermitted site operated by the company.[135] Evidence presented showed that MacDonald & Watson was a relatively small corporation, that the president was a "hands on" manager, and that he had been warned on other occasions that his company had illegally disposed of hazardous waste.[136] But, no direct evidence was presented to prove that the president knew of the particular unlawful shipment charged in the indictment.[137] Nevertheless, the government argued that the president could be found guilty of the felony charged if he knew, or should have known, of the waste shipment.[138] The trial judge accepted the government's contention, and instructed the jury that RCRA's knowledge requirement would be met if the jury found that the following three criteria were satisfied: (1) that the accused was an officer of the corporation, not merely an employee; (2) that the officer had direct responsibility to supervise the activities alleged to be illegal; and (3) that the officer knew or believed that illegal activity of the type alleged occurred.[139]

The First Circuit overturned the president's conviction, holding that the district court had improperly applied the responsible corporate officer doctrine "as a substitute means of proving the explicit knowledge element of this RCRA felony."[140] The court did state that the knowledge criterion could be satisfied without direct evidence of "what was in that Defendant's mind."[141] The court stated that knowledge can be proven by circumstantial evidence, such as a defendant's "position and responsibility" or "willful blindness to the facts constituting the offense."[142] The First Circuit in *MacDonald & Watson* established that the RCO doctrine provides an additional piece of circumstantial evidence to prove criminal liability.[143] The decision does not, however, provide an independent means by which guilty knowledge may be imputed from an employee with direct responsibility for an environmental violation to a supervising employee or an officer at headquarters.[144] *McDonald & Watson* and *White* indicate that courts are beginning to balance

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[135] *Id.* at 41-42.
[136] *Id.* at 42.
[137] *Id.*
[138] *Id.* at 50.
[139] *Id.* at 50-51.
[140] *Id.* at 52.
[141] *Id.*
[142] *Id.*
[143] Brenda S. Hustis & John Y. Gotanda, *The Responsible Corporate Officer: Designated Felon or Legal Fiction?*, 25 LOY. U. CHI. L.J. 169 (1994).
[144] *Id.*

the public policies behind vigorous enforcement with a stricter view of individual liability for environmental crimes.[145]

The Department of Justice (DOJ) appears to have accepted the limitations on the application of the RCO doctrine established by the First Circuit and has made public statements that it will not bring indictments against corporate officials based solely on their line responsibility for supervising the employees who committed the knowing violations.[146] In August 1993, Charles A. DeMonaco, Assistant Chief of the Environmental Crimes Section, announced at the Annual Meeting of the American Bar Association that as a matter of policy and notwithstanding the broader interpretation suggested by some courts, corporate officers would not be prosecuted for knowing violations of the environmental laws unless they met the liability standards of *MacDonald & Watson*.[147]

Although there are legal and policy limits on the reach of the RCO doctrine, the theory still plays a critical role in environmental investigations. The government's ability to use the doctrine as circumstantial proof of actual knowledge reduces the amount of evidence otherwise necessary to prove actual knowledge on behalf of senior officials of a corporation. The doctrine remains a powerful weapon for the prosecutor and can pose a significant threat to senior corporate officials.

The intended effect of the RCO doctrine is to force CEOs and high-ranking officials to develop new, responsible attitudes about business and the environment that will result in greater compliance. CEOs are in the best position, and now have the added incentive of avoiding criminal charges to make the needed changes to ensure company compliance with environmental regulations. The RCO doctrine is a necessary tool to allow prosecutors to reach high level decision-makers in companies. Without the use of the doctrine, prosecutors have a heavier burden in proving that such officials acted "knowingly" as is required by RCRA § 6928(d).

V. THE RESPONSE TO THE THREAT OF JAIL: SELF-AUDIT PROGRAMS

The best way for a company to respond to the government's threat of criminal prosecution is to implement a full-time compliance auditing program that alerts officials both to ongoing and potential violations at the earliest possible stage.[148] This is a way to avoid imprisonment, embarrassment, and

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[145] Thomas J. Kelly, Jr., *Enforcement Trends*, *in* CRIMINAL ENFORCEMENT OF ENVIRONMENTAL LAWS 31 (ALI-ABA Course of Study) (1992).

[146] *Corporate Officer's Prosecution Should Rest on Real Knowledge, According to DOJ Official*, 23 ENV'T REP. 5 (Aug. 15, 1993).

[147] *Id.*

[148] Hodson, *supra* note 45, at 567.

a loss of corporate profits. Executives need to be truly informed and knowledgeable of possible shortcomings or even intentional violations of the environmental statutes and regulations that affect their business.[149]

Although the government has favorable standards for proving knowledge to prosecute environmental violators, this does not mean that they will automatically seek a criminal indictment in every situation. The DOJ has promulgated guidelines[150] that it follows when an environmental violation has occurred and uses the guidelines when deciding what type of sanctions to seek.[151] To determine when to prosecute, the DOJ looks at five main factors: voluntary disclosure; cooperation; presence of a compliance program; the practice of condoning unlawful activity; and the scope and nature of subsequent compliance efforts.[152]

The EPA has also identified certain types of illegal corporate activity against which it intends to direct its enforcement efforts.[153] The factors that affect a decision as to whether or not to resort to criminal prosecution include:

1. the gravity and extent of any health or environmental impact (actual or potential) of the conduct in question;
2. the timeliness and degree of disclosure made to regulatory authorities;
3. the timeliness and degree of efforts made to control the problem or to mitigate its effects;
4. any history of recurrent or persistent violations by the corporation or a corporate image of "bad faith" or recidivism; and
5. evidence of intentional corporate noncompliance as a result of an informed policy decision.[154]

In general a characteristic, deliberate disregard for the law is most likely to precipitate enforcement action.[155] The specific types of egregious offenses named as priority items include: knowing endangerment of employees; repeated, similar offenses; false reporting or record keeping; and failure to obtain proper licenses and permits.[156] A carefully planned compliance

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[149] *Id.*

[150] U.S. Department of Justice, FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR, July 1, 1991, *reprinted in* James R. Moore, *Environmental Criminal Statutes: An Effective Deterrent?*, CRIM. ENFORCEMENT ENVTL. L. 137, 162 (1992).

[151] *Id.*

[152] *Id.*

[153] Norton F. Tennille, Jr., *Criminal Prosecution of Individuals: A New Trend in Federal Environmental Enforcement?*, ENVIRONMENTAL LAW (Spring 1987).

[154] *Id.*

[155] *Id.*

[156] Habicht, *supra* note 16 at 10,480.

program will ensure that a company avoids the types of egregious offenses that are priority items.

An environmental audit program is an extensive or rigorous self-evaluating, self-policing program that a business implements to ensure compliance.[157] According to the EPA, an environmental audit is "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."[158] Such a program should include the following:

1. a declaration by management that compliance with all applicable environmental laws and regulations is a top corporate priority;
2. the development of an internal reporting system to assure that "responsible officers" are fully informed as to the status of compliance with pollution control laws and regulations so that they can make the necessary efforts to achieve and maintain compliance;
3. the development of an external reporting system to assure corporate compliance with all reporting or disclosure obligations; and
4. establishment of educational programs for all relevant individuals, from the CEO down to affected low-level employees.[159] This might involve periodic classes or seminars on relevant regulatory requirements and corporate environmental policy manuals, all regularly updated.[160]

There is also a need for the creation of incentives that reward employee compliance efforts, as well as disciplinary actions against employees who violate environmental obligations.[161] Companies also need to make a strong commitment to continuing evaluation and upgrading of corporate environmental compliance and self-auditing programs in order to achieve the goal of strict compliance with environmental regulations.[162]

Regulated businesses are not required by law to develop or maintain audit programs.[163] A lack of mandatory regulation benefits both EPA and the regulated facility and its officers. A mandatory program would require the agency to commit much of its resources to developing and enforcing such

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[157] Daniel Riesel, *Criminal Enforcement and the Regulation of the Environment*, ENVTL. LITIG. 869, 909-10 (1993).

[158] Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,006 (1986) [hereinafter Policy Statement].

[159] James T. Banks et al., *Developing and Implementing an Environmental Corporate Compliance Program*, 107, 122 *in* CRIMINAL ENFORCEMENT OF ENVIRONMENTAL LAWS (ALI-ABA Course of Study) (Sept. 1992).

[160] *Id.*

[161] John F. Cooney et al., *Criminal Enforcement of Environmental Laws: Part III—From Investigation to Sentencing and Beyond*. 25 ENVTL. L. REP. 10600, 10601 (1995).

[162] *Id.*

[163] Policy Statement, *supra* note 158, at 25,007.

programs.[164] Instead, the EPA can channel its funds into prosecuting violators and remedying environmental damage caused by violations.[165] The benefit to business is the freedom to develop a program that will most closely fit the needs and specifications of that individual facility.[166] Given this freedom in the development of an audit program, the company has an incentive to create the most cost-efficient, and yet, compliance-effective program.[167]

In spite of all the benefits of self-auditing, some corporate officials have complained that such audits bring with them the risk of increasing their own personal exposure as well as exposure of the corporation to investigation, if not criminal prosecution, and that such risks act as disincentives to pursuing audit programs.[168] Because of these enforcement risks, the regulated community has sought enforceable guarantees that audit documents will not be used against the individuals or a company under any circumstances.[169] In an attempt to deal with this problem, the EPA has stated that it would consider good-faith efforts by regulated companies to identify and correct environmental violations, but it would not guarantee that documents would not be used against individuals or a company.[170] Rather, the EPA's position is that it "may exercise its discretion to consider such actions . . ."[171] EPA stated that it would not "routinely" request environmental audit reports; rather such reports would be requested on a case-by-case basis where the Government deems them material to a criminal investigation.[172]

The EPA clarified its policy on audits in 1994[173] when it stated that self-auditing and full disclosure should be considered as mitigating factors in an investigation and that the agency generally would not expend its scarce criminal investigative resources on violations that a company completely and quickly remedied as part of the corporation's self-evaluation program.[174] Even with this policy statement, the EPA reserved discretion and the regulated

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[164] George Van Cleve, *The Changing Intersection of Environmental Auditing, Environmental Law and Enforcement Policy*, 12 CARDOZO L. REV. 1215, 1221-22 (1991).

[165] Murnane, *supra* note 13, at 1198.

[166] *Id.* at 1199.

[167] *Id.*

[168] Cooney, *supra* note 161, at 10602.

[169] *Id.* at 10603.

[170] Policy Statement, *supra* note 158, at 25004.

[171] *Id.* at 25007.

