UNIVERSITY OF HAWAI'I LAW REVIEW

VOLUME 19

1997

University of Hawai'i Law Review

Volume 19 / Number 2 / Fall 1997

A TRIBUTE TO RICHARD S. MILLER

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The issue is a tribute to
Richard S. Miller
upon his retirement from the
William S. Richardson School of Law
University of Hawai'i at Manoa

A Career of Service

David L. Callies*

Since his recent retirement, it is hard to think of our law school community without Dick Miller. Not only is he the last of our links to the founding of the William S. Richardson School of Law in 1973, but he was instrumental in conceiving our innovative and—at the time—national trendsetting legal writing program. A tireless advocate for the growth and development of the law school, Dick Miller has served as Associate Dean and Dean of the law school, the first faculty advisor to our law review, and the first Chair of our Pacific and Asian Legal Studies Program (PALS). Indeed, it was through his prodigious efforts that the school began its first formal faculty exchange in Asia, with Hiroshima University in 1985, an exchange which continues with visiting scholars today.

Dick Miller got his legal education in the traditional LL.B. program at Boston University where he excelled not only in the classroom but also as editor-in-chief of the law review. This penchant for excellence he brought with him to Hawai'i. He helped to establish, and served as the first faculty advisor to, the University of Hawai'i Law Review in 1978, insisting that it maintain the same high standards to which he was accustomed in his own legal education. A strong supporter of the use of the Socratic method, closed-book examinations and vigorous grading, the school owes much of its reputation today to his establishment and maintenance of academic standards, both as professor and dean.

But it is Dick Miller's work in establishing the basis for his cherished PALS program that is probably his most enduring contribution. At no small cost to his other research interests, Dick became a tireless advocate for such a program to provide research, teaching and exchange opportunities between the law school and similar institutions in Asia and the Pacific Islands. Dick Miller's ceaseless prodding and promoting resulted in the Hiroshima exchange, during which virtually every member of our faculty spent from a few weeks to a few months with Hiroshima University's faculty of law. His friendship with that department's then Dean, Hiroyuki Hata, made mutual research visits possible well after the initial program grant expired in the late 1980's. The example which Dick Miller set is in a large part responsible for the law school's later study and exchange relationships, both formal and informal, with Ritsumeikan

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* Benjamin A. Kudo Professor of Law, and (for better or worse) one of Professor Miller's early recruits to the law school faculty, for which generations of law students hold him accountable.

University, Nihon University, and Meijo University, as well as training programs and exchanges with institutions in China. Later, Dick became particularly interested in and involved with institutions in New Zealand as well, arranging for conferences in Hawai'i featuring former Prime Minister Palmer, and visiting New Zealand several times himself. Dick also actively participated in and encouraged teaching and research in many Pacific Island states, enabling many of the faculty to undertake judicial training and field research projects in American Samoa, Fiji, the Philippines, Republic of the Marshall Islands, Federated States of Micronesia, and the Commonwealth of the Northern Mariana Islands.

Finally, towards the end of his distinguished career, Dick Miller became a tireless advocate for insurance reform and a free press. His articles in pursuit of both causes appeared regularly in the opinion to the editor columns of our daily newspapers, and he chaired and appeared on many distinguished panels, with the likes of *New York Times* columnist Anthony Lewis. His comparative law articles again appeared in law reviews and journals. Dick also became expert on—and a tireless promoter of—computer-assisted legal research and writing, leaving many of his younger colleagues in the cyberspace dust.

Dick Miller will never be absent from the law school, no matter where he hangs his trademark straw hat. That's a good thing for the law school, which owes him a debt of gratitude which will never be fully repaid.

Hawai'i's *Kahuna* of Torts

Denise E. Antolini*

During a military furlough to his home state of Massachusetts in 1951, before going overseas to Germany during the Korean War, 21-year-old Richard S. Miller sustained minor injuries in a car accident.[1] An attorney who was a family friend quickly secured for him a generous settlement of $1,500. The young Miller thought it "all very nice," but was nagged by a fundamental question, one which would eventually lead him into his future career. The question: "Why?" Why should he receive that much money for a mere bump on the head?

Throughout his thirty-seven years of teaching law, Miller never stopped asking that disarmingly simple question, prodding generations of law students, practitioners, and legislators alike to think critically about one of the most fundamental areas of common law — torts and accident compensation schemes. This tribute to Professor Emeritus Richard S. Miller can only scratch the surface of his distinguished academic career from 1972 to 1996 at the William S. Richardson School of Law, University of Hawai'i at Manoa. Nonetheless, it is highly appropriate now, given Miller's elevation to *emeritus* status last year, to pay homage to this kind, intelligent man who became Hawai'i's *kahuna*[2] of torts.

After graduating from Boston University School of Law in 1956, Miller practiced law for a few years with two fellow graduates and then with a "kingmaker" trial lawyer in Boston. During that period, however, Miller became disenchanted with "a lot of awful cases" and the lack of training. One case that made a particular impression on him involved an auto accident from which his client claimed back injuries. After settling for a "small amount," Miller and his client walked to the bank together to cash their joint check. After taking his share, the client turned to Miller and confessed that the whole

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[1] This and other personal stories about Professor Miller in this Tribute are based on personal communications. Interview with Richard S. Miller, in Honolulu, Haw. (Feb. 27, 1997). The author would like to thank Professor Miller for his gracious and affable assistance.

[2] The Hawaiian word "kahuna" means a "priest, minister, sorcerer, expert in any profession." MARY KAWENA PUKUI & SAMUEL H. ELBERT, NEW POCKET HAWAIIAN DICTIONARY 46 (1992).

case had been "a fake" and that his back was "just fine." Forty years later, Miller still seems appalled by the event, amazed by his own "innocence," and repulsed by the idea that such fraudulent cases make it through the legal system. After that experience, Miller's interest in private practice rapidly waned. His thoughts turned to teaching.

Miller decided to enter the LL.M. Program at Yale University in 1958, where his scholarship focused on the constitutional implications of the Internal Revenue Code. The next year, Miller landed an entry level position teaching civil procedure at Wayne State University in Ohio. After a "very fast" three years that he attributes to "demand and supply," Miller received tenure, based in part on his Yale tax code scholarship. Initially, Miller received what he called "one of the best starting salaries in law teaching" — $7,000 a year. Six years later, his salary had leapt to $12,000. Still unsatisfied, however, Miller demanded that the Dean give him another $2,000 raise "or else." The Dean offered $1,000. Miller quit. Looking back, Miller sheepishly concedes it was "a pretty stupid thing to do," but it was that precipitous move that led Miller toward a quarter century of torts teaching, scholarship, and community service.

Accepting the only job offered after his abrupt resignation from Wayne State, Miller landed at nearby Ohio State University Law School. Miller had no idea what subjects the Dean might ask him to teach. When queried "How about torts?," he reflected on how much he had enjoyed his first-year class with noted torts Professor Tom Lambert, and then enthusiastically replied: "Sure, I'll teach torts." Although Miller found torts much more "amorphous" than procedure, torts quickly became his passion. Miller enjoyed torts because, he says, it is "important to human dignity," and, at the same time, it is comprehensible. As he vividly puts it: "everyone understands a sock in the teeth."

Not surprisingly, Miller's story of how he made the journey from Ohio to Hawai'i is both fortuitous and humorous. While serving as the director of clinical education programs at Ohio State University Law School, he and his daughter attended a "farm party" at a friend's house. When it came to saddling up Miller and his daughter for a pleasure ride on a tired old mare and a frisky young gelding, the host incorrectly assumed that Miller could ride better than his daughter. Miller's ride on the gelding did not last long. As a result of the fall, Miller separated his left shoulder, rendering him completely unable to work.

To break the boredom of recovery, Miller attended a conference on clinical education, where he met the then-newly appointed Dean of the University of Hawai'i School of Law, David Hood. Hood was out recruiting the school's founding faculty and struck up a conversation with Miller about an article

Miller had written on the future of legal education.[3] Hood soon offered Miller a job. Miller now recalls the rumors circulating that year at the annual American Association of Law Schools meeting; professors were joking about a law school opening up in Hawai'i and how there would be an impossibly long line for faculty applicants. Yet, there he was, with an offer to teach in paradise.

Despite his preconception that Hawai'i might just be "Miami Beach West," Miller was intrigued and accepted Hood's invitation to visit Hawai'i. Miller stepped off the plane and caught the aroma of Hawai'i's flowers. Within fifteen minutes, he had fallen in love with the place. Thanks to a frisky horse, Miller became one of the original "quarry" faculty in 1973 and the Law School has been his home ever since.

During his nearly two-and-a-half decades at the University of Hawai'i School of Law, Professor Miller's observations of, commentary on, and scholarly contributions to the torts system ranged from topics as the diverse as the negligent infliction of emotional distress, to interspousal immunity, the accident compensations schemes of New Zealand and Japan, auto insurance no-fault reform, the activism of the Hawai'i Supreme Court, and "tort law and power."

Miller's earliest major article focused on the then-developing tort called "mental distress."[4] In 1979, Miller's piece appeared as the *first* article in the *first* issue of the newly established *University of Hawai'i Law Review*. In *The Scope of Liability for Negligent Infliction of Emotional Distress: Making The "Punishment Fit the Crime,"*[5] Miller examined the potential floodgate of litigation that could be opened by the emerging claim of emotional distress and argued that a reasonable restriction on this new tort would be to limit the victim's recovery to economic losses only. Miller's approach received significant attention from academia — including favorable mention in the torts

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[3] Richard S. Miller, *The Role of the University Law School in the Evolution Scheme*, 1971 U. ILL. L.F. 1.

[4] Fortuitously for Miller, the evolution of the modern tort "negligent infliction of emotional distress" had been given new impetus by the Hawai'i Supreme Court shortly before he arrived at the William S. Richardson School of Law. In Rodrigues v. State of Hawai'i, 52 Haw. 156, 472 P.2d 509 (1970), the Hawai'i Supreme Court allowed plaintiffs to recover $2,500 for the emotional distress caused by flooding damage to their home. The Court rejected the traditional requirement that a plaintiff must show direct physical injury or illness to him or herself. *Id.* at 170-73, 472 P.2d at 519-20. The opinion caused some uproar in the legal community, and prompted Miller to ponder the limits of the Court's decision. Today, only a handful of courts have expanded the tort to the broad extent it is embraced in Hawai'i. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 54, at 364-65 (5th ed. 1984).

[5] Richard S. Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime,"* 1 U. HAW. L. REV. 1 (1979).

"bible" *Prosser and Keeton on Torts*[6] — and was cited by scholars and numerous courts searching for appropriate limits on this relatively new cause of action.[7]

In the early 1970s, Miller's attention turned to another tort law revolution that had just arrived on Hawai'i's shores: the accident compensation - no-fault debate. Miller had been interested in this area since the late 1960s, when he had hosted a television show in Ohio called "Law Forum," which featured vigorous debates on the then-novel concept of no-fault compensation.

He admits that, at the time, he was "enamored" with no-fault. He speaks a bit wistfully of the social reform movement in the early 1970s, when preeminent University of California at Berkeley, Boalt Hall School of Law, Professor Stephan Reisenfeld came to Hawai'i to work with the Hawai'i Legislature to create many of the social insurance schemes (such as prepaid health insurance, workers compensation, and temporary disability insurance) that we take for granted today,

As part of this sweeping reform movement, the Legislature addressed the issue of automobile accident compensation and the problems with the traditional "pure tort" approach. In 1972, Hawai'i enacted a "modified no-fault" system that provided basic insurance coverage for injuries and property damage sustained in automobile accidents, but at the same time barred a tort suit for most victims.[8]

In the 1980s, the trial lawyers in Hawai'i convinced the Legislature to retreat and lower the barriers to tort suits. A decade later, the insurance industry fought back and successfully lobbied for even more departures from traditional tort law. As a result, in 1992, the Legislature once again raised the bars to

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[6] KEETON, *supra* note 4, § 54, at 364 (calling Miller's article a "thorough policy analysis").

[7] Professor John L. Diamond picked up Miller's idea, suggesting that it be adopted and applied also to the tort of loss of consortium. John L. Diamond, *Dillon v. Legg Revisited: Toward A Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477 (1984). Numerous courts also relied on Miller's approach. *See, e.g.*, Thing v. LaChusa, 771 P.2d 814, 825 (Cal. 1989); Vasquez-Gonzales v. Superior Court of San Diego County, 231 Cal. Rptr. 458, 460 n.2 (1987); Ochoa v. Superior Court of Santa Clara County, 703 P.2d 1, 15 (Cal. 1985); Larsen v. Pacesetter Sys., 74 Haw. 1, 43, 837 P.2d 1273, 1294 (1992); Kinard v. Augusta Sash & Door Co., 336 S.E.2d 465, 467 (S.C. 1985).