[172] *Id.*

[173] Memorandum from Earl E. Devaney, Director, Office of Criminal Enforcement, to all EPA Employees Working in or in support of the Criminal Enforcement Program, The Exercise of Investigative Discretion (Jan. 12,1994) *quoted in* John F. Cooney, et al., *Criminal Enforcement of Environmental Laws: Part III—From Investigation to Sentencing and Beyond*, 25 ELR 10600, 10604 (1995).

[174] *Id.*

industry expressed the need for an audit privilege.[175] In March 1995, the EPA issued a revision of its audit policy that attempted to provide greater assurances to companies that wanted to maintain effective self-audit programs, without hindering the EPA's enforcement.[176] This policy sets forth the conditions a company must satisfy in order to enjoy the policy's two principal benefits - reduced civil penalties and nonreferral for criminal prosecution.[177] In particular, the violator must commit to rectify any harm, adopt measures to prevent future violations and cooperate with the regulator.[178] In addition, the EPA may require the violator to enter into a written agreement or consent decree to assure that the conditions are satisfied.[179] The policy also provides that the EPA will not refer a self-reported violation for criminal prosecution against the company unless the investigation shows a corporate practice of concealing or condoning environmental violations, high-level corporate involvement, blindness to the violation, or serious harm to human health or the environment.[180]

Current law and the policies regarding environmental auditing present many corporate officers with a dilemma: they fear that if they perform such internal invesigations in an attempt to fully comply with environmental regulations and reduce the long-term risks associated with environmental hazards, they may increase their short-term risks of successful criminal enforcement actions against them.[181] The EPA argues that a "credible enforcement program," and particularly the threat of criminal penalties, creates "a strong incentive for regulated entities to audit,"[182] but fails to acknowledge that traditional privileges and the assurances in policy statements are regarded by corporate officers as inadequate protections that counteract the positive incentives for environmental auditing created by increased enforcement.[183]

The EPA should revise its Environmental Auditing Policy Statement to provide industry with immediate reassurances and pro-auditing incentives.[184] The EPA should institute a legally binding policy that will prevent the

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[175] *Id.*

[176] U.S. EPA, Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement, 60 Fed. Reg. 16875 (Apr. 1995).

[177] *Id.* at 16877-78.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] Terrell E. Hunt & Timothy A. Wilkins, *Environmental Audits and Enforcement Policy*, 16 HARV. ENVTL. L. REV. 365, 400 (1992).

[182] Policy Statement *supra* note 158, at 25,007.

[183] Hunt & Wilkins, *supra* note 181, at 400.

[184] Murnane, *supra* note 13, at 1203.

criminal prosecution of companies with compliance programs if a good faith effort has been a proven element of the program.[185]

A comprehensive self-audit program involves documenting every aspect of a company's environmental compliance status, including violations and potential risks.[186] Without this information, a company will not be in a position to address its weaknesses and remedy current violations.[187] However, company officials are reluctant to document this information if there is the possibility it may be used against them in a criminal prosecution.[188] It is important for the government to remember that the long-term goal of the EPA is compliance with environmental regulations, not successful prosecution of corporate officials.[189] Once there is a binding guarantee that such records are protected when they are generated under a good faith audit program, there will be more incentive for corporate officials to authorize these rigorous self-evaluations.[190]

Additional incentives for self-audit could be provided by allowing the government to enact new and much higher penalties which would allow them to seek additional punitive damages for businesses and corporate officials it prosecutes where it can be proven that the violation would not have occured if the company had been using a comprehensive audit program.[191] Although possibly difficult to prove, this penalty would make corporate officers weigh the costs involved in implementing a self-audit program in a different light.[192] It would be more cost-effective to have a self-audit program than to incur the risk of such punitive damages.[193] These changes would increase the rate of self-audit by the regulated industry, increase compliance, and so create greater protection for the environment.[194]

VI. CONCLUSION

Congress enacted RCRA to protect public health and the environment.[195] In accordance with this goal, Congress declared a national policy of reducing

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[185] Hunt & Wilkins, *supra* note 181, at 400.

[186] Mary Ellen Kris & Gail L. Vannelli, *Today's Criminal Environmental Enforcement Program: Why You May Be Vulnerable and Why You Should Guard Against Prosecution Through an Environmental Audit*, 16 COLUM. J. ENVTL. L. 227, 240 (1991).

[187] *Id.*

[188] Hunt & Wilkins, *supra* note 181, at 398.

[189] *Id.* at 374.

[190] Murnane, *supra* note 13, at 1203.

[191] *Id.* at 1205.

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] 42 U.S.C.A. § 6902 (1982 & Supp. 1988).

or eliminating the generation of hazardous waste wherever possible.[196] In addition, hazardous waste should be treated, stored or disposed of in such a manner as to minimize the present and future threat to both human health and the environment.[197] RCRA ensures that this policy is carried out, but no amount of regulation will be effective without high levels of compliance.

Penalties such as fines were not effective deterrents.[198] Corporate officials regarded fines as just an added cost of doing business.[199] Only criminal prosecutions, with the very real threat of jail time, caused corporate officials to change their behavior and ensured compliance with RCRA.[200] In the cost-benefit analysis used by businesses in decision-making, the threat of criminal prosecution far outweighed the economic benefits of non-compliance.

In criminal prosecutions under RCRA, the courts have allowed the use of the RCO doctrine and lenient knowledge standards.[201] These powerful prosecution tools force corporate officers to be responsible or pay the price.[202] Imposing such a high duty of care on the individuals who have the power to ensure compliance with RCRA is an effective and much-needed deterrent. Industry's response to this deterrent, the implementation of self-audit programs will ensure continued compliance. The EPA must now provide the guarantees that industry needs so that information and documentation provided by a company's good faith self-audit program will not be used against it unless there is proof of bad faith or willful violation. Compliance is the most effective way to protect the environment and keep the public safe. But, the threat of criminal prosecution must remain a necessary deterrent. Without the threat of criminal prosecution it is unlikely that compliance will be achieved.

Maura M. Okamoto[203]

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196 *Id.*

197 *Id.*

198 Riesel, *supra* note 3, at 10,072.

199 *Id.*

200 *Id.*

201 Addison & Mack, *supra* note 4, at 1435.

202 Murnane, *supra* note 13, at 1186.

203 Class of 1997, William S. Richardson School of Law.

The Manoa Valley Special District Ordinance: Community-Based Planning in the Post-*Lucas* Era

When I was attending college in California, a group of friends and I were having dinner and someone asked, "If you could live anywhere in the world, where would it be?" There were answers like Paris, San Francisco, and Bali. My answer was Manoa Valley. Anyone who lives in Manoa knows why. It's as close to paradise as we can get.[1]

I. INTRODUCTION

Economic pressures, combined with high land and housing costs, have encouraged increased building density in previously underdeveloped older residential neighborhoods. This is true in both urban and suburban areas of the United States where severe price escalation occurred in the late 1980's.[2] Multi-story structures covering large areas of their respective lots have suddenly appeared in pre-war residential districts where smaller homes on landscaped plots had prevailed. Typically, the new structures conform with existing zoning codes which permit greater development than had been economically feasible before.[3] In response, community and neighborhood groups have sprung up, demanding that the existing character of their neighborhoods be preserved.[4]

In Honolulu, where housing costs are nearly three times the national average, such pressures have been especially strong.[5] The median value of a single family home on the island of Oahu more than tripled between 1980 and 1995, rising from $118,100 to $385,000.[6] Yet median family income on Oahu

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[1] Letter from Aubrey Hawk to THE HONOLULU ADVERTISER, Dec. 11, 1995, (Letters), at A11 [hereinafter Hawk].

[2] Clifford A. Pearson, *Coming: Housing that Looks Like America*, ARCHITECTURAL RECORD, Jan. 1995, at 84.

[3] Gerald D. Adams, *Planners Junk New Rules for Homes; Area Standards in Stripped-down Plan*, S.F. EXAMINER, Aug. 25, 1995, at A-25; Kandace Bender, *Home Expansions a Hot Issue*, S.F. EXAMINER, July 23, 1995, at B-1.

[4] *See, e.g.*, *Manoa Divided*, HONOLULU WEEKLY, Nov. 22, 1995, at 5 [hereinafter *Manoa Divided*]; MALAMA O MANOA, SUMMARY OF MANOA VALLEY SPECIAL DISTRICT PLANNING EFFORTS AND EVENTS, (April 14, 1995) (on file with author) [hereinafter MALAMA O MANOA].

[5] T.J. Becker, *1994 Home Prices*, S.F. EXAMINER, May 28, 1995 at E-6. According to Coldwell Banker surveys, Honolulu housing is 2.84 times the national sales price. *Id.*

[6] DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT, & TOURISM, STATE OF HAWAII DATA BOOK 466 (1993-94) [hereinafter DBEDT DATA BOOK]. Median value of single family Oahu home, 1980: $118,100; 1990: $245,000; 1995: $385,000. Telephone Interview with Honolulu Board of Realtors statistician (Jan. 15, 1996). Only five percent of Hawai'i's land

was only $45,313 in 1990, and the island's economy has been anemic since then.[7] Because Honolulu has the highest comparative annual living costs in the nation, it is not surprising that housing is crowded.[8] The physical isolation and cultural uniqueness of Hawai'i, as well as its high concentration of Asian and Pacific Islanders, militate against migration to the mainland for economic opportunities—living in extended or multi-generational family units is an accepted alternative.[9]

In Manoa Valley, one of Honolulu's oldest and most stately neighborhoods, a group of residents formed the preservation society, Malama O Manoa, in 1992 to "preserve, protect, and enhance the special qualities of historic Manoa Valley."[10] The valley is home to many buildings and sites that are architecturally or culturally significant in the history of Honolulu.[11] Membership in this community organization has grown to include 3350 individuals of the nearly 6000 households in the district.[12] Through a series of community design workshops, Malama O Manoa has devised its own zoning ordinance amendment for a "special district."[13] In January 1995, this amendment was submitted for review to the county's planning department for eventual incorporation into the county's Land Use Ordinance ("LUO").[14] Many Malama members share the view expressed in the above quoted letter: "Complacency and selfishness are already eroding lovely Manoa. If we don't act now to preserve the valley, bit by bit we'll see paradise paved over."[15]

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is zoned "urban" by the state, that is, suitable for extensive residential or other non-agricultural development. DBEDT DATA BOOK 159. The complexity and slowness of zoning redesignation prevents a quick supply-side response to the shortage of developable land. DAVID CALLIES, PRESERVING PARADISE 57-79 (1994).

[7] DBEDT in cooperation with the SEATTLE REGIONAL OFFICE OF THE U.S. BUREAU OF THE CENSUS, CENSUS '90 (Nov. 1993) [hereinafter CENSUS '90].

[8] DBEDT DATA BOOK, *supra* note 6, at 341, (tbl. 14.13 *Comparative Annual Living Costs*).