[8] Under the scheme, which was in effect for about 25 years until the 1997 Legislature's amendments (*see infra* notes 20-26 and accompanying text), tort suits were barred unless the victim's injuries (1) exceeded a "medical rehabilitative limit" ("MRL"), set most recently at $13,900, HAW. REV. STAT. § 431:10C-306(b)(2) (referring to the limit set in *id.* § 431:10C-308), (2) met any of three "verbal thresholds," which were death, serious injury by a "significant permanent loss of use of a part or function of the body," or serious injury "by permanent and serious disfigurement which results in . . . mental or emotional suffering," *id.* § 431:10C-306(b)(1)(A)-(C), or (3) exceeded the no-fault benefits, set most recently at $20,000, *id.* § 431:10C-306(b)(3) (referring to the limit set in *id.* § 431:10C-103(6)).

lawsuits, instituted a new "peer review" system,[9] and tied payments of claims to the workers' compensation payment schedule. This approach, according to Miller, "loaded up the costs" and "the plaintiffs' lawyers began to despair."[10]

For years, Miller has advocated a common-sense approach of moving back toward the tort system but with certain major caveats. Miller's primary idea, which he describes as "[a] moderate position that would preserve ample victims' rights while reducing costs significantly" is a "very simple, very uncomplicated, much less litigious system in which $20,000 of no-fault coverage is required, similar to current law."[11] He advocates a "cost tie-in" to pre-paid health care and preferred medical providers, coupled with an automatic deduction of the amount of required no fault ($20,000) from "every tort judgment or award."[12] Among other innovations, he proposes that, to enhance coverage for severely injured victims, all automobile owners would have to buy "excess" liability insurance to cover tort damages above $150,000 and below $500,000.[13] Miller estimates that this basic package would reduce premiums by 40%.[14] In particular, the automatic deduction would "discourage most *manini*[15] lawsuits but would allow significant recoveries in truly serious cases. It would also eliminate all litigation about whether a 'threshold' had been met."[16]

Armed with his new approach, during the 1996 legislative session, Miller helped repel the move by former Senators Milton Holt and Donna Ikeda to adopt "pure" no-fault. Miller calls the proposal "mean spirited and stupid"[17] because it would have drastically raised the cost of no-fault insurance, with no corresponding benefit to consumers. He called the passage of the legislation "outrageous" and wrote scathing letters to the Legislature and media.

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[9] This peer review system required "costly and much-hated" independent medical examinations and administrative hearings for any claims that the insurance companies wanted to challenge. Memorandum from Dick Miller to Persons Interested in Automobile Insurance Reform Efforts, Jan. 16, 1997, "table" at 6 (on file with author) [hereinafter Miller Memorandum].

[10] Miller Interview, *supra* note 1.

[11] Richard S. Miller, *Dump House, Senate no-fault 'reform' proposals,* HONOLULU ADVERTISER, Mar. 9, 1997, at B3.

[12] *Id. See infra* note 24 (describing automatic $5,000 deduction amendment).

[13] Miller Memorandum, *supra* note 9, "table" at 2.

[14] *Id.*

[15] The Hawaiian word "manini" is used to describe something small. It literally means a "small striped surgeonfish (*Acanthurus triostegus*) very common on Hawaiian reefs." PUKUI & ELBERT, *supra* note 2, at 95.

[16] Miller Memorandum, *supra* note 9, "table" at 3.

[17] The bills would have required consumers to purchase large medical insurance policies (duplicative of employer-provided health insurance) and eliminated wage loss benefits. Miller Interview, *supra* note 1.

The day of reckoning for the Holt-Ikeda proposal arrived when the bill passed the House and landed on the desk of Governor Ben Cayetano, himself a former trial lawyer. Commenting that he had been "consulting with Miller," the Governor vetoed the bill. Without the votes to override, the 1996 Legislature's "reform" efforts stalled.

Today, Miller does not align himself with either of the warring factions in the no-fault debate. He says he is "squarely in the middle" and just "trying to come up with a decent bill."[18] While he does not agree that the cost of auto insurance in Hawai'i is excessive in light of the generally higher cost of living here, he did think that Hawai'i's current no-fault system was leading to a lot of "hanky panky,"[19] including expensive treatments, and double recovery by victims who successfully sue in tort. On the other hand, Miller thinks that a pure tort approach, where every victim's only recourse is a lawsuit, is not a good system because of the nuisance value of cases and the potential for fraud.

During the 1997 session, the Hawai'i Legislature fiercely debated two very different proposals to change the State's no-fault law. The Senate sought to move closer to pure no-fault, while the House wanted to return to a tort-based approach. Neither prospect pleased Miller,[20] however, and he persistently raised an independent voice on the issue.[21] Ultimately, the Legislature borrowed some ideas from both sides, and seemed to listen to Miller's most vociferous criticisms,[22] creating what he calls a "political document, where everyone got

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[18] *Id.*

[19] In particular, Miller points to fraudulent efforts by claimants to exceed the MRL of $13,900, which Miller calls "the driver of high insurance costs because accident victims are motivated to seek expensive therapy—whether necessary or not—in order to reach the threshold so they can sue for big bucks." Miller Memorandum, *supra* note 9, "table" at 3.

[20] Miller's otherwise calm demeanor was also piqued by another aspect of the recent debate in the Legislature over no-fault reform: the attempt by the House and Senate to restrict the free speech of insurance companies and others participating in the debate. In his capacity as Chair of the non-partisan, non-governmental Honolulu Community Media Council, a self-described "watchdog" of the local media, Miller wrote a passionate letter to the *Honolulu Advertiser* "vigorously protest[ing]" the bills. Richard S. Miller, *Auto insurance bill would curb free speech,* HONOLULU ADVERTISER, Feb. 27, 1997, at A11. Miller reminded the Legislature of constitutional fundamentals, concluding "the only appropriate remedy for false speech or wrong ideas in the political debate is more speech and more debate." *Id.*

[21] According to Miller, the Senate removed a provision prohibiting contingent fees and added an allowance of reasonable attorneys' fees for those who sue only for uncompensated economic loss. It also modified the "false statement" provision, *see supra* note 20, to make it "somewhat more clear that it was not to be applied to insurers." Communication from Richard S. Miller to the author (Mar. 30, 1997) (on file with author).

[22] As he charged in a commentary in the *Honolulu Advertiser*, some aspects of the 1997 session proposals were "excessively ungenerous and mean-spirited" as well as "unconstitutional" and "penurious." *Dump House, Senate no-fault reform proposals, supra* note 11.

a little something."[23] While the sweeping changes were aimed at achieving significant reductions in rates and in fraudulent claims,[24] Miller predicts that the gains may be short-lived. He predicts that, while rates may initially drop significantly due to the reductions in basic coverage, some insureds will end up paying more when they purchase optional coverages for damages that used to be automatically included in the no-fault benefits package, and, with the expanded ability of victims to file tort lawsuits, overall system costs may soon begin to creep back up, promoting yet another round of review by the Legislature.[25] And, in case any legislators have the mistaken impression that Miller has "retired," Miller promises that his interest and involvement in the issue "will persist."[26]

Miller's interest in no-fault also led him toward another of his primary areas of scholarship. In 1987, he traveled to New Zealand, visiting the faculty at the Victoria University of Wellington, where he focused his research on New Zealand's revolutionary national accident compensation scheme.[27] In his 1989

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[23] Interview with Richard S. Miller, in Honolulu, Haw. (Oct. 8, 1997) [hereinafter Miller Interview II].

[24] The primary amendments adopted during the 1997 session, which become fully effective in January 1998, included: (1) renaming and reducing the "no-fault" benefits limit of $20,000 with a "personal injury protection" ("PIP") benefits limit of $10,000, which is further restricted to coverage "comparable" to that available under prepaid health care plans, HAW. REV. STAT. § 431:10C-A(a)-(c); (2) eliminating the MRL and instead allowing tort lawsuits if the claim meets any of the three verbal threshholds (*see supra* note 8) or the PIP benefits equal or exceed $5,000, *id.* § 431:10C-306(b)(4); (3) instituting a "covered loss deductible" from $5,000 up to "the amount of personal injury protection benefits incurred, whichever is greater," up to the $10,000 PIP limit, which will be deducted from any insured's recovery in a lawsuit (by judgment, arbitration or settlement) for bodily injuries, *id.* § 431:10C-C; (4) requiring a mandatory rate reduction from all insurance companies by January 1, 1998 of 20-35% on basic minimum coverage policies, *id.* Act 251, § 62, 19th Leg., Reg. Sess. (1997) *reprinted in* 1997 Haw. Sess. Laws 902, and giving new authority to the Insurance Commissioner to order future rate reductions, HAW. REV. STAT. § 431:10C-D; (5) creating new criminal penalties for the submission of fraudulent claims, *id.* § 431:10C-I; and (6) making changes in the coverage limits, including reducing the minimum basic limit for liability coverage from $25,000 to $20,000, *id.* § 431:10C-301(b)(1), and making coverage for wage loss, death benefits, funeral expenses, and alternative treatments optional. *Id.* § 431:10C-302(a)(4), (5) & (10).

Of these amendments, the "covered loss deductible" idea was uniquely Miller's. However, while Miller is "gratified" that the Legislature adopted the concept, the $5,000-$10,000 deduction is only half of the $20,000 deduction proposed by Miller, and he questions if it will be effective at this level. However, he is hopeful the Legislature will expand on the concept in the future. Miller Interview II, *supra* note 23.

[25] *Id.*

[26] *Id.*

[27] While in New Zealand, Miller's interests also wandered to another of his beloved subjects —Japanese law. He published *Apples v. Persimmons—Let's Stop Drawing Inappropriate Comparisons Between the Legal Professions in Japan and the United States,* 17 VICTORIA U. WELLINGTON L. REV. 201 (1987). Two years earlier, Miller had secured a major grant from the

article, *The Future of New Zealand's Accident Compensation Scheme*[28] Miller examined that country's comprehensive no-fault approach to accident compensation, adopted in 1972. As Miller explained, New Zealanders had given up their common law right to sue in tort in exchange for "substantial benefits including virtually complete medical and rehabilitative expenses, substantial wage replacement for earners whether they are injured on or off the job, and payment of some noneconomic losses."[29]

After a thorough examination of the scheme, and the backlash against it in late 1986 and in 1987, Miller recommended that certain aspects of tort law be reintroduced into the New Zealand approach. Despite some criticism by the New Zealand Law Commission,[30] this change was, in Miller's view, a "necessary device to improve accident prevention and to preserve and perhaps to extend an effective and compassionate compensation scheme of which New Zealand can be very proud."[31] Ultimately, he concluded that, while the New Zealand approach may have dangerously reduced the deterrence value provided by the tort system, the compensation component was worthy of consideration in the United States.[32] Three years later, Miller revisited subsequent changes to the New Zealand scheme.[33] He concluded: "Notwithstanding the confusion of principles and the weakness of deterrence, it is likely that, as to most of its features, the New Zealand scheme as amended will become even more attractive as a substitute for the tort system than the former Act."[34]

Befitting the experience and wisdom gained from nearly four decades in the field,[35] Miller's most recent article may indeed be what he calls "his best

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United States Information Agency for a faculty exchange between the William S. Richardson School of Law and the Hiroshima University Faculty of Law. That grant funded a visit by Miller to Hiroshima University in 1986, as well as many other visits by faculty from each school. In 1990, he and Professor Hiroyuki Hata of the Hiroshima University Faculty of Law were jointly named "Lawyer of the Year" by the Japan-Hawai'i Lawyers Association.

[28] Richard S. Miller, *The Future of New Zealand's Accident Compensation Scheme*, 11 U. HAW. L. REV. 1 (1989) [hereinafter *The Future*].

[29] *Id.* at 4.

[30] The Commission, in fact, took the somewhat extraordinary step of formally replying to Miller's proposal the next year. *See* New Zealand Law Commission, *Comment on "The Future of New Zealand's Accident Compensation Scheme" by Richard S. Miller*, 12 U. HAW. L. REV. 339 (1990).

[31] *The Future*, *supra* note 28, at 73.

[32] *Id.* at 79-80.

[33] Richard S. Miller, *An Analysis and Critique of the 1992 Changes to New Zealand's Accident Compensation Scheme*, 52 MD. L. REV. 1070 (1993).

[34] *Id.* at 1091.

[35] Notably, in recognition of his contributions to the field, Miller was invited to join (and did join) the prestigious American Law Institute in 1992.

piece."[36] In *Tort Law and Power: A Policy-Oriented Analysis*,[37] Miller recalls a memorable story told by his torts professor Tom Lambert about an injured bird in the hands of a small boy. "[T]he lesson was that the bird's life, a symbol for what is good, was in the boy's hands, just as the future was in our hands."[38] For Miller, the metaphor was about life and power. Taking a deliberate step back from the details of the torts process and toward political theory, Miller proceeds to examine the larger picture of the social utility of the torts system. In particular, he analyzes the relationship between the torts system and "power," especially between plaintiffs and defendants, and he inquires whether the present scheme delivers "justice." As Miller explains:

> Furnishing decisional power to accident victims does not merely permit them to counter corporate abuses of power but gives them a voice in decisions that affect their values, with regard to both accidental injuries already sustained and future accidents that may be deterred. This voice is important irrespective of the existence of adversaries who are in a strong power position. On the whole our current system appears to provide such a voice.[39]

After contrasting the American system to that of Japan, New Zealand, and England, he concludes:

> Thus, with regard to providing effective power to accident victims, the American system of tort liability appears, at first glance, to be the most effective source of countervailing power, not unsuitable in a nation that takes prides itself [in] giving the individual citizen a voice in her or his destiny.[40]

While admittedly "impressionistic," Miller's "power" article is a bold, valuable, and timely contribution both to the vigorous national debate about the promise

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[36] Two years earlier, in 1992, Miller had published a comprehensive review of the influence of the modern Hawai'i Supreme Court on tort law in this state, focusing on the question of whether the torch of activism lit by Chief Justice William S. Richardson had been picked up by his successor Chief Justice Herman T.F. Lum. Richard S. Miller and Geoffrey K.S. Komeya, *Tort and Insurance "Reform" in a Common Law Court*, 14 U. HAW. L. REV. 55 (1992).