[9] Many Americans of Japanese Ancestry (AJA's) live in multi-generational families: there are 9,520 AJA's in Manoa. Mark Santoki, *Manoa Lost? Special Ordinance Debate Divides Community*, THE HAWAII HERALD, Aug. 4, 1995, at 1. Asian and Pacific Islanders are approximately 60% of the state's population. CENSUS '90. Nonetheless, the year ending July 1995 saw 1.4% of Oahu's population migrate to the mainland. *Thousands Quit Oahu for Better Shot at Jobs*, THE HONOLULU ADVERTISER, March 17, 1996, at A1.

[10] MALAMA O MANOA, *supra* note 4. According to Multiple Listing Service statistics on Zone 2 Sect. 9, encompassing Manoa, the median sales price of a single family house was $575,000 in 1995. Telephone Interview with Honolulu Board of Realtors statistician (Jan. 15, 1996).

[11] CHARLES BOUSLOG ET AL., MANOA: THE STORY OF A VALLEY 4-26 (1994).

[12] *Manoa Divided*, *supra* note 4, at 5; MALAMA O MANOA, 1995 membership application.

[13] *See* discussion of special districts *infra* part II.

[14] Beryl Blaich, *Explaining the Planning Workshops History and Purpose*, MALAMA O MANOA, Aug. 1995, at 2.

[15] Hawk, *supra* note 1, at A11.

Opponents claim that a historic designation for the Valley would destroy property values and unnecessarily restrict property rights.[16] Moreover, as another writer to the Honolulu Advertiser observed:

> Changing socio-economic conditions have forced many residents to expand their homes, not for profit, but out of necessity. Is it selfishness that compels parents to provide space for children who can't afford to purchase homes? . . . Manoa is much more than old architecture, greenery and open spaces. Our valley is special because of the importance residents place on family and community.[17]

Clearly the fissures opened in the Valley represent conflicting values and visions for the future. Nonetheless, this article focuses on the underlying legal implications of the proposed ordinance change, rather than the broader social policy implications. Part II explains the special district designation under the Honolulu LUO. Part III analyzes the proposed special district ordinance for Manoa Valley, and its comparative relationship to the existing zoning. Part IV tests the legality of the proposed ordinance's component parts in the face of allegations of property rights violations, and suggests some procedural means to avoid potential violations. Finally, the conclusion notes proposals to make the ordinance more palatable, and reflects on the viability of the community-based planning that generated it.

II. SPECIAL DISTRICTS IN THE HONOLULU LAND ORDINANCE

State enabling legislation grants Hawaiian counties zoning power to regulate residential and other uses, as well as building height, bulk, setbacks, and lot coverage.[18] The counties are also granted the power to restrict or prohibit activities along natural watercourses and streams.[19] These are traditional zoning exercises of the police power, utilized by local governments (since Supreme Court approval 70 years ago) to regulate for the public health, safety, and welfare.[20] The state's enabling act also confers power to zone

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[16] *Manoa Divided, supra* note 4, at 5; Santoki, *supra* note 9, at 1; Mary Adamski, *Manoa Families at Odds Over Special District,* HONOLULU STAR BULLETIN, Dec. 7, 1995, at A3.

[17] Letter from Mike Yamamoto to THE HONOLULU ADVERTISER, Dec. 16, 1995, (Letters), at A6.

[18] HAW. REV. STAT. ("HRS") § 46-4(a) (1993). "Zoning in all counties shall be accomplished within the framework of a long range, comprehensive general plan . . . . Zoning shall be one of the tools available to the county to put the general plan into effect in an orderly manner." *Id.*

[19] *Id.* Note that Hawai'i has no municipal governments—the county and city functions are coterminous, thus the appellation "City and County of Honolulu." Consequently, "O'ahu" (the county and island) and "Honolulu" (the nominal city) are used interchangeably.

[20] *See generally* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

areas in which uses may be subjected to "special restrictions,"[21] and the "designation of uses for which buildings and structures may not be used or altered."[22] Despite the vague enabling language, the Honolulu City Council has enacted ordinances establishing "special districts" (beginning with the "Hawaii Capital Special District" in 1972-73) in order to "guide development to protect and/or enhance the physical and visual aspects"[23] of "certain areas . . . in need of restoration, preservation, redevelopment or rejuvenation."[24]

Special districts are essentially overlay zoning. The underlying zoning regulations are preserved with an overlay of modifying or additional requirements unique to the special district. Requests for special district designation in Honolulu are processed by the director of the Department of Land Utilization ("DLU") who, after review by himself and the agency, submits a proposed ordinance to the Planning Commission.[25] The Commission, in turn, holds a public hearing and transmits its recommendations, and the director's report, to the City Council.[26] The Council holds another public hearing and either rejects, modifies, or approves the ordinance.[27]

Requests for special district designation have traditionally been made at the direction of the city administration or the City Council.[28] They have also resulted from state or federal action.[29] While citizen groups were instrumental in providing the impetus for the creation of special districts in Hale'iwa and Diamond Head, the ordinances themselves were generated internally by the Planning Department.[30] Malama O Manoa is the first community group to generate its own proposed special district ordinance for insertion in the LUO, essentially usurping the traditional function of the Planning Department.[31]

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[21] HAW. REV. STAT. § 46-4(a)(4).

[22] *Id.* § 46-4(a)(5).

[23] HONOLULU, HAW., LAND USE ORDINANCE ("LUO") § 7.20 (1995).

[24] *Id.* Zoning under HRS § 46-4 must be by ordinance; LUO § 8.30-2 provides that the City Council shall approve or deny proposed special district ordinances.

[25] HONOLULU, HAW., LAND USE ORDINANCE § 8.30-2(a)&(b) (1995).

[26] *Id.* § 8.30-2(b).

[27] *Id.* § 8.30-2(c). The process is identical in all respects, other than the timeline, to ordinary zoning changes under LUO § 8.30-3.

[28] Telephone Interview with John Whalen, AICP, former Department of Land Utiliation ("DLU") director (Feb. 29, 1996).

[29] *Id.* The Capitol District was generated by the state's concerns; the Chinatown District the result of federal placement of the area on the National Register of Historic Places. *Id.*

[30] *Id.*

[31] Bob Krauss, *Face-off Time for Divisive Manoa Plan*, THE HONOLULU ADVERTISER, Dec. 6, 1995, at A4. It should be noted that Malama O Manoa has enlisted the aid of many qualified professionals, not the least of whom is John Whalen, the former director of the DLU.

If approved, the Manoa Valley Special District Ordinance ("MVSDO"), like other special districts, will modify or supplement the underlying residential and commercial zoning district regulations.[32] In other words, applicants for a building permit will need to meet all the normal requirements of the LUO in addition to the special district requirements. Within a special district, projects are classified as either "major," "minor," or "exempt."[33] Major permits are intended for projects which may significantly alter the character of a district; minor permits are for those of limited impact; exempt projects are assumed to have so little impact as to require no review beyond that required by the underlying zoning regulations.[34] Of course, major, minor, and exempt are defined by each special district ordinance in accordance with the fundamental purposes of the district.[35]

Major and minor projects require a Special District Permit.[36] The former require only the DLU director's approval, while the requirements for the latter are significantly more burdensome.[37] Even before submission of an application to the DLU, an applicant for a major permit must meet with the local neighborhood board and give notice to all adjacent property owners.[38] After acceptance of the application, the DLU director holds a public hearing and forwards the application to the Design Advisory Committee which may modify, approve, or reject it.[39] This committee consists of seven members—all design professionals—and includes an officer from the State Office of Historic Preservation in the Department of Land and Natural Resources ("DLNR").[40] The Committee's recommendation is considered by the DLU director, who has final authority to grant the request.[41] A denial must be accompanied by reasons in writing.[42]

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[32] HONOLULU, HAW., LAND USE ORDINANCE § 7.20-1 (1995).

[33] *Id.* § 7.20-2.

[34] *Id.*

[35] *See id.* §§ 7.20, 7.30 - 7.90.

[36] *Id.* § 8.30-5 (minor projects) and *id.* § 8.30-8 (major projects).

[37] *Id.*

[38] *Id.* § 8.30-8(a). The notification requirements are not nearly as severe as many California cities, however. The Palo Alto Planning Code, for example, requires notification of all residents within a 300 ft. radius for a simple variance. PALO ALTO, CAL., MUNICIPAL CODE § 18.90.030.

[39] HONOLULU, HAW., LAND USE ORDINANCE § 8.30-8(b)&(c) (1995).

[40] *Id.* § 7.20-5. The DLNR is the state zoning agency which may designate landmarks through the State Office of Historic Preservation. According to John Whalen, the state officer's recommendation carries significant weight with the other committee members and the DLU director because many major permits are for historic or landmark properties. Telephone Interview with John Whalen, AICP, former DLU director (Feb. 26, 1996).

[41] HONOLULU, HAW., LAND USE ORDINANCE § 8.30-8(c) (1995).

[42] *Id.*

As indicated in Part III, major permits would apply to only a handful of buildings under the MVSDO. Minor permits, though more numerous, entail only a 45 day administrative review.[43] *All* building permits would be subject to the special district development standards modifying the underlying zoning for residential, commercial, or apartment districts as part of their normal review, but there are no additional permit review procedures.[44]

Despite the lack of additional procedural hurdles for most applications, opposition to the ordinance has been vocal. Consideration of the draft of the proposed ordinance submitted to the DLU in January 1995 was deferred indefinitely largely due to opposition expressed in two petitions to the agency.[45] Not surprisingly, this opposition has focused on the zoning changes themselves, rather than procedural aspects of the ordinance. Therefore, in the next part, the differences between the existing and proposed regulations will be contrasted.

III. A COMPARATIVE ANALYSIS OF THE PROPOSED MANOA SPECIAL DISTRICT ORDINANCE AND THE EXISTING LUO

Like all other Honolulu special district ordinances, the "final" draft of the MSVDO contains a section on the purposes of the ordinance and the overall objectives of the district.[46] Presumably, this section establishes the need for regulation beyond the existing zoning, affirms consistency with the state's enabling act, and establishes a rational basis.[47] The objectives include: preserving significant views; preserving buildings of significant historic, cultural, or architectural significance; preserving trees and mature landscaping; providing for safe pedestrian and vehicular movement; and minimizing stormwater runoff and pollution of Manoa Stream by limiting coverage of land by structures and paving.[48] Only the latter two objectives

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[43] *Id.* § 8.30-5.

[44] Honolulu, Haw., Manoa Valley Special District Ordinance, Final Draft with Annotations (Oct. 1, 1995) [hereinafter MVSDO]; MVSDO § 7.100-8 annots.