> [W]ith regard to those areas of tort law of primary concern to those seeking 'tort and insurance reform' in Hawaii . . . the pro-plaintiff tort revolution has all but come to an end. While pro-recovery doctrines adopted during the Richardson years have not been overturned, rights of victims and insureds have been kept within narrow bounds, and opportunities to expand recovery have generally been rejected. On the other hand, with regard to products liability, . . . the court has continued and indeed expanded upon the Richardson Court's liberal tendencies.

Id. at 66 (footnote omitted).

[37] Richard S. Miller, *Tort Law and Power: A Policy-Oriented Analysis*, 28 SUFFOLK U. L. REV. 1069 (1994).

[38] *Id.*

[39] *Id.* at 1094.

[40] *Id.* at 1097 (footnote omitted).

and pitfalls of the tort system and to the venerable body of theoretical works on tort law.

To over one thousand law students, to the legal community in Honolulu and across the country, and to the Hawai'i Legislature, Richard S. Miller has truly earned the mantle of a *kahuna*. A respected and cherished scholar, teacher, and community leader, his contributions range far beyond that touched upon in this brief tribute. Perhaps most importantly, Miller has done it all by staying grounded in fundamentals and maintaining his sense of humor. As students over the decades were somberly reminded by a framed print hung carefully on his office wall: "A tort is not a piece of cake."

Bayonets In Paradise: A Half-Century Retrospect on Martial Law in Hawai'i, 1941-1946

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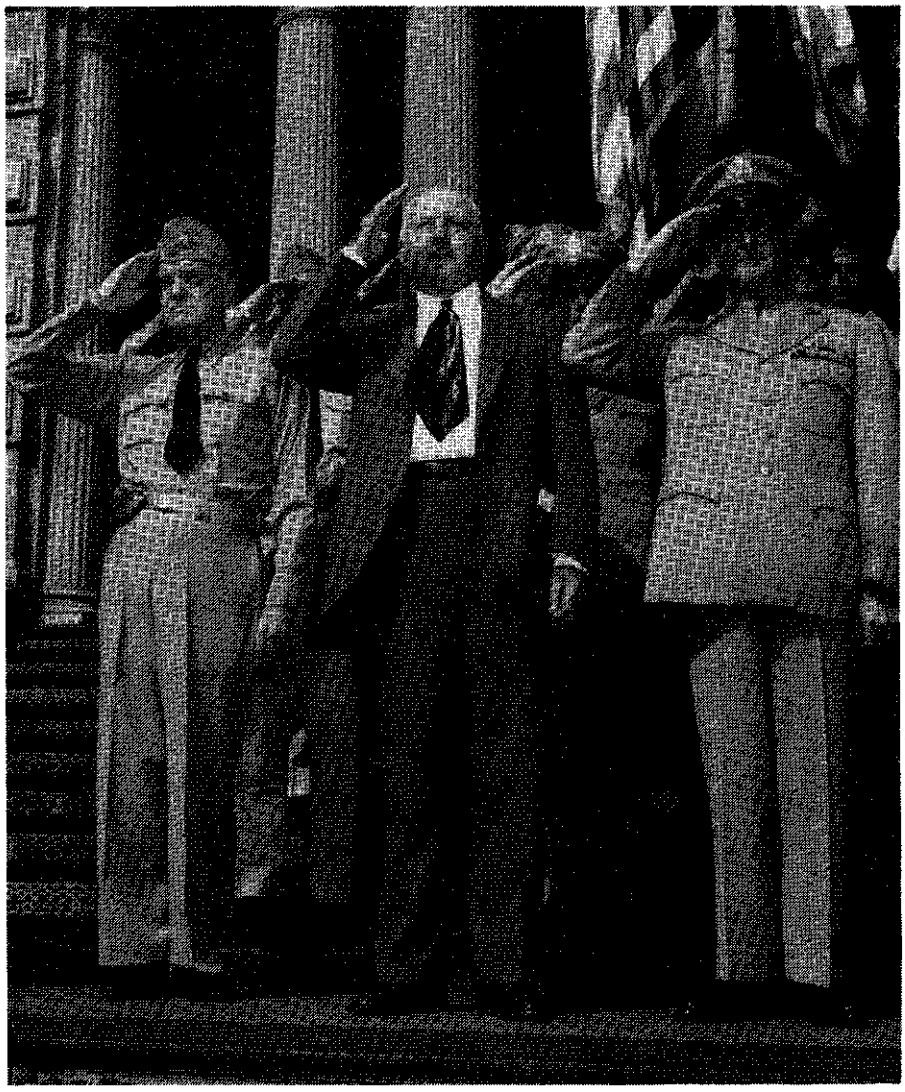
When the Supreme Court of the United States decided the case of *Duncan v. Kahanamoku*, just over half a century ago, it passed judgment upon an extraordinary episode in American history—an episode that involved the longest period of martial law to which residents of a state or territory had ever been subjected. For throughout most of World War II, Hawai'i was under the full control of the military; the privilege of the writ of habeas corpus was suspended; and the authority of the civilian government was subordinated so fully that the Army referred even to the federal district judges as "agents" of the military. By any measure, the Pearl Harbor attack and the ensuing combat in the Pacific placed the Hawaiian Islands in great danger. But there was profound disagreement as to whether that danger warranted the kind of curbs on civil liberties that the Army imposed and then kept in force even after the Battle of Midway had greatly diminished the danger of a further attack on Hawai'i. By 1944, the conflicts surrounding Army rule in Hawai'i—manifested not only by divided civilian opinion in Hawai'i itself but also by serious divisions within the nation's top military and civilian leadership, involving the War, Justice, and Interior departments, as well as the White House and the federal judiciary—had surfaced as an issue that demanded resolution. The constitutional question was profoundly important, and in 1944-45 the contending champions and critics of the martial law regime looked to the Supreme Court for a definitive statement on how far the military might legally or constitutionally extend its power over a civilian population in wartime. It is the history of these developments, and their meaning in the retrospect of these five intervening decades, that are the subject of this article.

I. INTRODUCTION

On only a few occasions in the history of the United States have citizens of this nation been placed for a substantial period of time under a rule of martial law, with the suspension of constitutional rights that military control of civilian life entails. The best-remembered such episode came in the Civil War years, when President Abraham Lincoln justified a suspension of the writ of habeas corpus and ordered military trials of civilians behind the lines since he believed the safety of the armies was at stake. By the time the United States Supreme Court decided upon the constitutionality of these measures in the famous decision of *Ex parte Milligan*[1] in 1866, the war had ended. The Court's ruling

[1] 71 U.S. 2 (1866). For a full discussion of the case and its background, *see* CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864-1888, PART ONE 192-237 (The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, Vol. 6 1971); *cf.* MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 160-84 (1991).



Pictured from left to right are Admiral William F. Halsey, commander of Navy forces in the Pacific; Governor Ingram M. Stainback, governor of the Territory of Hawai'i; and Lt. General Robert C. Richardson, Jr., commanding general for the mid-Pacific theater and "Military Governor" of Hawai'i at a military review on the steps of Iolani Palace (Honolulu, Hawai'i 1944) (The National Archives).

went by a narrow majority against the government and declared that constitutional rights must be respected in wartime unless there were conditions of actual, not merely anticipated, invasion; and unless the civilian courts were closed and unable to function owing to the war emergency. So stood the law at the outbreak of World War II.[2]

Not until 1941 would the *Milligan* doctrine be tested in the crucible of wartime conditions. In the interim, a line of cases in the nation's high court did deal with martial law in various situations; but all of them concerned the invocation of emergency military power by state governors in times of labor strikes or other civil turmoil.[3] Meanwhile, when Congress established Hawai'i and other overseas territorial governments in 1900 following the War with Spain, it provided by statute for the territorial governors to declare martial law in cases when invasion was "imminent" as well as actual—a seeming departure from the *Milligan* standard. Thus, Section 67 of Hawai'i's Organic Act provided that the territorial governor might, "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory or any part thereof, under martial law until communication can be had with the President and his decision thereon made known."[4]

But how far the powers of military authorities under martial law would run, under this language, if American territory should actually be threatened with attack—and whether the high court would permit the Army to curtail on its own discretion the jurisdiction of civilian courts—remained only theoretical questions until the Japanese launched their infamous air raid on Pearl Harbor and the surrounding American bases on Oahu on December 7, 1941.[5]

With rescue work and fire-fighting in Honolulu still going on frantically, once the last of the Japanese attack planes had departed on that fateful day, the civilian territorial governor and the commanding general of the Army in Hawai'i jointly announced that martial law was declared and the privilege of the writ of habeas corpus suspended. The Army stated that, with fears of impending land invasion and subversion well justified throughout the Islands, it was taking complete control of the territory and its civilian population of over

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[2] *See* John P. Frank, *Ex Parte Milligan v. The Five Companies: Martial Law in Hawaii*, 44 COLUM. L. REV. 639 (1944) (legal arguments against the Army's position in the then-pending *Duncan* case). Frank was a legal officer in the Department of the Interior in 1945.

[3] *See* Charles Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253 (1942) [hereinafter Fairman, *The Law of Martial Rule*] (discussing these cases). *See also* J. GARNER ANTHONY, HAWAII UNDER ARMY RULE (1955) [hereinafter ANTHONY, ARMY RULE]; *cf.* CHRISTOPHER N. MAY, IN THE NAME OF WAR: JUDICIAL REVIEW OF THE WAR POWERS SINCE 1918 (1989).

[4] Organic Act, ch. 339, § 67, 31 Stat. 141 (1900).

[5] *See* J. Garner Anthony, *Martial Law, Military Government and the Writ of Habeas Corpus in Hawaii*, 31 CAL. L. REV. 478, 478-79 (1943) [hereinafter Anthony, *Martial Law*].

400,000 persons, of whom some 159,000 were of Japanese birth or of Japanese-American descent.[6]

There followed more than two-and-a-half years of military government, covering nearly every important aspect of civilian life—a situation entirely without precedent in American history. As had occurred during the Civil War, there were legal challenges to this regime. As had also occurred in past wars generally, the federal courts did hear such challenges—but their proceedings typically went on over many months, appeals were taken, and the issue did not reach the U.S. Supreme Court for a definitive ruling until after the fighting had ended. Indeed, no appeal challenging military rule in Hawai'i reached the Supreme Court of the United States until the nearly-forgotten case of *Duncan v. Kahanamoku*[7] was heard—ironically enough—on December 7, 1945, exactly four years after the day of the Pearl Harbor bombing. (The Court had agreed to hear it the previous October, on the same day President Harry S. Truman formally terminated the last of the wartime measures for Army control over civilian life in Hawai'i.) The *Duncan* decision finally came down, from a divided Supreme Court, only in February 1946, many months after Japan's surrender.[8]

The Court's majority in *Duncan* handed a stinging rebuke to the government. Although the majority opinion was technically focused upon the terms of the Hawai'i Organic Act, i.e., interpreting the statute rather than terms of the Constitution itself, the Court did reaffirm in powerful terms the more general proposition that the judiciary has an obligation to protect citizens' constitutional rights even under the conditions of modern warfare. In that sense, *Duncan* stands in dramatic contrast to the two most notorious "Japanese-American cases" of the World War II era—*Hirabayashi* and *Korematsu*, in which the Justices upheld an extraordinary discretionary authority exercised by the

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[6] *Id. See generally* ANTHONY, ARMY RULE, *supra* note 3. *See also* Harry N. Scheiber and Jane L. Scheiber, *Constitutional Liberty in World War II: Army Rule and Martial Law in Hawaii, 1941-1946*, 3 WESTERN LEGAL HIST. 341 (1990) [hereinafter Scheiber and Scheiber].

[7] 327 U.S. 304 (1946) (The Court decided the *Duncan* case in a merged appeal with the case of White v. Steer, 327 U.S. 304 (1946)). The name of the famous Hawaiian athlete and cultural leader Duke Kahanamoku appeared as respondent in the appeal because in 1944 he was Sheriff of Honolulu City and County, hence he was formally in charge of the prisoner (now petitioner) Duncan, who had been turned over to the civilian jail by the Army during the course of the appeal. On Kahanamoku, *see* JOSEPH BRENNAN, DUKE: THE LIFE STORY OF HAWAII'S DUKE KAHANAMOKU (1994).

[8] John P. Frank has made the argument that this is the typical pattern for the Court in wartime civil liberties crises, i.e., the Court acts after the emergency is over. *See* John P. Frank, *Judicial Review and Basic Liberties, in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER 397, 397-400 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978).

government in the Japanese-American internment.[9] By casting the mantle of constitutional legitimacy over the tragic fate visited by the government upon these 110,000 mainland internees, the great majority of them American citizens, the Court had held itself fairly open to comparisons with the judicial role in advancing detested pro-slavery doctrines in the *Dred Scott* case of 1857. And, of course, the judgment of history has subsequently repudiated the Court in regard to the doctrines of the Japanese-American cases. The two decisions were termed "a disaster" by the earliest of the academic commentators, and they have been virtually without respectable defenders in the scholarly and professional literature of the last four decades.[10] More recently both Congress and the federal courts have acknowledged the tragic errors that were made; and now nominal restitution is being paid from the national treasury as conscience money to living survivors of the internment camps.[11]

Ironically, critics of the Court's decisions in the Japanese-American cases frequently have cited the wartime experience in the Hawaiian Islands as compelling evidence that the mainland internments were totally unnecessary even had they been somehow justifiable constitutionally. In Hawai'i, this argument runs, except for fewer than 1,500 interned, the very populous community of American residents of Japanese ancestry—50 percent greater in number than were interned on the mainland, and constituting some 40 percent of the Islands' civilian population—were not interned or detained, let alone evacuated from their home area. They were left to lead their lives as before in the wartime community. And yet there were no proven instances whatsoever of espionage, sabotage, or other overt antiwar activity by Americans of

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[9] *See* Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 319 U.S. 432 (1943). These cases involving the Japanese internments are analyzed thoroughly in PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE-AMERICAN INTERNMENT CASES (1983) [hereinafter IRONS, JUSTICE AT WAR], a work that upon its publication revealed on the basis of conclusive (and newly discovered) archival documentation that Army officials on the West Coast had lied blatantly about the security threat allegedly posed by permitting the Japanese-Americans to remain in their homes and jobs. Irons also presents a detailed accounting of how the War Department prevailed on the Attorney General to suppress information of these falsehoods when *Korematsu* and other cases were in progress in 1944. Irons does not deal with the Hawai'i situation, however, except with passing references to the internments.