[45] Blaich, *supra* note 14, at 2. Six hundred names were gathered for a petition against adoption. Krauss, *supra* note 31, at A4.

[46] *See generally* HONOLULU, HAW., LAND USE ORDINANCE §§ 7.20, 7.30 - 7.90 (1995), and MVSDO, *supra* note 44, annots.

[47] Rational basis review is the lowest level of judicial scrutiny applied to legislation for the public health, safety, and welfare. *See* discussion *infra* part IV.A.

[48] MVSDO, *supra* note 44, § 7.100-1. "The purpose of the Special District is not only to protect the beauty of [Manoa Valley's] features, but also to prevent the adverse effects of stormwater runoff resulting from extensive paving and building coverage." *Id.* at annot.

can firmly be described as protecting the health or safety—as opposed to welfare—of the public.[49]

The MVSDO provides for the modification of the existing development standards for residential, apartment, and commercial districts in Manoa.[50] The existing district standards apply island-wide; district designation is largely a function of lot size rather than location, particularly for residential districts.[51] The MVSDO would largely remove Manoa from this scheme.

A. Residential Districts

Residential districts in Honolulu are intended for detached residences of one or two units (with ohana units of up to 1000 sq. ft. also permitted).[52] Residential districts in Manoa include R-10 (minimum lot size of 10,000 sq. ft.), R-7.5 (7,500 sq. ft.), and R-5 (5,000 sq. ft.).[53] The average lot size in Manoa is 7,500 sq. ft.[54]

Existing zoning standards require a minimum front yard of 10 ft. in all the above districts and a 5 ft. side yard.[55] Owners of corner lots are free to choose which street frontage is a "side" yard requiring only the 5 ft. setback. The proposed standard would establish minimum front yards of 15 and 20 feet, or 15-20% of lot depth on enumerated streets to conform with existing conditions.[56] Hardship exceptions for shallow lots permit the underlying 10 ft. front yard and garages within the setback where topography or existing

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[49] *See* discussion of the requirement that zoning ordinances have a substantial relation to public health, safety, welfare, or morals *infra* part IV.B.1. Since the U.S. Supreme Court questioned the validity of artful, harm-preventing justifications for land-use ordinances in the *Lucas* decision, a health or safety rational has been preferred over one that is welfare-based. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1026 n.12 (1992).

[50] *Id.* §§ 7.100-4, 7.100-5. The University of Hawai'i at Manoa is exempt from the MVSDO, although technically in an R-5 district. It is regulated as a Planned Review Use, a sort of floating zone. Telephone Interview with John Whalen, AICP, former DLU director (Feb. 29, 1996).

[51] HONOLULU, HAW., LAND USE ORDINANCE, tbls. 5.7-B to 5.11-D (1995).

[52] *Id.* § 5.40. Ohana units are accessory units to a single family dwelling intended to accommodate extended family living. *Id.* § 6.20. *'Ohana* is Hawaiian for "family" or "relative." MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 254 (1979). The mainland equivalent of the ohana unit is the "mother-in-law" apartment or "granny flat."

[53] HONOLULU, HAW., LAND USE ORDINANCE, tbls. 5.7-B & 5.8-B (1995). R-7.5 and R-5 indicated minimum lot areas are for single-family detached residences. Two-family detached dwellings require larger lot areas. *Id.*

[54] MVSDO, *supra* note 44, § 7.100-4 annots.

[55] HONOLULU, HAW., LAND USE ORDINANCE, tbls. 5.7-B & 5.8-B (1995).

[56] MVSDO, *supra* note 44, § 7.100-4.

structures prevent compliance.[57] These standards would maintain the character of major streets, such as Manoa Road, where deeper setbacks have been the traditional pattern.

The MVSDO would add floor area ratio ("FAR") limitations to residential districts for the first time in the LUO. Presently, building bulk on a residential lot is limited only by the lot coverage, height limit, and setback standards noted above.[58] An FAR is the ratio of the floor area of building to the lot area of the subject property; its purpose is to regulate bulk. The Manoa FAR would be "0.8 minus 0.4 sq. ft. of floor area for each square foot of lot area above 3,500 square feet."[59] In other words, the typical 7,500 sq. ft. Manoa lot would permit a residence of 4,400 sq. ft. Note the average house in Manoa is approximately 2,500 sq. ft., so this leaves plenty of room for ordinary expansion.[60] A little math, however, reveals that this bulk formulation represents significant downsizing for the average 7,500 sq. ft. lot in an R-7.5 or R-5 district. Because the existing LUO permits 50% lot coverage in all residential districts and the height setback formula easily allows for three story structures, one could conceivably build a 7,500 sq. ft. house on the average lot!

Currently, fences or walls of up to 6 feet are permitted in front yards.[61] The proposed ordinance would limit the height to 3-1/2 feet of solid wall, and the remaining 2-1/2 feet to permeable lattice or slats (but no chain link).[62] This restriction is intended to prevent a continuous visual barrier along the street.[63] Another important restriction of the MVSDO is a ban on paved parking areas in front yards, except when there are no reasonable alternative locations.[64] While one might assume that the impetus for the change is driven by aesthetic

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[57] *Id.* § 7.100-4 annots. Permits for non-complying garages would require an LUO § 5.40-1 "Zoning Adjustment."

[58] HONOLULU, HAW., LAND USE ORDINANCE, tbls. 5.7-A to 5.8-B (1995).

[59] MVSDO, *supra* note 44, § 7.100-4(B). FAR's are normally expressed as a number, for example 1.4 or 2.0. The LUO's penchant for obtuse building density formulas, however, continues in the MVSDO: the MVSDO formula is a *declining* FAR for properties over 3500 sq. ft. In other words, the smaller one's lot, the bulkier the structure that one can build relative to the size of the lot. This prevents the apparent windfall to large lot owners that would occur under a "flat" FAR.

[60] MVSDO, *supra* note 44, § 7.100-4(B) annots.

[61] HONOLULU, HAW., LAND USE ORDINANCE § 3.30(d) (1995).

[62] *Compare* MVSDO § 7.100-4(A) *with* LUO § 3.30.

[63] MVSDO, *supra* note 44, § 7.100-4 annots. The walled streetscape is common in Kahala, another wealthy Honolulu neighborhood, with a pattern of development Malama O Manoa members often privately disparage.

[64] MSVDO, *supra* note 44, § 7.100-4(A)5.

concerns, the comments to the ordinance emphasize the need to minimize stormwater runoff throughout the valley.[65]

The proposal *does* grandfather nonconforming structures and, unlike the existing LUO, such structures may be reconstructed on the same building footprint.[66] Non-residential structures in residential districts would be expected to respect the residential character of the surrounding neighborhood by conforming to all the development standards indicated above.[67] Further, residential district dwellings of one or two units are classified as "exempt" from special district permit procedures; i.e., new or remodeled homes need only go through the standard permit review procedures established for Honolulu generally.[68] Fences and walls, however, are subject to the 45 day administrative review procedures as a minor permit, if within a front yard along a major street.[69]

B. Commercial and Apartment Districts

Commercial districts permit business activities to include those as diverse as retail establishments, schools, gas stations, and theaters.[70] In contrast to the residential development standards,[71] the proposed B-1 neighborhood business district development standards *waive* the front yard requirement.[72] Nineteenth and early twentieth century commercial districts generally located storefronts directly on the sidewalk; shopping was largely a pedestrian undertaking. Manoa's older commercial buildings, especially along East Manoa Road, retain this pedestrian character, including such features as overhanging canopies (also not allowed under current standards).[73]

New architectural character requirements specifically include providing display windows in commercial buildings located at the sidewalk, and generally, architectural compatibility with adjacent buildings.[74] Awnings would be permitted.[75] No more than 50% of the street frontage of buildings

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[65] *Id.* § 7.100-4(A)5 annots.

[66] *Id.* § 7.100-4(C); HONOLULU, HAW., LAND USE ORDINANCE § 3.120 (1995).

[67] MVSDO, *supra* note 44, § 7.100-4(D). "The architectural design of non-residential structures . . . shall respect and reflect the residential character of surrounding uses." *Id.*

[68] *Id.* § 7.100-8 and annots. "[N]ew or remodeled homes in Manoa will not have to go through more permit review procedures than houses anywhere else in Honolulu." *Id.* at annot.

[69] *Id.*

[70] HONOLULU, HAW., LAND USE ORDINANCE § 5.80 (1995).

[71] *See* discussion *supra* part III.A.

[72] MVSDO, *supra* note 44, § 7.100-5(A).

[73] *Id.* § 7.100-5 annots. Manoa's older commercial buildings typically have display windows with canopies overhanging the sidewalk. *Id.*

[74] *Id.* § 7.100-5(B).

[75] *Id.*

in these districts could be dedicated to parking.[76] Of course, these standards are consistent with current mainstream planning principles.[77]

Apartment districts permit multi-family dwellings of more than two units.[78] Currently, apartment buildings in Manoa are located in A-1, low density apartment districts. In the MVSDO, the construction of apartment buildings of more than six units, and other buildings or additions of over 10,000 sq. ft., are to be classified as major permits.[79] As indicated above, this entails a public hearing and review by the Design Advisory Committee.[80]

Public infrastructure design standards are also modified in the MVSDO.[81] Rather than continuing to require the spot application of modern standards and materials, street widths and sidewalks would be improved to standards equivalent to existing conditions.[82] Consequently, narrower streets and sidewalks would be permitted; the latter may even be eliminated when absent from adjacent properties.

C. Landscaping

The MVSDO also calls for the landscaping of those front yard areas not permitted to be paved.[83] The LUO defines landscaping as "a maintained area of which a minimum of 50 percent shall be devoted exclusively to plants which are rooted directly in the ground . . . [t]he remaining 50 percent may be devoted to rock gardens, fountains, and reflecting pools."[84] Current Honolulu standards generally do not require landscaped front yards, with the exception of other special districts such as Diamond Head or Punchbowl.[85]

A tree with a trunk diameter of more than 24 inches, or a tree with a diameter of more than 12 inches located within 25 feet of a street or park, may

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[76] *Id.* § 7.100-5(C).

[77] *See, e.g.*, ANDRES DUANY, TOWNS AND TOWN MAKING PRINCIPALS (1992), a bible for modern planners. The underlying LUO remains, in many respects, a remarkably *retardataire* document. Indeed, Hawai'i is a bastion of 1960's era auto-dependent, suburban-style planning. Thus, the planned O'ahu "second city," Kapolei, resembles more the 1960's new towns of Reston, Va. or Columbia, Md. than the currently favored neo-traditional town planning created by Duany at influential Seaside, Fla.

[78] HONOLULU, HAW., LAND USE ORDINANCE § 5.50 (1995).