[10] *See* Eugene V. Rostow, *The Japanese-American Cases—A Disaster*, 54 YALE L.J. 489 (1945). *But see* Fairman, *The Law of Martial Rule*, *supra* note 3 (defending the internment policies, seeing no constitutional objections and contending that the exigencies of war justified suspicion of the Japanese sufficient to warrant their removal and detention).

[11] Peter Irons, *Race and the Constitution*, THIS CONSTITUTION, Winter 1986, at 18-26, *reprinted in* [T]HIS CONSTITUTION: FROM RATIFICATION TO THE BILL OF RIGHTS 217, 227-32 (American Political Science Association & American Historical Association eds., 1988). *See also* REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS: PERSONAL JUSTICE DENIED (1983); ROGER DANIELS, PRISONERS WITHOUT TRIAL: JAPANESE AMERICANS IN WORLD WAR II (1993).

Japanese descent in Hawai'i during the war.[12] Whatever disloyalty there may conceivably have been in the community had no identifiable effects—and indeed there was extensive positive evidence of the Japanese-Americans' patriotic support of the war, not least in the oversubscribing by thousands of men to the call for *Nisei* military enlistment that the Army finally agreed to conduct in 1943.[13] An obvious question arises from this evidence as to its relation to the "military necessity" argument for interning the mainland Japanese: If Americans of Japanese ancestry in Hawai'i, thus freely conducting their activities and working in the larger wartime community, posed no danger in a location closer by two thousand miles to the combat areas, what possible reason existed for the internment of the mainland's Japanese-Americans?[14]

We say it is ironic that Hawai'i should thus be cited as exemplary of a liberal policy respectful of civilians' constitutional rights because, in fact, throughout most of the war period the United States government suspended the constitutional liberties not only of Hawai'i's Japanese-Americans but of the entire civilian population of the Islands—people of every ancestry—when the Army instituted a comprehensive and restrictive military regime just after Pearl

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[12] This was well known in official circles. Thus, in May 1943 Colonel Kendall Fielder, head of military intelligence in Hawai'i, made known his conclusion that "[t]here have been no known acts of sabotage, espionage or fifth column activities committed by the Japanese in Hawaii either on or subsequent to December 7, 1941." Memorandum from Colonel Kendall Fielder (May 17, 1943) (on file in the Japanese-American Resettlement and Relocation Collection, Bancroft Library, University of California, Berkeley).

[13] GWENFREAD ALLEN, HAWAII'S WAR YEARS, 1941-1945 263-71 (1950) [hereinafter ALLEN, WAR YEARS]. This excellent study of social life and public policies in wartime Hawai'i is based upon extensive documentary materials in the Hawai'i War Records Depository located at Hamilton Library, University of Hawai'i. The Depository contains a vast and unique collection of printed materials from the war era, private correspondence, official papers of various Hawai'i organizations, and public documents that has been an invaluable source for the present study.

[14] *See* Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175, 196 (1945) (citing the large numbers of residents of Japanese descent in Hawai'i, as compared with the West Coast, and the logic of concluding that there must have been a greater danger in Hawai'i than on the mainland). Even contemporary commentators critical of the internments made the same point, e.g., an editorial in the *New Leader* that deplored arguments that stereotyped Japanese-Americans as they were made by government counsel in the *Hirabayashi* case (in which they were characterized as unduly influenced by family ties to Japan, as isolated from the mainstream American society, etc.): "The obvious refutation of all these dangerous inferences based on race is Hawaii . . . . There, American citizens and aliens of Japanese ancestry constitute a full 37 percent of the population . . . . Hawaii, furthermore, is 1,500 miles [sic] closer to the enemy . . . . But Hawaii had no evacuation, no deliberately drummed up race hysteria, and instead, there, the citizens of Japanese origin are engaged in vital defense work." John Dixon Ford, *Government Brief Invoked "Race Doctrine" to Justify "Jap-Crow" Evacuations*, NEW LEADER, June 12, 1943, at 1, 7.

Harbor. As we shall argue here, it was also largely an arbitrary and capricious regime: Hawai'i's civilians were subjected to what the Supreme Court's majority in *Duncan* would deplore as a wholesale and wanton violation of constitutional liberties.[15]

Yet, in contrast to the mainland internments, the story of Hawai'i has gone largely unnoticed. Immediately after the war, Garner Anthony—a distinguished Hawai'i lawyer who had served as the territory's attorney general during the war and then was counsel to Duncan in his habeas corpus case and the subsequent appeal to the Supreme Court—wrote a small and excellent book on Hawai'i martial law.[16] Later, a work by Gwenfread Allen, based on contemporary documents and interviews that had been systematically collected during the war for the Hawai'i War Records Depository, offered a wide-ranging, fascinating overview of Hawai'i's wartime experience, including some material on the military regime.[17] With very few exceptions, however, historians until recently have largely ignored this chapter in the history of American civil liberties. Indeed, *Duncan* is almost never excerpted—and seldom even mentioned in passing or in notes—in standard constitutional history casebooks or texts.[18] Generally, studies of emergency powers that give

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[15] Army and War Department insiders who during the war defended their mainland internment policies believed that it was precisely because martial law governed in Hawai'i that no espionage, sabotage, or vocal war dissent existed there. *See infra* notes 59, 594.

[16] *See* ANTHONY, ARMY RULE, *supra* note 3.

[17] *See* ALLEN, WAR YEARS, *supra* note 13.

[18] A major exception to the neglect of the Hawai'i experience was an officially published Army history, written by professional historians: STETSON CONN ET AL., UNITED STATES ARMY IN WORLD WAR II: THE WESTERN HEMISPHERE AND ITS OUTPOSTS, Vol. II at chs. v-vi (1964). Thirty years ago, the historian Fred Israel used archival materials to cast some new light on civil-military relations and tensions in the Roosevelt administration concerning Hawai'i's Army regime. *See generally* Fred Israel, *Military Justice in Hawaii, 1941-44*, 36 PAC. HIST. REV. 252 (1967). In 1976, documentary materials and analysis of the evacuation and internment policies appeared in a valuable work, MICHI WEGLYN, YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS (1976). Its main emphasis was on the mainland internments but with some attention to the nearly-forgotten story of internments of Hawaiian residents of Japanese ancestry. *Id.* at 86-89, 499-552 *passim*. A few important political scientists concerned with the question of constitutional liberties in wartime have written on *Duncan*, although never with a full accounting in any depth of the background and context in wartime Hawai'i itself. The most significant study in this genre is CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP (1948). *See also* CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF (1976) (expanded edition) (with introductory note and additional text by Richard P. Longaker); MAY, *supra* note 3. A classic work that gives little attention to Hawai'i but remains highly important for its analysis of constitutional, social, and policy issues is JACOBUS TENBROEK ET AL., PREJUDICE, WAR AND THE CONSTITUTION (1968).

ALLEN, WAR YEARS, *supra* note 13, includes two chapters on Army rule. *See also* JAPANESE AMERICANS: FROM RELOCATION TO REDRESS (Roger Daniels et al. eds., 1986), in which the government's treatment of the civilian population in Hawai'i does receive some attention,

any sustained attention to World War II cases discuss the Japanese-American cases at length, then (at best) follow with something like: "But cf. *Duncan v. Kahanamoku*."[19]

It seems that as the mists of time have gathered over a fifty-year period, the record of Army rule in Hawai'i has receded gradually—and for a while seemed very nearly to have disappeared—from historical consciousness. The *Duncan* case and its background in the social, political and legal impact of martial law in Hawai'i during the war years deserve much better from historians and legal scholars if the full story of civil liberties and of civil-military relations in American history is to be understood.

In a previously published article,[20] we undertook a reappraisal of the record on martial law in the Islands during the war years, treating the Hawai'i situation during 1941-45 as a case study in civil liberties under stress. In the present study, we seek to provide a fuller account of the record, one now founded upon an expanded base of materials including some newly opened archival sources that offer fresh evidence and insights into the history of Army rule. On that basis we offer an analysis in more depth than was possible earlier, dealing with the society's experience under martial law, the behavior of public officials in both the civilian agencies and in the military, and the dynamics of the civil liberties crisis that endured through nearly the entire war.

In Section II, we set out the circumstances under which martial law was imposed, and then trace the emergence of legal problems that provided the focus of subsequent constitutional challenges to Army rule. Also considered are the specific policies imposed by the military, and the nature and operations of the institutions of military justice—particularly the provost courts that dealt with matters of ordinary criminal and civil law that would otherwise have been

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though the analysis is not based on new research. Howard Ball, *Judicial Parsimony and Military Necessity Disinterred: A Re-examination of the Japanese Exclusion Cases, 1943-44*, *in* JAPANESE AMERICANS: FROM RELOCATION TO REDRESS 176 (Roger Daniels et al. eds. 1986), is an excellent analysis of the positions taken by the Justices in the internal deliberations of the Supreme Court. An excellent popular work featuring photographs and other illustrations, annotated with excerpts from contemporary documents is DESOTO BROWN, HAWAII GOES TO WAR: LIFE IN HAWAII FROM PEARL HARBOR TO PEACE (1989).

The most important work on Americans of Japanese ancestry in Hawai'i is the recent study by GARY OKIHIRO, CANE FIRES: THE ANTI-JAPANESE MOVEMENT IN HAWAII, 1865-1945 (1991). For analyses of the larger historical context of Japanese-Americans in the Islands, *see* ROGER DANIELS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850 (1988); RONALD TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA (1993); EILEEN TAMURA, AMERICANIZATION, ACCULTURATION, AND IDENTITY: THE NISEI GENERATION IN HAWAI'I (1994).

[19] *See, e.g.*, Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1405 n.122 (1989).

[20] Scheiber and Scheiber, *supra* note 6.

handled by the civilian courts. Section III provides an account and analysis of early political challenges to martial law, including a campaign by some of the Territory of Hawaii's political elite to achieve a modification of Army rule; and it also considers the way in which Franklin D. Roosevelt's wartime government initially dealt with these challenges by a compromise that restored partial civilian rule. In Section IV, we treat a succession of important challenges to martial law in the courts, involving petitions for writs of habeas corpus by persons summarily imprisoned by the Army. In addition, we analyze the Army's defensive litigative strategies (and stratagems), as military lawyers and the Justice Department moved to sustain the full extent of the Army's authority over civilians and its assumed plenary power with respect to alleged loyalty and security threats. This section culminates with the *Duncan* and *White* cases, which eventually were appealed to the Supreme Court of the United States, and we seek therein to provide the kind of full narrative and analytic history of the litigation that its importance in our constitutional history warrants. Section V deals with these habeas cases in the Supreme Court. In the concluding section, we offer reflections on personae and principles in the constitutional battles generated by the Hawai'i civil liberties crisis.

Fully as applicable today, we think, as it was more than forty years ago is Attorney General Garner Anthony's admonition that the history of Hawai'i's experience in World War II with martial law, especially with regard to the dramatic constitutional and legal questions that this history produced, is "not only of particular interest to lawyers, political scientists and historians," but also must be "of general interest to every thoughtful citizen who believes that the constitutional safeguards of civil liberties are as important in time of war as in time of peace."[21]

II. INTER ARMA, SILENT LEGES: THE MILITARY GOVERNMENT

> The present setup was built entirely upon Army plans and it is held in place by Army cooperation and the faith that the local public has in the Army for honesty and integrity. If turned over to the civil authorities, it would lack public confidence, would be less efficient, and might even fail . . . . The safety of the civilian population is not the function of the Secretary of the Interior; it is that of the Military Commander . . . . Utter confusion existed among the civil population between December 7th [and] until the Military organized the Civil Government. The present success, and it has been great, is due solely to the fact that the Military and the Civil Governments pulled closely together . . . . The public there

[21] J. Garner Anthony, *Hawaiian Martial Law in the Supreme Court*, 57 YALE L.J. 27 (1947-48) [hereinafter Anthony, *Hawaiian Martial Law*].

> knows this and are dreading the possibility that the Military may be ousted in a time of peril.
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> —General Thomas H. Green, August 1942[22]

> No one can examine the evidence available as to government in the Hawaiian Islands without noting a basic element of totalitarian government: *unlimited authority without direct responsibility to the people governed.* That military men of essentially good intention and good will exercise this authority ameliorates the vices of the system but not the violations of principle involved. While fighting for democracy on a dozen fronts, we have dictatorship, quite needlessly—almost by accident, in one vital part of the United States of America . . . . The authority of the 'Military Governor,' exercised through his executive officer in civilian matters, has grown in a Frankenstein displacement of civilian functions . . . reducing the legal government, under the title of 'Civil Governor,' to a negligible appendage.
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> —W. W. Garner, December 1942[23]

A. Martial Law Declared

Within hours of the early morning attack on December 7, 1941, Joseph P. Poindexter, the territorial governor of Hawai'i, issued a proclamation placing the entire territory under martial law. He suspended the writ of habeas corpus and requested the commanding general of the Hawaiian Department to exercise all governmental functions, including judicial powers, "until the danger of invasion is removed."[24] In a simultaneous proclamation, the commanding general, Lieutenant General Walter C. Short, declared himself the "Military Governor" of Hawai'i—a self-assumed title that was to become a point of great controversy in later months—and he warned that citizens who disobeyed his orders would be "severely punished by military tribunals" or held in custody until the civil courts were once again able to function.[25]

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[22] Notes Made by General Thomas H. Green in Washington, D.C. (Aug. 1942) (unpublished manuscript, on file in the Hawaii Military Government Records, Record Group 338, National Archives) [hereinafter Green Notes].

[23] Memorandum from W. W. Gardner [to the Secretary of the Interior] re. the Military and Civil Governments in Hawaii (Dec. 18, 1942) (on file in the Papers of Delegate Joseph R. Farrington, Hawai'i State Archives) (emphasis added).

[24] ANTHONY, ARMY RULE, *supra* note 3, at 127 (reprinting the proclamation).

[25] *Id.* at 127-28. A controversy, still not resolved, emerged regarding whether Poindexter voluntarily undertook to suspend the writ of habeas corpus and declare martial law. *See infra* notes 27, 31. As will be discussed *infra* notes 95, 102 and accompanying text, Garner Anthony regarded it almost from the beginning as an unconstitutional usurpation of authority for the Army to take over all the functions of government and close the civilian courts; many other legal commentators and civil liberties specialists and activists came over to that view within a few months after Pearl Harbor (and certainly after the Battle of Midway in June 1942). This became

The martial law regime came forth full-blown rather than incrementally, for Lt. Colonel Thomas H. Green, the Army's chief legal officer in Hawai'i, had been working at the Fort Shafter headquarters for nearly a year to prepare detailed plans for military control in the event of an acute war emergency. In pursuing this task, Green had drafted a set of detailed general orders not only for martial law as a temporary emergency measure, but for complete displacement by the military of the territory's civilian authority—executive, legislative, and judicial—and the creation of a comprehensive military government.[26]

Thus was the entire civilian population of the Hawaiian Islands placed under the control of a military governor whose discretionary powers were absolute. This comprehensive suspension of constitutional guarantees was destined to last for nearly three years, until October 1944.

According to later recollections of Governor Poindexter, immediately after the air raid had ended, Commanding General Walter Short came to his office to inform him that the security of the Islands urgently required immediate declaration of comprehensive martial law.[27] Just three months earlier, General Short had taken an active role in persuading the territorial legislature to prepare for a war emergency by enacting the Hawaii Defense Act, also known as the M-Day (Mobilization-Day) Act, a measure vesting in the territorial governor virtually dictatorial rules-making powers in case of an extreme war

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the view of the Supreme Court majority in the *Duncan* decision in 1946. *See* J. Garner Anthony, *Martial Law in Hawaii*, 30 CAL. L. REV. 371, 371-76 (1942) [hereinafter Anthony, *Martial Law in Hawaii*], for Anthony's earliest published analysis.

[26] *See generally* Office of the Chief of Military History, "United States Army Forces, Middle Pacific and Predecessor Commands during World War II, 7 December 1941-2 September 1945: Civil Affairs and Military Government" (microfilm document, on file in the Hawai'i War Records Depository, Hamilton Library, University of Hawai'i) [hereinafter Office of the Chief of Military History, Civil Affairs].

See also Garner Anthony, Report on the Status of Civil Government in Hawaii (Sept. 20, 1943) (manuscript, on file in the Hawai'i and Pacific Collection, Hawai'i State Library) [hereinafter Anthony Report]; Interview with Hon. Ernest Kapuamailani Kai, The Watumull Foundation Oral History Project, Honolulu (1987); General Thomas H. Green (Jan. 1961) (untitled manuscript, on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.) (recounting Green's initiative in preparing detailed orders for martial law and military rule).

[27] Memorandum from Benjamin Thoron to Harold Ickes (May 12, 1942) (on file in Secretary of the Interior Records, Record Group 48, National Archives) (reporting interview of Poindexter); published interview with Poindexter, HONOLULU STAR-BULLETIN, Apr. 27, 1946. In a memorandum for files, Green denied that Poindexter had been promised a termination of martial law "in thirty days maximum." Green Notes, *supra* note 22. Poindexter, however, claimed in the interview accounts of the incident only that "early" termination had been promised him.

emergency.[28] Ironically, when the legislature proved reluctant to yield its powers to the governor on such a wholesale basis, Short had urged the passage of the measure because a host of governmental functions "[could be] done better by the civil authorities than by the military authorities"—and because the alternative to such a plan would probably have to be the more extreme measure of complete military control over civilian governance, an alternative he said he deemed undesirable.[29]

Nevertheless, when General Short came to Poindexter to argue for institution of a military regime and the declaration of martial law just after the Pearl Harbor attack, the alternative of relying upon the M-Day legislation for civilian control of many emergency functions was apparently set aside as inadequate. In Poindexter's recollection, the Army insisted upon the absolute necessity of full power, though also promising that there would be at least a partial restoration of civilian authority at an early date. Secretary of the Interior Harold Ickes, the governor's superior in the civilian chain of authority, wrote in 1942 that Poindexter had told him personally "that he was coerced by General Short" to turn over all authority to the Army because Short had said he could not otherwise guarantee security of the civilian population; and that Short predicted a substantial restoration of the civilian government within thirty days.[30] The

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[28] Hawaii Defense Act (Act 24), 1941 Laws Terr. Haw. 1 (codified as amended at REV. L. HAW. ch. 324 (1945)).

[29] Anthony, *Hawaiian Martial Law*, *supra* note 21, at 28.

[30] Letter from Harold Ickes to Henry Stimson (Aug. 5, 1945) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

Regarding Poindexter as so ineffectual, Ickes in February 1942 sent Benjamin Thoron to Hawai'i as his special representative reporting directly to himself, with instructions from the Secretary "that, in effect," as Ickes recorded in his diary, "I wanted him to take over the duties of the Governor but to do it tactfully, and allow Poindexter to feel that he is really functioning. I told him also that he was to resist any improper demands on the part of the Army." T. H. WATKINS, RIGHTEOUS PILGRIM: THE LIFE AND TIMES OF HAROLD L. ICKES, 1874-1952 784 (1990) (quoting a Feb. 7, 1942 diary entry). Thoron could no more resist the Army successfully, however, than could the Governor. *See id.* Colonel Green had his own strategy, as it happened, for dealing with Thoron when he came out to Honolulu, noting in his diary that Ickes' emissary was "suspicious" with an "animus . . . well concealed"; he was "honest but misinformed," "[m]ight be a good idea to appoint him Advisor." Diary of General Thomas H. Green (Feb. 16, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

There was a Cabinet discussion in April 1942 about the possibility of seeking legislation from Congress to eliminate the requirement that the governor of Hawai'i be a resident of the Islands, but the idea was abandoned since Ickes and the President agreed that "such a move could easily be used by the Axis powers for propaganda purposes to show that America was eating up the small countries." Diary of Francis Biddle (Apr. 24, 1942) (on file in the Papers of Attorney General Francis Biddle, Franklin D. Roosevelt Library, Hyde Park, N.Y.). A few weeks later, Ickes was advised by Frank Midkiff, a Hawai'i businessman generally supportive of the Army's authority and not known to be publicly critical of martial law, that "the governor

Army command, however, consistently denied that any such prediction as to restoration of control had been offered, contending that Poindexter had agreed fully and willingly with the proposition that an entire and unqualified transfer of authority over judicial and executive as well as legislative functions was an absolute necessity.[31]

Whatever the accuracy of Poindexter's account of his meeting with General Short, when war thundered down from the skies over Oahu on December 7, the Army—thanks to Colonel Green's earlier efforts—was fully prepared to place the entire governance of the population under its own control. Although the wide scope of martial law brought the activities of all civilians in the Islands under Army rule, the declaration of martial law and the actual administration of military government had some uniquely harsh consequences for residents of Japanese ancestry—both alien residents and citizens—in Hawai'i, and to some

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[Poindexter] is now desirous of restoring civil government to all except essentially military affairs;" Midkiff further stated that while General Short had intended "to operate on this basis but a short time," the military government under General Emmons showed no signs of turning functions back and had even been "extended to many items that belong to and could be dealt with by the usual civil government." Letter from Frank Midkiff to Harold Ickes (May 28, 1942) (on file in the Public Morale Section Records, Hawai'i State Archives).

Ickes' special representative in Hawai'i, Benjamin Thoron, reported to Ickes that he had found that while Poindexter "does not approve of all the measures taken by the military authorities . . . , he [the governor] feels that when the Commanding General makes a decision that military necessity requires that a certain thing be done in a certain way, he cannot and should not take the responsibility of insisting that it be done otherwise or that it not be done . . . ." Memorandum from B. W. Thoron to the Secretary of the Interior: "Civilian Defense and Military Government in Hawaii, Report #4" (May 25, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.). That Poindexter's fate was already sealed was made clear by a further reference to his governorship as an "interregnum": "It is my opinion . . . that it is not too early to try to develop in the War Department here an attitude favorable to the return of administrative and judicial responsibility to the civil authorities, so that when the present interregnum in the Governorship is ended, the civil executive may be in a position to function more effectively." *Id.*

[31] On a copy of the letter from Ickes to Stimson (Aug. 5, 1942), *supra* note 30, there is a penciled notation that seems to be in General Green's hand, stating that on Sept. 10, 1942, Poindexter "personally denied that he ever made such a statement to Mr. Ickes . . . " It is on file in the Hawaii Military Government Records, Record Group 338, National Archives. Ickes recorded in his manuscript diaries, however, that in meeting personally with Green, Abe Fortas, John J. McCloy, and Benjamin Thoron (the Interior official), he (Ickes) "told the Army men that Governor Poindexter reported to me that he had surrendered all civilian power practically under duress at the hands of the commanding general. Green did not argue about this." Diary of Harold Ickes (Aug. 16, 1942) (on file in the Library of Congress, Washington D.C.) (copy provided by Prof. Laura Kalman, University of California, Santa Barbara). The press coverage of the controversy over Poindexter's role in establishment of martial law is reviewed in James B. Lane, *Joseph B. Poindexter and Hawaii During the New Deal*, 62 PAC. NORTHWEST Q. 7, 14-15 (1971).

degree for other residents of Asian ancestry.[32] In marked contrast, however, to the drastic policy of forcibly evacuating and then interning the 110,000 Japanese-American residents of California, Washington, and Oregon, the Army did leave most Japanese-Americans in Hawai'i free to continue their lives in their own homes (and in most cases, their prewar employment), as best they could—but, like the rest of Hawai'i's civilian population, under Army rule. After initially being prevented from enlistment in the armed forces, they were finally invited to form a Hawai'i fighting unit; and, as is well known, their combat team became one of the most decorated units in American military history.[33] Moreover, General Delos Emmons, appointed as commanding general to succeed Short in the first weeks after Pearl Harbor, issued several important public statements asking for racial and ethnic tolerance. He also lent his support to the activities of a civilian agency under the territorial governor, the Public Morale Section, which was sanctioned by the military and worked actively against discrimination in counterpoint with its conduct of a propaganda campaign for "Americanism" in the Japanese-American community.[34]

This is not to say that Hawai'i residents of Japanese ancestry were regarded by the military government as beyond suspicion. Approximately 159,000 persons out of a total civilian population of 465,000 were of Japanese descent. Of these, 124,000 were citizens and another 35,000 aliens. Both military and civilian security officials had long believed that there was substantial danger of "fifth column" activity from within this group if the Islands were invaded by Japan; and after the Pearl Harbor attack, such an invasion appeared to be an immediate danger.[35] As happened on the mainland, therefore, the Army and the FBI moved quickly to round up aliens and other individuals who previously had been investigated and were suspected of being disloyal or dangerous in a war situation. Eventually 1,569 persons were detained on suspicion of disloyalty. Of these, 1,466—less than 1 percent of their ethnic group—were of Japanese descent. The detainees included almost all Shinto and Buddhist priests, teachers of Japanese language schools, other leaders of the Japanese community, and many Japanese fishermen whose offshore activities had become the subject of unsubstantiated rumors and suspicions.[36]

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[32] *See infra* notes 50-56.

[33] ALLEN, WAR YEARS, *supra* note 13, at 263-73 (discussing, in addition, combat service by the Engineers units); *cf.* Eileen O'Brien, *Making Democracy*, PARADISE OF THE PACIFIC, Dec. 1943, at 42-45.

[34] ANDREW W. LIND, HAWAII'S JAPANESE: AN EXPERIMENT IN DEMOCRACY 70-71 (1946) [hereinafter LIND, HAWAII'S JAPANESE] (quoting Emmons); on the Public Morale Section, *see id.* at 81-83.

[35] LIND, HAWAII'S JAPANESE, *supra* note 34, at 38-61; *see generally* WEGLYN, *supra* note 18 *passim*.