[79] MSVDO, *supra* note 44, § 7.100-8.

[80] HONOLULU, HAW., LAND USE ORDINANCE § 8.30-8(c) (1995).

[81] MSVDO, *supra* note 44, § 7.100-6 and annots.

[82] *Id.* "The purpose of these provisions is to retain the basic design and materials for Manoa's streets. The spot application of modern standards and materials does not improve conditions but detracts from the visual character of the street." *Id.* at annot.

[83] *Id.* § 7.100-7(A).

[84] HONOLULU, HAW., LAND USE ORDINANCE, art. 9 Definitions (1995).

[85] *Id.* §§ 7.40-4(a) & 7.50-4(e).

not be removed unless dead, diseased, or a hazard to public health and safety.[86] A minor permit is necessary before removal, and the DLU director may require a small replacement tree.[87] Similar restrictions already exist in other special districts.[88]

D. Demolition and Other Restrictions

The MVSDO lists prominent scenic and cultural resources so that they may be protected. Among these are Manoa Valley Theater, Punahou School, St. Francis Convent, Manoa Chinese Cemetery, Lyon Arboretum, Manoa Stream, and various views of parks, valley walls, and the ocean.[89] Demolition of the enumerated *structures* and campus buildings eligible for the Hawaii Register of Historic Places is prohibited without a major permit.[90] It is not clear from the draft ordinance which procedures will be utilized to protect *views*; view obstruction might only be controlled when a major permit is otherwise required.

In sum, in order to meet its preservation goals, the MVSDO reduces allowable development relative to the existing LUO. As the above analysis suggests, the impact of this reduction may be disparately felt depending on the conditions of any given lot. However, as the next part will indicate, neither reduced development potential, nor disparate impact alone, will invalidate an otherwise sound ordinance.

IV. IS THE ORDINANCE CONSTITUTIONALLY INFIRM?

Opponents of the ordinance have alleged that it would impinge upon property rights and diminish property values. Given the vocal opposition generated by the proposal, it is certainly possible that, should the City Council approve the MVSDO in its present form, opponents will mount legal challenges to the ordinance. These challenges would likely take the form of either facial challenges to the constitutionality of the ordinance or its component parts, or challenges to the ordinance as applied to a particular set of conditions. Since one may assume that at least some of the ordinance is valid, I will analyze each of the major component parts for its constitutional firmness, whether under an applied or facial challenge.

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[86] MVSDO, *supra* note 44, § 7.100-7(B) and annots.

[87] *Id.* § 7.100-7(C).

[88] *See, e.g.*, HONOLULU, HAW., LAND USE ORDINANCE § 7.40-4(a)(8) (1995) (requiring the replacement of trees six inches or greater in diameter in the Diamond Head district that have been removed from public view).

[89] MVSDO, *supra* note 44, § 7.100-3.

[90] *Id.* § 7.100-8.

A. Background Legal Principles

Challenges to land use regulations are grounded in the Fifth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, which states that "[n]o person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."[91] The component due process and takings clauses provide the basis for challenges alleging procedural and substantive due process claims on the one hand, and compensable takings claims on the other.[92] Traditionally, challenges to zoning regulations were due process challenges aimed at the exercise of the police power, ending in invalidation of the ordinance where successful.[93] Compensable takings were aimed at the exercise of the power of eminent domain, despite Oliver Wendell Holmes' famous words in *Pennsylvania Coal v. Mahon*: "[W]hile property may be regulated to a certain extent, if a regulation goes too far, it will be recognized as a taking."[94] Following the Court's affirmation of compensable *regulatory* takings in the *First English*[95] decision of 1987, and the perceived higher standard of review for regulatory takings in the *Nollan*[96] decision of the same year, challenges to land use regulations based on the takings clause have become *de rigueur*.

In addition to the limitations of an injunctive relief remedy, a substantive due process claim is only subject to rational basis review by the courts.[97] Invalidation under rational basis occurs where a city could not have rationally decided that a regulation could achieve its stated purpose and therefore acted in an arbitrary and capricious manner.[98] Moreover, legislative acts such as the enactment of a land use ordinance are presumptively valid, leaving the challenger with the burden of establishing that an ordinance is arbitrary or unreasonable.[99] As indicated above, the MVSDO has been carefully crafted

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[91] U.S. CONST. amend. V.

[92] John J. Delaney, *What Does It Take to Make a Take?*, 27 URB. LAW. 55, 56 (Winter 1995).

[93] *Id.* at 57.

[94] *Id.* (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

[95] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). The Court held that "temporary" takings which deny an owner all use of property—other than normal delays—are also takings requiring compensation. *Id.* at 318-21.

[96] Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). *See* discussion of *Nollan* facts and holding *infra* note 112.

[97] Delaney, *supra* note 92, at 65.

[98] *Id.*; Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); Hans Hoek v. City of Portland, 57 F.3d 781, 786 (9th Cir. 1995).

[99] Lum Yip Kee, Ltd. v. City of Honolulu, 70 Haw. 179, 187, 767 P.2d. 815, 820 (1989).

to enumerate a health, safety, or welfare basis for its various requirements, with the emphasis on health or safety wherever plausible.[100] Substantive due process challenges to the ordinance must overcome generations of judicial decisions deferential to the determinations of public officials and legislative bodies regarding what constitutes good planning.[101]

To defeat a procedural due process claim, a governmental entity need only show that notice and an opportunity to be heard at a meaningful time and in a meaningful manner were provided before the deprivation of even a significant property interest.[102] The procedures for enactment and enforcement of the special district outlined above, the opportunities for a hearing through the standard LUO appeals and variance process, and the constructive notice provided by the neighborhood workshops would seem to eliminate procedural due process challenges except in extraordinarily irregular individual circumstances.

In short, due process challenges are difficult to sustain. Fifth Amendment regulatory challenges, on the other hand, have been more successful. Consequently, the remainder of this article will focus on the latter.

B. Facial Attacks on the MVSDO in General

In most respects the MVSDO is a typical zoning ordinance overlaying or substituting certain of its provisions for the existing zoning. A landowner has no vested right in an existing zoning classification absent a building permit.[103] Therefore, a Manoa owner without a permit must invalidate the overlay zoning in order to preserve the development rights he had in the former, now underlying, zoning.

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[100] *See* MSVDO, *supra* note 44, § 7.100 annot. (stating that the purpose of the ordinance section is to prevent adverse effects from stormwater runoff); *id.* § 7.100-5 annot. (stating that the proposed standards will promote small business and reduce traffic congestion).

[101] *See* Jerold S. Kayden, *Land-Use Regulations, Rationality, and Judicial Review: The RSVP in the Nollan Invitation*, 23 URB. LAW. 301, 302-07 (Summer 1991).

[102] Mathews v. Eldridge, 424 U.S. 319, 333 (1974); Sandy Beach Defense Fund v. City Council of Honolulu, 70 Haw. 361, 378, 773 P.2d. 250, 261 (1989) (finding no violation of constitutional due process when a legislative body, otherwise exempt from the Hawai'i Administrative Procedures Act, fails to conduct a "contested case" hearing before issuing a Special Management Area use permit).

[103] *See* Hadachek v. Sebastian, 239 U.S. 394, 410 (1915); Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 297 (1981); *cf.* Denning v. County of Maui, 52 Haw. 653, 659, 485 P.2d 1048, 1051 (1971) (finding that a "mere good faith expectancy" that a permit will be issued fails to establish a right to build).

1. Levels of review and substantial relation

A comprehensive zoning ordinance was first upheld by the Supreme Court against a facial constitutional challenge in *Village of Euclid v. Ambler Realty Co.* in 1926.[104] The ordinance allegedly reduced the value of the owner's industrial property by zoning it residential.[105] In addition to prescribing permissible uses, the Euclid zoning ordinance also prescribed building heights, lot sizes, setbacks and yard requirements.[106] While Euclidian use hierarchies have fallen from favor, the Euclid ordinance is the direct ancestor of modern zoning ordinances, including the LUO and MVSDO.

In *Euclid* the Court laid out the standard for judging provisions of zoning ordinances thereafter: "[B]efore the ordinance can be declared unconstitutional . . . [its] provisions are [to be] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[107] Although the Court did not indicate how substantial the relation of the regulations to public health, safety, or welfare must be, subsequent decisions have asserted a deferential, rational basis review of legislative bodies' determinations in land use planning.[108] Thus, ordinances were presumed valid, except when lacking any rational or reasonable basis related to the public interest.[109]

In *Agins v. Tiburon*, a 1980 facial takings challenge to a California town's new zoning ordinance, the Supreme Court shifted from the "substantial relation" standard to an arguably higher standard: "The application of a general zoning law to a particular property effects a taking if the ordinance does not *substantially advance* legitimate state interests *or* denies an owner economically viable use of his land."[110] Nonetheless, the Court upheld the Tiburon ordinance, despite an alleged diminution in the value of the property owner's land, finding that a legitimate state interest in limiting density and preserving scenic beauty was substantially advanced by the ordinance.[111]

In *Nollan v. California Coastal Commission*, the Court reasserted the "substantial advancement" standard, stating flatly: "We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, not that 'the State '*could rationally have decided*' that the measure

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[104] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[105] *Id.* at 384.

[106] *Id.* at 381-82.

[107] *Id.* at 395.

[108] *See* Kayden, *supra* note 101, at 304-06.

[109] *Id.* at 308.

[110] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)(emphasis added). *See* discussion of *Agins* factual context *infra* part IV.B.2.

[111] *Id.* at 261.

adopted might achieve the State's objective."[112] The facts of *Nollan* were such that the state's regulation was not even rationally related to the asserted state interest,[113] so the meaning of "substantially advance" remains somewhat of a mystery.[114] Regardless, Justice Scalia, the author of the opinion, cited three cases as examples when he wrote:

> Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter. They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements. See *Agins v. Tiburon* (scenic zoning); *Penn Central Transportation Co. v. New York City* (landmark preservation); *Euclid v. Ambler Realty Co.* (residential zoning).[115]

Moreover, Scalia noted that, in the *Nollan* factual context, height and width restrictions or a fence ban would satisfy the substantial advancement test.[116] Thus he would seem to have affirmed the substantial advancement viability of a broad range of land use regulations in addition to this handful of specific types of regulation.

In the Court's other famous takings case involving a dedication, *Dolan v. City of Tigard*, Chief Justice Rehnquist's majority opinion acknowledged the *Agins* substantial advancement standard.[117] Yet he distinguished *Dolan* by concluding that *Agins* (finding no taking) involved legislative decision-making and limitations on use of the property, while *Dolan* (suggesting a taking) involved adjudicative decisions resulting in the deeding of property to the city of Tigard.[118] The Court also noted that, with respect to generally

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[112] Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-35 n.3 (1987) (citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981)).