[36] ALLEN, WAR YEARS, *supra* note 13, at 39-46, 141, 351-52; OKIHIRO, *supra* note 18, at 204-67; Office of the Chief of Military History, "United States Army Forces, Middle Pacific and

These measures were deemed insufficient, however, by some prominent *haole* and by many junior uniformed officers and their families in the Islands, who were a principal source of what a confidential FBI report in 1942 dismissed as "the million false and fantastic rumors" of disloyalty among the Japanese-Americans in Hawai'i.[37] Colonel Green confided to his diary in February, not quite two months after the Pearl Harbor attack, that the Japanese-American residents had "simply shut up" and were "scared to death," in fear of "a local uprising and a slaughter."[38] Green added, ominously: "I am afraid of it too."[39]

Secretary of the Navy Frank Knox and some other high-ranking civilian government officials in Washington remained dissatisfied with the internment of such a small percentage of Japanese alien residents and Japanese-American citizens. They pressed for more drastic measures, despite the FBI's finding that there had been no espionage or sabotage by this community in Hawai'i before, during, or after the Pearl Harbor attack.[40]

Under pressure from the Navy and some elements of Hawai'i's civilian business leadership, President Roosevelt became persuaded that evacuation of the Japanese-American community from Oahu to camps on Molokai or

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Predecessor Commands during World War II, 7 December 1941-2 September 1945: History of G-2 Section," (on file in the Hawai'i War Records Depository, Hamilton Library, University of Hawai'i) [hereinafter Office of the Chief of Military History, History of G-2 Section]; *see also* Michael E. Macmillan, *Unwanted Allies: Koreans as Enemy Aliens in World War II*, 19 HAWAIIAN J. HIST. 179 (1985) (on the extension of prohibitions to residents of Korean ancestry, despite the suffering that their ancestor nation had undergone at the hands of Japanese imperial armies); WEGLYN, *supra* note 18, at 49-52, 86-89. A total of 617 of the persons interned in the Islands during the war were U.S. citizens, 570 of them being of Japanese ancestry, 42 of German ancestry, 2 of Italian, and 3 native-born citizens. Memorandum from Office of Internal Security (Honolulu) to War Department No. R73740 (Nov. 30, 1945) (on file in the Hawaii Military Government Records, Record Group 338, National Archives).

[37] Memorandum from Edward H. Hickey to James Rowe (Apr. 6, 1943) (on file in the Papers of James Rowe, Jr., Franklin D. Roosevelt Library, Hyde Park, N.Y.) [hereinafter Summary of FBI Reply to Angus Taylor's Memorandum]. *See also* LIND, HAWAII'S JAPANESE, *supra* note 34, at 47 (quoting the FBI chief in Honolulu to the effect that "I speak with authority when I say that the confusion in Hawaii [during and after the Pearl Harbor attack] was in the minds of the confused, and not because of fifth column activities").

[38] Diary of General Thomas H. Green (Feb. 3, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

[39] *Id.*

[40] *See* Memorandum from FBI Director J. Edgar Hoover to Assistant Attorney General James Rowe, Jr. (Mar. 16, 1942) (on file in the Papers of James Rowe, Jr., Franklin D. Roosevelt Library, Hyde Park, N.Y.) (it was attached to a Memorandum for the Attorney General dated Apr. 20, 1942) (Hoover wrote: "relative to the question of whether there had been any sabotage committed in Hawaii, I desire to advise that no sabotage was committed there prior to Dec. 7 [1941], on December 7, or subsequent to that time," and that only Japanese consular officials had been found to have engaged in espionage prior to Dec. 7).

internment camps on the mainland was an essential security measure; indeed Secretary Knox urged the White House to order mass evacuation and internment "no matter what it costs or how much effort it takes."[41] Then, in February 1942, Roosevelt actually instructed his cabinet officers to begin the process. "I do not worry about the constitutional question," he told Knox, first because his Executive Order 9066, which was the legal basis for the mainland evacuation, was already in place; "and, second," the President wrote, "because Hawaii is under martial law. The whole matter is one of immediate and present war emergency."[42]

The top Army officials in Hawai'i opposed mass evacuation, however, mainly because the loss of Japanese labor would result in the collapse of agricultural, dockyard, and commercial operations vital to the war effort. Most, though not all, of the influential business leaders supported the Army in its position.[43] Moreover, as the months passed after the December 7 attack and not a single act of espionage or sabotage by an American resident of Japanese descent was discovered, the President's order increasingly seemed misguided to the Army command in Honolulu and to the War Department. "It was a calculated risk" to resist the idea of a mass internment or evacuation, General Green later recalled, "but there was very little choice in the matter" since it would have been impossible to fill the places of thousands of Japanese-Americans who worked as skilled mechanics and artisans. Hence Generals

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[41] Letter from Secretary Frank Knox to President Franklin D. Roosevelt (Feb. 23, 1942) (on file in the Papers of Franklin D. Roosevelt, PSF Confidential file, Franklin D. Roosevelt Library, Hyde Park, N.Y.) (contending that "our forces in Oahu are practically operating now in what is, in effect, enemy country . . . in the presence of a population predominately with enemy sympathies and affiliations").

Similarly, a year later, the acting U.S. district attorney in Hawai'i, Angus Taylor, was pressing the Justice Department to crack down on the Japanese-Americans in Hawai'i on grounds there was extensive espionage and sabotage; he condemned the Army regime for being too inattentive to the threat. Memorandum from Edward Hickey to James Rowe, Jr., "Memorandum for Mr. Rowe: Summary of Taylor Memorandum on Internal Situation in Hawaii" (Apr. 3, 1943) (on file in the Papers of James Rowe, Jr., Franklin D. Roosevelt Library, Hyde Park, N.Y.). Justice officials viewed his reports with great skepticism, especially as the FBI reportedly regarded Taylor as "unreliable and uninformed." Memorandum from James Rowe, Jr. to Francis Biddle, "Memorandum for the Attorney General: The Japanese in Hawaii" (Apr. 10, 1943) (on file in the Papers of James Rowe, Jr., Franklin D. Roosevelt Library, Hyde Park, N.Y.). The FBI flatly rejected Taylor's information. A Justice Department summary of the FBI views stated: "Taylor's comments on sabotage in Hawaii are incorrect, fanciful, and farfetched. These charges have been answered time and time again." Summary of FBI Reply to Angus Taylor's Memorandum, *supra* note 37.

[42] Letter from President Franklin D. Roosevelt to Secretary of the Navy Frank Knox (Feb. 26, 1942) (on file in the Papers of Franklin D. Roosevelt, PSF Confidential file, Franklin D. Roosevelt Library, Hyde Park, N.Y.). *See also* CONN, *supra* note 18, at 209; *see generally* WEGLYN, *supra* note 18, at 87-88.

[43] *See* ALLEN, WAR YEARS, *supra* note 13, at 310-26; OKIHIRO, *supra* note 18, at 253-60.

Emmons and Green decided that "all things considered our best policy would be to hold the local Japanese in place under very strict control."[44]

General Emmons meanwhile approved the continued internment of nearly all the Japanese-Americans picked up in the first wave of arrests, and he assured Washington that all persons of Japanese descent who were considered loyalty or security risks were either being held in a camp on Sand Island in Oahu or else transferred to camps on the mainland. What was important to the War Department at the time was that the Army appeared to be pursuing strong security measures against the Japanese-Americans. Citing these measures along with the pragmatic need for the work force, Assistant Secretary of War John McCloy—who had responsibility for oversight of the Army's governance of Hawai'i—provided strong affirmation of the military's view in the highest policy circles.[45]

Hence, although as late as October 1942 the Hawai'i command clearly was being made aware that "Washington is [still] pressing" for evacuation of more Japanese-Americans, the word went out from headquarters of the Military Governor and commanding general in Honolulu: "Agree but stall."[46] Apprised of the continued delays by the Army, President Roosevelt was unpersuaded that labor needs had to be given a high priority—especially so as he had been warned repeatedly by Secretary of the Navy Knox of a continuing security threat posed by the presence of Japanese-Americans, a view reinforced by special intelligence reports claiming that 500 or more "active agents [were] still loose" in Oahu and engaged in spying and possible espionage.[47] Thus

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[44] General Thomas H. Green (unpublished manuscript, on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.) (war recollections). In this retrospective view, Green also wrote that the plan for removal and internment in Hawai'i was "illegal, unjust, and, of even more importance, it was impractical" in light of shipping, maintenance, and other logistical needs. *Id.*

[45] *See* Memorandum from Assistant Secretary of War John J. McCloy to General Dwight Eisenhower (Mar. 28, 1942) (on file in the Japanese Internment Records, Folder 360, Hamilton Library, University of Hawai'i). In late October, Secretary of War Stimson formally certified to the President that no persons of Japanese descent "known to be hostile to the United States" any longer remained free in Hawai'i and outside the internment camps. Letter from Henry Stimson to President Franklin D. Roosevelt (Oct. 28, 1942) (on file in the Papers of Franklin D. Roosevelt, War Department File, Franklin D. Roosevelt Library, Hyde Park, N.Y.). *See also* WEGLYN, *supra* note 18, at 87-89 nn.23-30.

[46] Diary of General Thomas H. Green (Oct. 1, 1942, Oct. 3, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

[47] Memorandum from Secretary of the Navy Frank Knox to President Franklin D. Roosevelt (Apr. 20, 1942) (on file in the Japanese Internment Records, Hamilton Library, University of Hawai'i) (citing an excerpt from a report by Commander John Ford). Commander Ford was one of Colonel Bill Donovan's operatives in special intelligence and operations.

Secretary Knox was still agitating the question of whether Japanese-Americans in Hawai'i posed a palpable security threat in March 1943. Letter from Joseph R. Farrington to Riley Allen

concerned about the Army's attitude, FDR on November 2 personally sent a memorandum of his views to the Chief of Staff of the Army and to Secretary of War Stimson. "I think that General Emmons should be told," the President asserted,

> that the only consideration is that of the safety of the Islands and that the labor situation is not only not a secondary matter but should not be given any consideration whatsoever. General Emmons and Admiral Nimitz should be advised of this. Military and naval safety is absolutely paramount.[48]

On the very day that FDR sent off these instructions, General Emmons assured the War Department that he was continuing to plan the evacuation of some five thousand residents of Japanese descent—but he left little doubt that the reason was the need to respond to orders from the White House, and not any objective security danger. "The five thousand to be evacuated . . . when and if transportation becomes available," he wrote,

> are not necessarily disloyal to the United States. This group will comprise those residents who might be potentially dangerous in the event of a crisis, yet they have committed no suspicious acts. It is impossible to determine whether or not they are loyal. In general the evacuation will remove persons who are least desirable in the territory and who are contributing nothing to the war effort.[49]

Despite the explicit directive from the White House, the decision to initiate a comprehensive evacuation or internment was successfully resisted by the Army and the highest-ranking War Department officials. In effect, FDR's initiative died from suffocation by bureaucratic resistance. The fact that no hard evidence of any espionage or sabotage was ever discovered apparently served, in the end, to validate the Army's policy of giving labor needs first priority.

As to the hundreds who were interned in Hawai'i, unquestionably most were the victims of serious injustices. Many of them had been taken into custody—and even held for nearly the entire period of the war—on flimsy or non-existent evidence. None had been able to see specific charges, confront accusers, or defend themselves with counsel before special screening boards

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(Mar. 8, 1943) (on file in the Papers of Delegate Joseph R. Farrington, Hawai'i State Archives). And more than a year later, when the news of the decision in Judge Metzger's court in the *Duncan* habeas corpus hearing reached Washington, Knox went on record as implicitly critical; he was quoted in the press as saying he believed that "martial law should be invoked 'whenever military necessity invites it.'" *Hawaii as a 'Military Area' May Be a Compromise Measure,* BALTIMORE SUN, Apr. 15, 1944 (clipping on file in the Papers of Delegate Joseph R. Farrington, Jr., Hawai'i State Archives).

[48] White House Memorandum, initialed "F.D.R." (Nov. 2, 1942) (on file in the Japanese Internment Records, Hamilton Library, University of Hawai'i).

[49] Letter from General Delos Emmons to Secretary Henry Stimson (Nov. 2, 1942) (on file in the Japanese Internment Records, Hamilton Library, University of Hawai'i).

controlled by the military. Many individuals were treated badly in the Sand Island encampment where they were held, and the families of many of the earliest internees were rounded up, given misleading information of what would happen to them, and then evacuated on a "voluntary" basis to the mainland.[50] Army officers in charge conceded that many of those who were interned in those early months were viewed at a very general level only as "troublemakers," and that others were picked up on the basis of entirely unsubstantiated complaints or rumor; so that a great many of the people thus held hostage for larger policy purposes were in fact admittedly "harmless."[51]

Apart from the harsh treatment given them, many internees were incarcerated illegally in the first place, because the War Department had authorized the arrest and detention only of enemy aliens and dual citizens; but on its own, the Army command in Honolulu had decided to arrest and intern all who came under suspicion, including both naturalized and native-born citizens. Not until June 1943 did the Inspector General of the War Department discover this error, leading the Army to review all cases and to retroactively amend the records to specify that confinements had been authorized under the general terms of martial law.[52] In our examination of a small sampling available, out of the hundreds of records of loyalty-security hearing boards before which both alien residents and citizens of Japanese ancestry were brought for questioning—and to face the possibility of internment—we found that completely unsubstantiated allegations were quite consistently made the basis for decisions; also evident was the extent to which any expression by an internee of outrage or resistance based on a notion of his constitutional rights would be interpreted by the examiners as evidence of his disloyalty or untrustworthiness.[53]

Illustrative of the way in which internments were handled in the early weeks of the war was an incident originating in Kauai, where the local district commanding officer received reports that three postmasters of Japanese ancestry "[were] suspected of pro-Japanese sentiments." One, the district commander informed Green at the Military Government headquarters, was "a confirmed *haole* hater" who had visited the Japanese occupied areas of China and returned "with glowing tales about the might of the Japanese Empire"; a second was "supposed to have voiced publicly his sympathy with the Japanese cause"; and the last, he wrote, "also is supposed to have voiced pro-Japanese

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[50] OKIHIRO, *supra* note 18.

[51] *See* WEGLYN, *supra* note 18. *See also infra* note 52.

[52] Office of the Chief of Military History, Civil Affairs, *supra* note 26, at 305-06.

[53] Professor Okihiro came to the same conclusions on the basis of his examination of an unspecified number of internee case files. OKIHIRO, *supra* note 18, at 245.

sentiments; however so far I know very little about him."[54] This communication brought an immediate response from Green, who on February 18 wrote tersely but definitively:

> With reference to your letter of February 13, which reached me yesterday, pertaining to certain postmasters, I understand that the whole matter has been taken care of by arresting the individuals mentioned in your letter and that you have no further problem in this matter. Keep up the good work.[55]

With this letter Green also forwarded to Kauai a formal memorandum entitled "Disloyal Citizens," carrying the following instructions: "In all instances where individuals of Japanese ancestry have been apprehended for publicly voicing any opinion against the United States, they should be interned for the duration of the war."[56]

Some degree of alarm, even if dangers were only imagined, was probably to be expected in the immediate aftermath of the Pearl Harbor disaster. But the offhand way in which Japanese-Americans, both citizens and alien residents, were still being rounded up six months or more after Pearl Harbor either to appease public sentiment or else in response to White House pressure was epitomized in a trans-Pacific telephone comment by the Army's chief security and intelligence officer in Hawai'i: "The evacuation [of selected internees] is merely a matter of relieving pressure . . . . They really aren't dangerous and not bad at all."[57] The military nevertheless would make the continued presence of the large population of persons of Japanese ancestry in Hawai'i a key argument for the prolonged continuation of martial law. As late as 1944, the Army continued to hold in custody a group of Japanese-American internees despite a lack of any hard evidence that they posed any risk to security. If this policy represented a serious injustice to countless internees and their families, the continuance of the policy did operate to underscore the military's two-part argument before public opinion and with the civilian government in Washington—first, that a continuing threat to internal security could be

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[54] Letter from Lt. Colonel Eugene J. Fitz Gerald to Colonel Thomas H. Green (Feb. 13, 1942) (on file in the Hawaii Military Government Records, Record Group 338, Box 49, National Archives).

[55] Letter from Colonel Thomas H. Green to Lt. Colonel Eugene J. Fitz Gerald (Feb. 18, 1942) (on file in the Hawaii Military Government Records, Record Group 338, Box 49, National Archives).

[56] Memorandum from Colonel Thomas H. Green to Lt. Colonel Eugene J. Fitz Gerald, "Subject: Disloyal Citizens" (Feb. 17, 1942) (on file in the Hawaii Military Government Records, Record Group 338, Box 49, National Archives).

[57] WEGLYN, *supra* note 18, at 88 (quoting a Nov. 9, 1942 telephone conversation between Lt. Colonel W. F. Durbin and Colonel Fielding).

assumed to exist in the Islands; and second, that the Army was alert to it.[58] Thus the commanding general told the War Department that selective internment had served to warn and to intimidate the potentially disloyal Japanese-Americans, declaring:

> This method of handling the Japanese population has worked. The much-needed manpower has been utilized, and dangerous individuals interned while security demands for this [Military Area] have been met . . . . Martial law and the internments . . . have without doubt exerted a continuing pressure upon the Japanese community and acted as a deterrent on the Japanese community.[59]

This contention, that the Americans of Japanese ancestry constituted a serious and continuing threat to security in the Islands, would be cited repeatedly by the government in legal arguments when martial law was challenged in the courts; and, as applied to the mainland Japanese-Americans, it was one of the most important arguments upon which the Supreme Court's decisions upholding arrest and internment were based.[60]

Although the Japanese-American community, more than any other segment of Hawai'i's population, thus suffered manifest deprivation of constitutional liberties as the result of Army rule, the fact remains—and must be credited—that 99 percent of the Japanese-American community were at least spared the fate of so many on the West Coast: evacuation to "concentration camps" (as the government forthrightly called them initially, later to designate them instead—euphemistically—as "relocation centers"), and a humiliating, extended incarceration along with the loss of their homes, their businesses, and in many instances their health and the very fabric of their family lives.[61]

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[58] *See, e.g.*, WEGLYN, *supra* note 18, at 294, for a quotation of a communication from General Richardson, commander in Hawai'i, to Assistant Secretary John J. McCloy, Feb. 11, 1944, stating that "the release of prominent Japanese leaders [interned] of known Japanese tendencies [sic] is avoided although in the record of many of these cases it appears that no overt acts have been committed by them."

[59] Letter from General Robert C. Richardson, Jr. to Assistant Secretary of War John J. McCloy (Aug. 19, 1944) (on file in the Assistant Secretary of War Files (McCloy Files), Record Group 107, National Archives).

[60] Thus the Ninth Circuit, in several appeals of habeas cases from the district court in Hawai'i, and also the dissenters in *Duncan* in the U.S. Supreme Court, regarded the allegedly dangerous presence of the Japanese-American population as a major factor justifying martial law and military government. These decisions and opinions are considered, *inter alia*, in ensuing sections of this Article. In addition, the *Korematsu* and *Hirabayashi* cases turned, for the Supreme Court's majority, on the dual premises that the Japanese-American population posed a danger and that the Army was the best judge of security issues. *See* IRONS, JUSTICE AT WAR, *supra* note 9.

[61] IRONS, JUSTICE AT WAR, *supra* note 9, *passim*; OKIHIRO, *supra* note 18, at 358-63. President Roosevelt early used the term "concentration camps" in a memorandum to the Chief of Naval Operations. Memorandum from President Franklin D. Roosevelt to Chief of Naval

B. Civilians Under Army Rule

In the early weeks of the war, there was no public challenge to martial law. It was accepted as an emergency measure with practically no resistance in Hawai'i and indeed with obvious relief and enthusiasm in many segments of the civilian population.[62] Most residents of the Islands apparently also believed that the civilian courts and the civilian government would resume their basic functions as soon as the acute emergency situation had passed—in a few months at most. Any assumption that the Army would willingly relinquish its control over civilian life, however, proved wholly unwarranted. For more than fifteen months—until March 1943, when some of the civilian government's authority and individual civil liberties were restored—the military would rule Hawai'i with virtually an unchecked authority, suspending constitutional guarantees on a wholesale basis. Although the Army did permit the civil courts to re-open for non-criminal, non-jury cases early in 1942, the jurisdiction of those courts was strictly limited; hence, nearly all misdemeanors and all felonies continued to be tried before military tribunals. The general orders issued by the Army recognized no residual or controlling powers in the governor, the legislative officers of the territory or its municipalities, or the civilian courts at any level. Indeed, the Army thereafter formally regarded the civilian courts, when they were allowed to resume functioning in a limited way, as "agents of the Military Governor."[63] Martial law was not lifted entirely until October 1944, more than two years after the Battle of Midway had ended any real danger of invasion or massive strike against Hawai'i.

Operations (Aug. 10, 1936) (on file in the Papers of Franklin D. Roosevelt, Franklin D. Roosevelt Library, Hyde Park, N.Y.). In March 1942, the Joint Chiefs of Staff approved a plan for internment or evacuation in Hawai'i, referring to "transferring the Japanese population to a concentration camp located on the U.S. mainland." Quoted in WEGLYN, *supra* note 18, at 175. The War Department notified the Attorney General on March 27 that the President had accepted the Joint Chiefs' plan and ordered that it be put into effect. Letter from Henry W. Stimson to Francis Biddle (Mar. 27, 1942) (copy on file in the Papers of General Thomas H. Green, Box 3, Judge Advocate General's School Library, Charlottesville, Va.).

Attorney General Biddle stated in his notes of a Cabinet meeting on Dec. 22, 1944 (a time when the implications of the term as used to describe the Nazi operations was fully understood) that the Tule Lake center was "a dismal place—nothing but a concentration camp." Biddle Cabinet Notes (on file in the Papers of Francis Biddle, Franklin D. Roosevelt Library, Hyde Park, N.Y.).

[62] *See, e.g.*, ALLEN, WAR YEARS, *supra* note 13.

[63] Letter from Attorney General Francis Biddle and Acting Secretary of Interior Abe Fortas to John J. McCloy (Dec. 19, 1942) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives). *See also* Anthony, *Hawaiian Martial Law*, *supra* note 21, at 29-32; ANTHONY, ARMY RULE, *supra* note 3, at 14.

During the period of most comprehensive military rule in Hawai'i, from Pearl Harbor to March 1943, some 181 general orders were issued under the name of the commanding general. As the territorial attorney general recounted at the time, these orders represented a "military regime with . . . stringent controls over the civilian population."[64] Control was administered by the person who had planned the takeover of control: Lt. Colonel Green, who assumed for himself the title of "Executive, Office of the Military Governor," and who appropriated the Iolani Palace offices that had been the seat of territorial government. The costs of the operation were borne by the simple expedient of the Army's arbitrary confiscation of $15 million in emergency funds that were allotted by the President to the territorial governor and the Department of the Interior in February 1942 "for the protection, care and relief of the civilian population."[65] In addition, the Office of the Military Governor held onto all fines and forfeitures imposed by the provost courts, applying these funds to meet court costs and general administrative expenses.[66] And so Lt. Colonel Green (soon to be jumped to Colonel, then a year later to Brigadier General) became, in effect, the czar of Hawai'i's civilian life—including civil and criminal law enforcement: he was effectively a dictator with vast power, overseeing every aspect of comprehensive martial law, both administrative and judicial. "My authority was substantially unlimited," Green wrote in his recollections of his Hawai'i assignment.[67]

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[64] Letter from Territorial Attorney General Garner Anthony to Governor Ingram M. Stainback (Dec. 1, 1942) (on file in the Papers of Governor Ingram M. Stainback, Hawai'i State Archives). Substantially the same position is expressed by a high-ranking member of the Department of the Interior hierarchy, in Letter from Benjamin Thoron to Harold Ickes (May 12, 1942) (on file in the Papers of Harold Ickes, Library of Congress); *see generally* ANTHONY, ARMY RULE, *supra* note 3, at 12-45 (discussing martial law rule).

[65] ANTHONY, ARMY RULE, *supra* note 3, at 191-92 (reprinting a letter from Garner Anthony to Governor Ingram Stainback (Dec. 1, 1942), which quotes a letter from Franklin D. Roosevelt to Harold Ickes (Jan. 12, 1942)). *See id.* at 191-95 (discussing the efforts of the civilian governor to deal with the problem of the Army's seizure of funds and retention of fines, etc.).

[66] *Id.* at 48-52.

[67] General Green's handwritten marginal notes, on Manuscript, "Development of the Office of Military Governor" (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.) [hereinafter Manuscript, "Development of the Office of Military Governor"] (draft chapter of an unpublished history, apparently prepared by Army historians). Green wrote that at the outset of the military regime: "Emmons indicated I was to run the show." Diary of General Thomas H. Green (Jan. 1, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.). In a later entry, he mused that it was "very simple to get into an autocratic state in which we believe ourselves infallible. We're not, and it takes a blast now and then [in staff meetings] to keep us in line . . . ." Diary of General Thomas H. Green (May 3, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

The scope of the Army's general orders reached into every corner of daily life, often with the imposition of policies that deviated dramatically from the norms of peacetime American communities—and in many ways from the rules that were established during the wartime emergency in the forty-eight mainland states. The Army controlled not only the civil and criminal law, but nearly the entire range of federal administrative law that on the mainland was under jurisdiction of the War Production Board, the Office of Price Administration, the War Labor Board, and other "alphabet agencies."[68]

Japanese alien residents were subjected to additional special regulations, to guard against subversion. They were prohibited from meeting in groups of ten or more (even for religious ceremonies); or carrying flashlights, portable radios and cameras; or possessing radio transmitters and other items, even road maps, that could be used in espionage. Areas of Oahu, especially in and near the military bases and airfields, were ruled off limits for all enemy aliens; and Japanese-American workers in the shipyards or other government installations were required to wear large badges that set them apart from others on those jobs.[69] As a result many permanent residents who had been born in Japan, and who therefore were legally ineligible for U.S. citizenship, lost their jobs after decades of working in Hawai'i.

The 5,000 residents of Korean ancestry also found themselves subjected to these restrictions, simply because Army police and sentries claimed to be unable to differentiate them by appearance from the Japanese. Officials of the self-designated Korean government in exile, in Washington, conducted an intensive publicity campaign to require the Army to recognize the distinction between residents of Korean ancestry and those of Japanese ancestry, winning some outspoken support from Senator Guy Gillette of Iowa;[70] and in Honolulu, the *Star-Bulletin* (owned by the family of the territorial delegate to Congress, Joseph R. Farrington, and the only newspaper in the Islands to question the legitimacy of Army rule) lent forceful support to the Korean cause.[71] The issue came to a head in May 1943, when a provost court ruling by Lt. Colonel Moe

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[68] ANTHONY, ARMY RULE, *supra* note 3, at 46-59; *see also Hawaii's Industry Goes to War*, HAWAII: A MAGAZINE OF NEWS AND COMMENT, July 18, 1942, at 7; *see* ALLEN, WAR YEARS, *supra* note 13.