[113] In exchange for a permit to replace a small beachfront bungalow with a larger house, the Coastal Commission required a lateral, public easement across the Nollans' beach, ostensibly to preserve good visual access from the road (and to overcome a "psychological" barrier to using the beach). *Id.* at 827-28. Because the view of the beach from the road was blocked by houses anyway, there was no rational relationship between the permit requirement and the asserted state interest. *Id.* at 835-37.

[114] Kayden, *supra* note 101, at 301, 330.

[115] *Nollan*, 483 U.S. at 834-35 (citations omitted).

[116] *Id.* at 836.

[117] Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994). In *Dolan*, Tigard had conditioned approval of Dolan's application to expand her store and pave a parking lot on the dedication of land along an adjacent creek for a public greenway and pedestrian/bicycle path. While the Court found that the permit conditions served legitimate public purposes—preventing flooding and reducing traffic condition—the Court also found that Tigard had failed to show that the permit conditions were "roughly proportional" to the impact that Dolan's project would have. *Id.* at 2317-18, 2321. *See* discussion of the *Dolan* test *infra* part IV.C.2.

[118] *Id.* Note that both *Nollan* and *Dolan* can also be distinguished as essentially involving physical invasions of property, requiring compensation regardless of how small the intrusion

applicable zoning ordinances, the burden of proving that a regulation is arbitrary rests on the challenging party.[119] Thus it appears that, despite *Nollan*, legislative determinations of land use regulations will continue to be afforded great deference.[120]

2. *Denial of economically viable use*

Given that the MVSDO easily fits within the zoning types the Court had approvingly recognized in *Nollan* (it is, after all, a combination of use, scenic, and preservation zoning), passage by the City Council all but immunizes it from a facial challenge alleging a substantial relation or substantial advancement deficiency. Under *Agins*, however, once the substantial advancement test is dispensed with, "[t]he test to be applied in considering [a] facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land . . . .'"[121]

In *Agins*, the city of Tiburon had modified its existing zoning with a new ordinance that restricted development to one single family residence per acre, in order to preserve open space for various ecological and aesthetic reasons.[122] Yet because economically viable use obviously remained, there was no taking.[123] The Court also expressed its often repeated belief that a zoning ordinance is fair despite a diminution in property values when the owner "will share with other owners the benefits and burdens of the city's exercise of its police power."[124]

The meaning of a total or *per se* taking that results when an owner is denied all economically beneficial use by a regulation was clarified by the U.S.

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under Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). The California Supreme Court, however, recently found that non-possessory, monetary exactions may also be takings under *Dolan* if imposed in an individual, ad hoc manner. Ehrlich v. City of Culver City, 911 P.2d 429, 442-47 (1996). *See generally* Daniel J. Curtin and Adam U. Lindgren, *Impact Fees After Dolan - Ehrlich v. City of Culver City*, 19 STATE & LOCAL NEWS 4 (Summer 1996).

[119] *Dolan*, 114 S. Ct. at 2320 n.8.

[120] Otto J. Hetzel and Kimberly A. Gough, *Assessing the Impact of Dolan v. City of Tigard on Local Government's Land-Use Powers*, *in* TAKINGS 219, 237 (David L. Callies, ed., 1996). Despite finding that *individualized* monetary exactions are subject to *Dolan* heightened scrutiny, the California Supreme Court in *Ehrlich* found an art fee exaction constitutional because it was a generally applicable assessment by a legislative body and comparable to traditional exercises of the police power. *Ehrlich*, 911 P.2d at 450.

[121] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987) (citing Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

[122] *Agins*, 447 U.S. at 257, 261.

[123] *Id.* at 261-63.

[124] *Id.* at 262.

Supreme Court in *Lucas v. South Carolina Coastal Council*.[125] In this 1992 decision, the Court found that a regulation preventing the construction of a house on a residential beach lot deprived the owner of all economically beneficial use.[126] The exceptions—where a taking would not be found despite such deprivation—were common law nuisance and regulations that are a part of the background principles of state property law.[127] Further, the Court arguably reduced the barrier to applied challenges by limiting the "ripeness" doctrine of the *Hamilton Bank*[128] decision (which required the challenger to seek all available regulatory relief before the applied challenge was ripe for adjudication).[129]

Perhaps more compelling were the Court's footnote ruminations. In footnote 7, the Court discussed the property interests against which a loss in value is measured: the denominator issue.[130] Without reaching a conclusion, other than to suggest the relevance of an owner's expectations based on interests established by state property law, the Court specifically rejected an approach to partial takings featured in *Penn Central*[131] (where other holdings in the vicinity were factored in the denominator).[132]

In footnote 8, the Court indicated that where an owner's deprivation was less than complete, the categorical takings formulation would not apply, but "the economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed

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[125] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[126] *Id.* at 1030. Pursuant to a coastal zone management scheme enacted after Lucas' purchase of the property, construction of a residence was prohibited, although construction of *non*-habitable improvements remained allowable. *Id.* at 1006-08.

[127] *Id.* at 1029-30.

[128] Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). The Court held that, in order for an applied takings challenge to be "ripe", the challenger must first show that all administrative remedies have been exhausted, and that compensation has been sought through the state's procedures. *Id.* at 186-97.

[129] David L. Callies, *After Lucas and Dolan: An Introductory Essay, in* TAKINGS 3, 6-7 (David L. Callies, ed., 1996).

[130] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016-17 n.7 (1992).

[131] Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). In *Penn Central*, the Court upheld a landmarks preservation ordinance against a takings challenge, where a permit for the construction of a high-rise office building in the airspace above Grand Central Station had been denied. *Id.* at 138. The Court reasoned that no taking had occurred because: 1) the same use of the terminal was permitted as before, thus not interfering with the owner's primary expectation concerning the property; and 2) it is impermissible to divide property into distinct segments—such as air space—to find a total taking of a segment. *Id.* at 130-31, 135-36.

[132] *Lucas*, 505 U.S. at 1016-17 n.17. The Court stated that "[f]or an extreme . . . unsupportable view of the relevant calculus, see *Penn Central*, where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the taking claimant's other holdings in the vicinity." *Id.* (citation omitted).

expectations" would be relevant, i.e. the factors set out in *Penn Central*.[133] In other words, a deprivation of all economically viable use is a categorical compensable taking. A lesser deprivation may result in a partial taking upon an ad hoc factual inquiry into such factors as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.[134] Because ad hoc inquiries must be conducted with respect to specific properties, partial takings are within the exclusive orbit of applied challenges.[135]

Except in a few unusual instances,[136] the Manoa Valley Special District Ordinance is unlikely to result in a denial of all economically viable use. Because the ordinance permits 50% lot development in residential areas and nearly total coverage in apartment and neighborhood business districts, the categorical *Lucas* compensable taking is generally precluded. Moreover, on the typical lot, there is no identifiable separate estate or segment whose total deprivation under a partial takings theory would be relevant:

> Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area . . . . [O]ne could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes. There is no basis for treating [this] as a separate parcel of property.[137]

Manoa residents who might challenge the ordinance will therefore likely allege a partial taking as applied to their individual parcels.

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[133] *Lucas*, 505 U.S. at 1019 n.8 (quoting *Penn Central*, 438 U.S. at 124). *See* discussion of *Penn Central* factors *supra* note 131.

[134] Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); *Penn Central* at 124.

[135] Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 495 (1987).

[136] *See* discussion of potential problem areas *infra* part IV.C.

[137] *Keystone*, 480 U.S. at 498 (citation omitted). In a vigorous dissent, Justice Rehnquist concluded that a segmentable estate had been extinguished and a taking had occurred. *Id.* at 518-21 (Rehnquist, J., dissenting). Because this "estate" was extinguished by a comprehensive state statute (a subsidence act), it remains an open question whether the current Court majority in the post-*Lucas* era would apply the "no remaining economic use" test to zoning regulations which deny use of segments or estates recognized in state law. *See* discussion of *Concrete Pipe* *infra* part IV.B.3.

3. Applied challenges and partial takings

Under the *Penn Central*[138] balancing test, it appears difficult to reach a level where the "economic impact" is significant enough to factor prominently in the balance. Substantial individualized harm resulting from restrictions on a previously permitted use is permissible.[139] So too are disparate impacts resulting from a comprehensive zoning ordinance.[140] Even land use regulations which in the exercise of the police power destroy or adversely affect recognized real property interests may be legitimate.[141]

The "character of the government action" is a somewhat less wobbly leg of the test. In considering the nature of the state action, restraint of uses tantamount to nuisance is acceptable, because while each is burdened, each in turn presumably benefits from the same restriction on others: a "reciprocity of advantage."[142] Impliedly, affirmative obligations, particularly those not firmly based in health or safety, may be intrusive governmental actions under this prong. Thus for example, the MVSDO's requirement that a specific species of tree be planted to maintain a consistent streetscape appearance might fail this prong of the test. Yet the preservation of existing trees, like the preservation of monuments, might be acceptable as part of a comprehensive plan intended to treat similar parcels similarly.[143]

The strong leg of the *Penn Central* test is "investment-backed expectations" (some would say the *only* remaining leg after *Lucas*).[144] Yet it remains a complex area with no consensus definition of when such expectations are frustrated.[145] In *Penn Central*, the investment-backed expectations issue was dismissed rather abruptly, because the preservation law did not interfere with what was the property owner's primary expectation concerning the use of the parcel.[146] In other words, the same use was permitted as before.[147] As overlay

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[138] Penn Central Transportation Co. v. New York City, 438 U.S. 104, 123-24 (1978).

[139] *Id.* at 125-26.

[140] *Id.* at 133.

[141] *Id.* at 125. "[I]n instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests." *Id.*

[142] Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 491 (1987).

[143] *Penn Central*, 438 U.S. at 131-32.

[144] Callies, *supra* note 129, at 16.

[145] *See generally* Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law*, *in* TAKINGS 119 (David L. Callies, ed., 1996).

[146] *Penn Central*, 438 U.S. at 136 (where the primary expectation was continued use as a railroad terminal).

[147] *Id.*

zoning, the MVSDO also permits the same uses to continue as before and non-conforming structures to remain.[148]

Although the Court has not been consistent with respect to the importance of reliance, notice, and expectation interests in property generally, state courts have accepted that when government action creates a vested right, investment-backed expectations protected by the takings clause are created.[149] Hawai'i recognizes that a vested right arises upon final discretionary action, usually a building permit.[150] One could conclude that an owner with a permit in hand for construction of a home exceeding the new ordinance's FAR would clearly have a takings claim based on the frustration of his investment-backed expectations, for example. Those without permits probably would not, even if their longstanding assumptions about the use of their properties originated at the time of acquisition.[151]

The other aspect of the partial takings equation, derived from *Lucas* footnote 7, is the deprivation of all economically viable use of discrete segments, rather than the parcel as a whole.[152] While this concept was rejected in *Penn Central* and *Keystone*,[153] both of which required the consideration of the value of the entire property rather than segments or individual strands in the bundle of property rights, the *Lucas* footnote opened the door to consideration of the "denominator" question.[154] Yet the Court has nonetheless found a taking when a separate estate recognized in state property law was destroyed as in *Pennsylvania Coal v. Mahon*,[155] or, impliedly, a stick

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[148] MVSDO, *supra* note 44, § 7.100-4(C).

[149] Mandelker, *supra* note 144 at 130-31.

[150] County of Kauai v. Pacific Standard Life Insurance Co., 65 Haw. 318, 338-39, 653 P.2d 766, 780 (1982) (holding that final discretionary action by government constitutes an official assurance which may be relied upon for zoning estoppel purposes).

[151] Mandelker, *supra* note 145, at 135-36. The degree of constructive notice engendered by the workshops and publicity surrounding the MVSDO is such that it might overcome Scalia's rejection of the constructive notice rule in *Nollan*: owners have had nearly four years to acquire permits under the existing LUO.

[152] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016-17 n.7 (1992).

[153] Penn Central Transportation Co. v. New York City, 438 U.S. 104, 130-31 (1978) (refusing to recognize air rights over Grand Central station as a separate segment of property for takings clause purposes); Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 500-01 (1987) (refusing to recognize a "support estate" in coal separate from surface or mineral estates in land where—in contrast to *Pennsylvania Coal*—an important *public* interest is served).

[154] *Lucas*, 505 U.S. at 1016-17 n.7. *See generally* Robert H. Freilich et al., *Regulatory Takings: Factoring Partial Deprivations into the Taking Equation*, *in* TAKINGS 165, 171-77 (David L. Callies, ed., 1996) (discussing the problem of determining the denominator parcel against which to measure a partial taking).

[155] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922) (where the recognized estate is in subterranean coal support pillars which prevent the subsidence of surface land).

in the bundle of property rights removed as in *Dolan*.[156] As discussed *infra*, with respect to the MVSDO, there do not seem to be any recognizable estates destroyed or sticks removed.

Some courts, particularly the United States Court of Appeals for the Federal Circuit, have been willing to engage in segmenting. In *Loveladies Harbor*[157] and *Florida Rock*,[158] the Federal Circuit found possible takings by considering discrete parcels of a larger whole.[159] By analogy to these decisions, a subdividing owner of a subdivisible parcel in Manoa who is precluded from developing his last parcel by the imposition in the interim of MVSDO restrictions intended to preserve views would have a categorical takings claim for this discrete parcel. Under Federal Circuit logic, the denominator against which the taking of the last parcel is measured is the last parcel itself, not the whole subdivision.[160]

Assuming there is such a subdivisible parcel left in Manoa, the Supreme Court's 1993 holding in *Concrete Pipe* may preclude the Federal Circuit's approach. Although not a real property case, the Court held that, "the relevant question . . . is whether the property taken is all, or only a portion of the parcel in question. 'Our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains . . .'"[161] The Court also repeated the *Penn Central* rejection of segmenting.[162]

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[156] Dolan v. City of Tigard, 114 S. Ct. 2309, 2320 (1994) (where the removed stick in the *Dolan* bundle is "the right to exclude").

[157] Loveladies Harbor, Inc. v. U.S., 28 F.3d 1171 (Fed. Cir. 1994).

[158] Florida Rock Industries, Inc. v. U.S., 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995).

[159] *Id.* at 1562-63 (treating the denial of a mining permit application for a 98 acre segment of a 1560 acre parcel as a taking); *Loveladies Harbor*, 28 F.3d at 1180-82 (finding the denial of a permit for the residential development of the final 12.5 acres of a 250 acre tract to be a taking).

[160] *Loveladies Harbor*, 28 F.3d at 1181-82; *see also Florida Rock*, 18 F.3d at 1572; *but see* Clajon Production Corp. v. Petera, 70 F.3d 1566, 1576-77 (10th Cir. 1995) (declining to follow *Florida Rock*, finding relevant denominator is entire bundle of sticks).

[161] Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 113 S. Ct. 2264, 2290 (1993) (quoting Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 497 (1987)). *Concrete Pipe* dealt with the application of a regulatory statute governing employer pension plans, which Concrete Pipe contended amounted to a taking without just compensation. *Id.* at 2264.

[162] *Id.* at 2290. Writing for the majority, Justice Souter stated: "[A] claimant's parcel of property [can] not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable." *Id.*

C. Potential Problem Areas

If the ordinance as a whole is sound, there remain a handful of problem areas as applied to particular sets of circumstances. These can roughly be divided into the scenic and demolition restrictions on the one hand, and the landscape and tree requirements on the other.

1. Demolition and scenic restrictions

The Supreme Court has upheld both demolition and scenic restrictions: the former in *Penn Central*, the latter in *Agins*.[163] Interestingly, while the Hawai'i state constitution confers the power to conserve "places of historic or cultural interest and provide for public sightliness,"[164] the county zoning enabling act is silent except to grant the city council the power to enact "other such regulations as may be deemed . . . necessary . . . to . . . encourage orderly development of land resources . . . ."[165] If, in acting on a major permit to preserve a significant view, the DLU director deprives a parcel of all economically viable use, a categorical regulatory taking under *Lucas* occurs.[166] Nor is it likely that artful, welfare-based legislative findings to support such regulation would be given much credence.[167]

A less than total taking in this situation would not usually be compensable under *Penn Central* balancing.[168] The absence of a recognized segmentable interest in air rights, or whatever is lost in such a restriction, is an important additional factor. Recall that Justice Scalia specifically recognized height restrictions and a fence ban as legitimate methods to regulate view blockage in *Nollan*.[169] Of course, regulations regarding fence heights, materials, and

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[163] Penn Central Transportation Co. v. New York City, 438 U.S. 104, 138 (1978); Agins v. City of Tiburon, 447 U.S. 255, 262 (1980).

[164] HAW. CONST. art. IX, § 7.

[165] HAW. REV. STAT. § 46-4 (a)(12) (1993).

[166] Blocking a view, after all, is not recognized as a nuisance, so regulating it does not fall within a *Lucas* exception. *See* Posey v. Leavitt, 280 Cal. Rptr. 568, 576 (Cal. Ct. App. 4th App. Dist. 1991), noting that "courts have held that a building or structure cannot be complained of as a nuisance merely because it obstructs the view from a neighboring property" and that "a landowner has no right to an unobstructed view over adjoining property." *Id.* (citations omitted).

[167] Delaney, *supra* note 92, at 60 (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1026 n.12 (1992)).

[168] *See* discussion of investment-backed expectations *supra* part IV.B.3.

[169] Nollan v. California Coastal Comm'n, 483 U.S. 825, 836 (1987). Having cited *Agins*' scenic zoning as a legitimate state interest, Scalia assumed that preserving a view was a valid public purpose, so a prohibition that logically advances that end was a legitimate exercise of the police power. It follows that if a fence may be banned altogether to achieve this end, an alternative that merely restricts height and permeability is allowable. *See Nollan*, 483 U.S. at

permeability may be construed as primarily aesthetic controls. Yet, such aesthetic controls are of a type that have long been held to be valid exercises of the police power.[170] One could even advance a safety justification: tall fences obscure houses from neighbors and police officers to the benefit of burglars. At least fence controls need not rely on either a scenic or aesthetic rationale.

More troublesome are demolition restrictions on the MVSDO listed structures. Such restrictions may also result in categorical takings if the result is the denial of all economically viable use. While preservation ordinances containing demolition restrictions are generally constitutional under *Penn Central*, even when, as in Manoa, they designate specific buildings, courts may find compensable takings where preserving the building renders it obsolete and unusable for any viable purpose.[171] In such situations, demolition or a change of use may be the only means to an economically viable use; denial of a permit for a change of use or demolition then becomes a taking requiring compensation. Even where economically beneficial use remains, at least one federal district court has reasoned that the application of a residential hotel ordinance, barring conversion to other uses and prohibiting demolition, deprives owners of their reasonable investment-backed expectations.[172]

Demolition restrictions have been a particular problem for churches and religious structures with disappearing congregations and viable uses limited by the design features inherent in ecclesiastical architecture.[173] Nonetheless,

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[170] Ehrlich v. City of Culver City, 911 P.2d 429, 450 (Cal. 1996) (citing Metromedia Inc. v. San Diego, 453 U.S. 490, 508 n.13 (1980) (upholding the prohibition of billboards on aesthetic grounds)).

[171] Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 131-33 (1978). The *Penn Central* Court cites, for the proposition that preservation of aesthetic features and quality of life is constitutional, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) and Berman v. Parker, 348 U.S. 26 (1954) among others. *Penn Central*, 438 U.S. at 129. *But see* United Artists Theatre Circuit, Inc. v. City of Philadelphia, 595 A.2d 6 (Pa. 1991) (invalidating the application of a preservation ordinance). In *United Artists*, the Supreme Court of Pennsylvania determined that Historical Commission control over the use of a movie theater which would result from a historical designation was so thorough as to comprise a taking without compensation. *Id.* at 11, 13.

[172] Golden Gate Hotel Ass'n v. City of San Francisco, 864 F. Supp. 917, 926 (N.D. Cal. 1993), *vacated and rev'd on other grounds*, 18 F.3d 1482 (9th Cir. 1994). The court found that, given California's Ellis Act, landlords have an expectation shaped by state property law that they may "go out of business". *Id.* at 926-27. Hawai'i has neither a comparable landlord act nor hotel ordinance. *See generally* HAW. REV. STAT. (1993).

[173] St. Francis Convent is a listed site. MVSDO, *supra* note 44, § 7.100-3(C)(1). Note that some churches have found second lives as offices, apartments, and even discotheques. *See, e.g.*, Dan Akroyd's House of Blues in Atlanta, a former Baptist church and popular nightclub venue

the Second Circuit has found that prohibiting demolition of a church by designating it a historic landmark did not constitute a taking, because the church could continue to use the building as it had in the past, despite the high costs of maintaining the building.[174] On the other hand, claims alleging that preservation ordinances substantially burden the free exercise of religion have met with occasional success.[175] Thus, the listed religious structures may have greater constitutional protection from demolition restrictions than the other sites.

Provided the structures designated in the Manoa ordinance as sites of particular historic or cultural interest can continue their present use or find alternative viable economic uses, the application of restrictions by the DLU director in the major permit process should be constitutional. Where current uses are no longer viable, the DLU should encourage applicants for demolition permits to instead apply for a "conditional use" compatible with preserving the existing structure.[176] Similarly, scenic restrictions that limit height and the location of structures on properties are also constitutional. However, where scenic controls severely impact properties, the DLU should encourage and approve variances allowing greater development, given the obvious hardship and unique circumstances.[177] While granting conditional uses and variances in such circumstances may not be constitutionally mandated, application of these remedies is consistent with the overall preservation goals of the MVSDO and might further serve to deter legal challenges.

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during the 1996 Olympic Games. Amy Rosewater, *Atlanta Roars to Life: Residents, Visitors Party in Olympic Style While Others Flee City to Avoid Hoopla*, THE PLAIN DEALER (Cleveland), July 20, 1996, at 9D.

[174] The Rectors of St. Bartholomew's Church v. the City of New York, 914 F.2d 348, 356-57 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991). The court also rejected a claim based on a First Amendment free exercise of religion. *Id.* at 353-56.

[175] The Supreme Court of Washington *upheld* a free exercise claim under facts similar to *St. Bartholomew's Church* in First Covenant Church v. Seattle, 787 P.2d 1352 (Wash. 1990). Courts have generally denied free exercise claims where the law is neutral and of general applicability, following Employment Division v. Smith, 494 U.S. 872 (1990). However, in 1993 Congress adopted the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4, which purports to restore a strict scrutiny, compelling interest test where religious exercises are substantially burdened. (Congressional authority is presumably found in Sect. 5 of the Fourteenth Amendment.) The effect of the Act on judicial review of preservation ordinances is yet unknown. *See generally* Simon J. Santiago, *Zoning & Religion: Will the Religious Freedom Restoration Act of 1993 Shift the Line Toward Religious Freedom?*, 45 AM. U. L. REV. 200 (1995); Melanie E. Homer, *Landmarking Religious Institutions: The Burden of Rehabilitation and the Loss of Religious Freedom*, 28 URB. LAW. 327 (1996).

[176] *See* HONOLULU, HAW., LAND USE ORDINANCE §§ 4.10 - 4.80 (1995) (conditional uses).

[177] *See id.* § 1.50 (variances); HONOLULU, HAW., CHARTER OF THE CITY AND COUNTY §§ 6-909 & 6-910.

2. Landscape requirements

The landscaping regulations of the proposed ordinance may also pose potential problems, particularly with respect to trees. The front yard landscaping requirement, at least, is carefully crafted so that its purpose is defined as the prevention of stormwater runoff.[178] The MVSDO defines landscape as any sort of groundcover, so even an unmaintained weed patch would apparently comply.[179] Thus, if an affirmative duty is imposed, it is negligible.

Because prevention of flooding in Manoa Stream and downstream pollution can be characterized as abating a nuisance, the imposition of a generally applicable regulation to limit impervious cover would seem to substantially advance a legitimate state interest, and be accorded deferential treatment by the courts. Under a traditional benefit/burden analysis and *Penn Central* balancing, the regulation seems equally valid as applied to any particular parcel. It seems unlikely that a court would find that an owner has an investment-backed expectation to pave a front yard absent a permit. While there may be some *cost* associated with parking in the rear or in a structure, it is difficult to contend that it *diminishes value.* In any case, a diminished property value is allowable if the regulation is otherwise legitimate.[180] Finally, to the extent that runoff creates a nuisance, a regulation limiting it is compatible with the prescriptions of the Fifth Amendment.[181]

A ban on the removal of healthy trees might also be characterized as abating a nuisance or public harm.[182] Malama O Manoa has noted the ability of trees to control air pollution, noise, water runoff, and heat gain.[183] In *Miller v. Schoene*, the Supreme Court upheld the destruction of diseased trees as part of a comprehensive statute.[184] Arguably, a comprehensive statute, as here, which requires the *retention* of trees to prevent this public harm is an equally

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[178] MVSDO, *supra* note 44, § 7.100-4 annot.; MVSDO § 7.100-7(A) and annots.

[179] *See id.* § 7-100-7(A) annots.

[180] *See* discussion of *Agins supra* section IV.

[181] "[A] taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use." Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 511 (Rehnquist, J., dissenting).

[182] *See generally* MVSDO, *supra* note 44, § 7.100-7(B). "The cumulative impact from the loss of trees . . . increases the risk of flooding and downstream pollution." *Id.* § 7.100-1 annot.

[183] John P. Whalen, AICP, *What's the Value of a Tree?*, MALAMA O MANOA, Aug. 1995, at 4.

[184] Miller v. Schoene, 276 U.S. 272, 279 (1928). *See also* Whitesell v. Houlton, 2 Haw. App. 365, 632 P.2d. 1077 (1981) (finding an owner liable for costs relating to curing the nuisance created by his banyan tree).

valid measure, especially given the minimal economic impact and government intrusiveness.[185]

Yet another potential problem remains: when an owner applies for a minor permit to remove a tree and the decision of the DLU director is to require the owner to replace the tree, it appears as though the DLU has imposed an exaction (tree replacement) for the permit.[186] Of course, it is well accepted that discontinuance of a private land use can have an impact that justifies the imposition of an exaction to alleviate it.[187] Still, is such an exaction subject to the recent *Dolan v. City of Tigard* test? The California Supreme Court's *Ehrlich* decision indicates that ad hoc, non-possessory exactions may be subject to *Dolan*.[188] The decision of the director in this instance is adjudicative, not legislative, and the DLU would have to prove the exaction meets the standards of the *Dolan* test.[189] That is, there must be: 1) an essential nexus between the permit condition (tree replacement) and the public impact of the development (loss of the environmental benefits the tree provides); and 2) *rough proportionality* between that exaction and the impact of the development.[190] Here, the direct nexus between exacting a tree replacement for the loss of a tree is self-evident, as is its proportionality. Moreover, as with the other landscaping requirements, the tree restrictions are narrowly drawn to burden Manoa landowners no more than necessary. It has been said that the essence of the takings clause is the unfairness of making a citizen pay, in some manner other than taxes, to remedy a social problem for which he is not responsible.[191]

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[185] Of course, it is assumed there are no Manoa koa tree farmers who would have an investment-backed expectation in periodic tree removal!

[186] Because the MVSDO never requires the planting of trees, except as a condition of tree removal, it seems appropriate to analyze this provision as an exaction rather than as another regulation subject to the substantial advancement test. Of course, the provision does advance the same interests as the restriction on tree removal; as Justice Scalia has noted, "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1024 (1992).

[187] Ehrlich v. City of Culver City, 911 P.2d 429, 446 (Cal. 1996) (citing Nollan v. California Coastal Comm'n, 483 U.S. 825, 836 (1987)).

[188] *Ehrlich*, 911 P.2d at 442-47 (holding that the *Dolan* test is applicable to an *ad hoc* "recreation fee" imposed on a developer for a change in land use designation).

[189] Christopher J. Duerksen and Richard Paik, *Open-Space Preservation After Dolan*, *in* TAKINGS 266, 279 (David L. Callies, ed., 1996).

[190] Dolan v. City of Tigard, 114 S. Ct. 2309, 2317-19 (1994).

[191] Pennell v. City of San Jose, 485 U.S. 1, 23 (1988) (Scalia, J., dissenting from the Court's holding that a provision of San Jose's rent control ordinance was not a taking).

V. CONCLUSION

The proposed Manoa Valley Special District Ordinance will likely withstand facial challenges to its constitutionality. Its regulations substantially advance the city's legitimate interest in preserving its scenery, architectural history, and quality of life. It provides for no physical invasions of private property, nor does it destroy any recognized estates in property. No owner will be deprived of a use that he does not currently have.

The weakness of the ordinance, as applied, is the apparently broad discretion granted to the DLU director to make decisions on major permits based on the recommendations of the Design Advisory Committee. Neither the director nor the Committee has any established criteria for evaluating such permits; their determinations are ad hoc.[192] One criterion should be economically viable use: permits for demolition of structures should not be denied where the property has no remaining economically viable use. In order to avoid this outcome and preserve the listed sites, the director should facilitate and approve variances and conditional uses for these properties.[193]

Because ordinance opponents apparently live primarily in Manoa's post-war subdivisions, opposition to the proposed ordinance could evaporate if certain district neighborhoods were excluded.[194] While this would certainly be politically expedient, it may also make sense from a planner's perspective. Other special districts have provided for a "core" where requirements are more exacting.[195] The bulk of Manoa's significant sites could be located in a core district with more stringent regulation than is proposed; outside the core area there could be less.[196] After all, while Honolulu has a significant interest in preserving its quality of life, a component of that is surely the well-being of its citizens who cannot afford the island's housing and prefer living in extended families to poverty, homelessness, or migration to the mainland. Accommodating these important interests is also a legitimate government objective.

While participants in the development of the proposed ordinance note that it has created a sense of community and a commitment to orderly neighborhood development, the effort to achieve broad consensus has watered down the initial preservation goals. While the democratic planning workshop

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[192] Telephone Interview with John Whalen, AICP, former DLU director (Feb. 27, 1996). *See generally* HONOLULU, HAW. LAND USE ORDINANCE §§ 7.20-2, 7.20-5 (1995).

[193] *See* discussion *supra* part IV.C.1.

[194] Telephone Interview with John Whalen, AICP, former DLU director (Feb. 29, 1996).

[195] *See, e.g.*, HONOLULU, HAW. LAND USE ORDINANCE § 7.40 and Exhibit 7.5 (Diamond Head Special District controls and map).

[196] Telephone Interview with John Whalen, AICP, former DLU director (Feb. 29, 1996), where he described core concept.

process has undoubtedly generated many ideas that would not have been generated in the context of an administratively derived ordinance, the exclusion of the DLU from the process means it has little stake in the outcome. Like the politicians, the DLU seems to be handling the ordinance like a hot potato.

In a state where development interests have historically driven the planning process, resistance to democratic planning is inevitable. Nevertheless, the sensitivity to the special conditions of Manoa Valley that the proposed ordinance demonstrates—to its unique ecosystem and its man-made and natural monuments—should indeed serve as a model for other Oahu communities.[197] As the preceding analysis indicates, homeowner community groups are also intuitively sensitive to property rights, and unlikely to tread on them in pursuit of preservationist goals.

Many in the design community believe that the LUO is badly in need of revision. Given the budgetary constraints on the LUO's ability to undertake this task, who better than the neighborhoods themselves? Manoa Valley's experience proves that community-based planning is a viable alternative.

Robert Heckel, AIA[198]

[197] Telephone Interview with John Whalen, AICP, former DLU director (March 7, 1996). He understands the DLU is looking at the Manoa residential standards as a model with possible applications island-wide.

[198] Hawai'i architect; Class of 1997, William S. Richardson School of Law.