[69] On this and related regulations impacting Japanese-Americans, *see* ANDREW W. LIND, THE JAPANESE IN HAWAII UNDER WAR CONDITIONS (American Council, Institute of Pacific Relations Paper No. 5, 1943) [hereinafter LIND, THE JAPANESE IN HAWAII]; Office of the Chief of Military History, History of G-2 Section, *supra* note 36. *See also generally* Colonel George W. Bicknell, "Security Measures in Hawaii During World War II" (typescript) (on file in the Hawai'i War Records Depository, Hamilton Library, University of Hawai'i).

[70] *See General Emmons Asked to Alter Korean Status*, HONOLULU STAR-BULLETIN, May 18, 1943, at 1.

[71] *See Time to Correct an Injustice*, HONOLULU STAR-BULLETIN, May 6, 1943, at 8 (editorial).

Baroff, declaring Koreans to be enemy aliens for purposes of enforcing regulations directed at Americans of Japanese ancestry, was appealed to General Emmons by a civilian counsel in a curfew violation case.[72] Emmons tersely rejected counsel's arguments—that the Korean people had endured long decades of harsh treatment at the hands of Japan's militarist regime, and that Europeans whose countries had been conquered by Nazi Germany were not considered to be enemy aliens—by stating simply that after consideration "the findings and judgment of the provost court are sustained."[73] This was clearly a particularly stinging insult to a people whose country and kin had so long suffered under the hand of Japanese imperialism.

Other, far broader, restrictions applied to all civilians. Early measures instituted by the Army included the compulsory registration and fingerprinting of all civilians except infants, and strict censorship of the press and broadcasting as well as of the civilian mails. Hospitals and other emergency facilities were placed under direct military control. Within a few months of the outbreak of war, the Army was also busily regulating gambling (forbidding use of marked cards and dice), sale of alcoholic beverages, traffic and parking, prostitution, and even dog-leash requirements.[74] Among the most intrusive, and, in the long run, most resented incursions on freedom were the curfew that kept civilians off the street at night and the blackout orders that kept their homes dark after sunset; these orders were kept in effect for two-and-a-half years. As noted earlier, the Army also assumed control during 1942 of all the wartime "alphabet agencies," including key administrative units such as the War Production Board, the War Labor Board, and the Office of Price Administration; it also directly supervised the territorial government's Office of Civilian Defense, and more generally assumed oversight of all the minutiae as well as general functions of administration in the civilian territorial agencies.[75]

The Army also encouraged women and children in civilian families to relocate to the mainland for their safety. Consequently, several thousand were evacuated from the Islands, taking up temporary homes mainly in California and the State of Washington. Within two years after Pearl Harbor, however,

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[72] *See Provost Court Rule on Koreans to be Appealed*, HONOLULU STAR-BULLETIN, May 5, 1943, at 5.

[73] *Koreans Here to Remain as Enemy Aliens*, HONOLULU STAR-BULLETIN, June 2, 1943, at 1 (reporting on the appeal of the curfew violation conviction of Syung Woon Sohn). On the Army's policy toward the Koreans in Hawai'i, so fraught with irony, see Macmillan, *supra* note 36.

[74] *See* ANTHONY, ARMY RULE, *supra* note 3, at 137-84 (reprinting the general orders and discussing the regulations). *See also* JIM A. RICHSTAD, THE PRESS UNDER MARTIAL LAW: THE HAWAIIAN EXPERIENCE (1970); ALLEN, WAR YEARS, *supra* note 13, *passim*.

[75] *See Hawaii's Industry Goes to War!* HAWAII: A MAGAZINE OF NEWS AND COMMENT, July 18, 1942, at 7; *see generally* ALLEN, WAR YEARS, *supra* note 13.

the increasingly difficult circumstances in which many of these evacuees found themselves had become a severe embarrassment for the Army. Finding places for passage on ships going eastward from Hawai'i was one thing; it was another matter to make space available for their return when thousands of troops were being loaded on every available vessel departing the West Coast for the Islands, then the staging area for the entire Pacific war. As many of the evacuated women and children began to encounter severe economic deprivation, the issue became known as the "strandee" problem. Some 3,000 Hawai'i residents in this status still remained on the West Coast in late 1943, denied places on Pacific-bound ships and focusing their anger on General Green and the Army command in Honolulu, which controlled space allocations. Secretary Ickes made it a policy priority for his department to press for return of the civilian strandees, but his office reported in March 1944 that after repeated appeals to the War Department, the Navy Department, and the War Shipping Agency "the upshot was flat failure."[76]

What made the strandee issue particularly volatile, politically, was the increasing public recognition that the Army was giving priority to the wives of newly recruited civilian laborers who were being brought out to the Islands—contributing, incidentally, to a serious housing shortage—while denying passage to residents who had been evacuated. Moreover, civilian employees of the military and naval services and their contractors apparently were given passage space for vacations on the mainland and return, while the "exiles" remained stranded. Even many women who were recruited to be "entertainers" for the troops, but who were believed by Hawai'i civilian officials to be taking up more remunerative careers as prostitutes once they arrived in the Islands, were obtaining priority on the ships over the strandees. The fact that a significant proportion of the workers being recruited for dockyard and other heavy work in the Navy and other military facilities were African-American may well have added to the resentment that strandees were given such short shrift. At a minimum, it was a public relations nightmare for the Army command; and clearly it was an area of policy—similar in that regard to the Army's failure to deal well with the housing crisis—in which the

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[76] Memorandum from J. [John Frank] to Under Secretary Fortas (Mar. 31, 1944) (on file in the Secretary of the Interior Files (Fortas Files), Box 9, Department of the Interior Records, Record Group 48, National Archives); *see also* ALLEN, WAR YEARS, *supra* note 13, at 346-48; Letter from Frank Midkiff to Admiral E. S. Land (Oct. 16, 1943) (on file in the Papers of Delegate Joseph R. Farrington, Hawai'i State Archives). *See also infra* note 77.

Criticism was also directed at the Army for its failure to deal effectively with the severe housing shortages that developed. *See* U.S. Congress, 79th Cong., 1st Sess., House, Committee on Naval Affairs, Congested Areas Subcommittee, INVESTIGATION OF CONGESTED AREAS: A REPORT ON THE PEARL HARBOR-HONOLULU AREA (1945).

military's performance in regulating Hawai'i's civilian life was less than minimally effective.[77]

A particularly onerous and eventually much-criticized aspect of martial law was the Army's control over labor, including wartime wages, working conditions, and allocations of workers to industries and firms. At the outset of martial law, the military suspended all labor contracts, froze prevailing wages, and required all civilians working for public utilities, civilian agencies, or government contractors—an estimated total of 80,000 workers—to remain in their positions. Much more sweeping control was instituted three months later, however, when job-switching and absenteeism from work without an employer's permission were made criminal offenses: under terms of General Orders No. 91 (March 3, 1942), these designated workers were made subject to prosecution in the provost courts and to fines or imprisonment of up to two

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[77] Scheiber and Scheiber, *supra* note 6, at 351; Col. George W. Bicknell, "Security Measures in Hawaii During World War II," *supra* note 69, at 82-83 (stating that prior to the war, too, there had been evidence of strong feeling among some elements of the Islands population against an influx of African-Americans, so that when the Army had planned "to import Negro labor battalions" to replace Americans of Japanese ancestry in security-sensitive areas such as dockyards, "an immediate protest had arisen from civilian organizations that such action would create a new racial problem;" and so the plan was abandoned). *See also* MICHAEL SLACKMAN, TARGET: PEARL HARBOR 241-43 (1991); BETH BAILEY AND DAVID FARBER, THE FIRST STRANGE PLACE: RACE AND SEX IN WORLD WAR II HAWAII (1992). The "exiles" phrase is from a Memorandum from W. Boardman, "The Territory of Hawaii Under Martial Law" (May 1944) (on file in the Secretary of the Interior Files (Fortas Files) U.S. Department of the Interior Records, Record Group 48, National Archives) (copy provided to authors by Professor Laura Kalman, University of California, Santa Barbara) [hereinafter Boardman Report].

After civilian rule was partially restored in early 1943, the governor established an Office of Island Resident Return to deal with the strandee problem. Former governor Lawrence M. Judd, Sr., was named Administrator of this agency. At year's end Judd filed a lengthy report complaining of the counterpart military agency, the Travel Section of the Office of the Military Governor, stating that the "general attitude" of the Army agency was to act arbitrarily and in violation of terms of a joint policy on returnee/strandee issues that had been agreed to by the Army, the Navy, and the civilian government in April 1943. Applications for passage from the mainland were not being treated on their merits, Judd averred; information was not being shared with Judd's agency; and priorities were being established and issued to individual applicants without the Army's obtaining concurrence (as the April agreement had provided) of the civilian agency. Memorandum from Lawrence M. Judd, Sr. (Dec. 1943) (on file in the Papers of Lawrence M. Judd, Sr., File IV.D., Hawai'i State Archives). Among the decisions by the Navy that led to friction with the civilian government was arbitrary establishment of three months residence in Hawai'i prior to evacuation to the mainland for an individual to even be considered for passage back to the Islands. Ironically, the families of Army personnel, some of them the families of men stationed in combat areas, were among those affected. *See* Letter from Lt. R. J. Hoogs to Maj. R. H. Johnston (an officer on active service in the Pacific) (Nov. 17, 1943) (on file in the Papers of Lawrence M. Judd, Sr., File IV.D, Hawai'i State Archives) (denying passage to Johnston's wife on grounds of lack of sufficient time in residence prior to evacuation).

months' time for unauthorized absences from work or attempts to change jobs without permission.[78] According to civilian leaders on the Islands, absenteeism was one of the crimes most frequently punished with jail sentences. What the General Orders termed a "failure to report to work" was interpreted by the provost judges as giving them authority to convict and punish for absences of even only a few hours. The harsh treatment received by "flagrant absentees" before the military tribunals was probably encouraged by the top Army legal officers, as evidenced by the advice given the provost officers at a May 1944 conference of all the provost judges: Because his office sought to "rehabilitate" such delinquents, the supervisor of the provost courts advised the judges, the typical defendant had already "had every chance" to correct his work habits before being prosecuted. "When all patience is exhausted, he is brought up before you for prosecution. To the best of my knowledge, we never lost a case in Provost Court."[79] Furthermore, he suggested that in every labor case the provost court should sentence the defendant to hard labor: "When they get to the places of incarceration," he explained, "they will be put on HARD LABOR anyway."[80] Under pressure from the Department of the Interior, General Robert Richardson, Jr. (then in command in Hawai'i) amended the general orders shortly after this May 1944 conference, to abolish jail sentences for absentees unless the convicted party could not pay the fine. But even that move, as Under Secretary of Interior Abe Fortas pointed out, could be fairly characterized as "still a far cry from restoration of an American system of values in Hawai'i."[81]

Moreover, the large plantations were favored with what critics regarded as "sweetheart deals" by which their field workers were frozen into their jobs, but the companies contracted out the same workers to the Army for military construction projects. (The Army defended this effective conscription of civilian workers because the arrangement assured that construction deadlines

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[78] General Orders No. 38 (Dec. 20, 1941) and No. 91 (Mar. 31, 1942) (copies on file in the Hawai'i War Records Depository, Hamilton Library, University of Hawai'i). General Orders Nos. 38 and 91 are also reproduced in ANTHONY, ARMY RULE, *supra* note 3, at 141, 155; *see also id.* at 42-45.

[79] Meeting Summary and Transcript, "Provost Court Judges in Conference at the Office of the Military Governor" 22 (May 26, 1944) (on file in the Hawaii Military Government Records, Record Group 338, National Archives) [hereinafter Provost Court Judges in Conference Transcript].

[80] *Id.* (quoting Captain John Wickham). In fact, most of the first offenders in absentee prosecutions were given fines of $150 to $200 and suspended sentences. One scholar has counted a total of 1,349 cases (only 143 of the defendants being Japanese-American workers) in the provost courts involving the violation of labor laws. OKIHIRO, *supra* note 18, at 313 n.54. Jail sentences for absenteeism were discontinued by order of General Richardson in May 1944. Letter from Abe Fortas to John J. McCloy (May 30, 1944) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[81] *Id.*

would be met while compensation to the plantation companies was consistent with cost-plus contracting rules then in effect.)[82] The powerful corporate interests in the Islands were given significant incentives by such measures to line up in support of the Army when the military encountered criticism for martial law; and when labor unions threatened job actions, as happened very late in the war, the Army could be relied upon to weigh in on the employers' side in the name of sustaining the Islands' security and readiness.[83] To the dismay of many political leaders in Hawai'i, however, the labor unions well into 1944 showed little inclination to resist Army control, or even to press for removal of absenteeism as an offense triable in provost courts. Instead, "supine acquiescence" was the typical posture of the top union brass, and as a patriotic act the unions followed a "no strike" policy until the fighting in the Pacific theater had nearly come to an end.[84]

Possibly the relatively passive role of the unions was also attributable to the curious fact that the military government—with the full approval, apparently, of the major employers—generally pursued a more permissive policy toward wage increases and misgrading of employees so as to allow higher pay scales than would have been allowed by strict application of the War Labor Board standards imposed on the mainland. Contrary to this pattern, on the other hand, the Army regulations provided for overtime pay only after 44 hours' work, despite provisions of the Fair Labor Standards Act of 1938 that explicitly required overtime scales on work in excess of 40 hours. Not until June 1944 did the chairman of the National War Labor Board reassert full jurisdiction and bring Hawai'i wage and hour policies into line with congressionally mandated standards.[85]

A particularly sinister aspect of the labor policy was the way in which it was administered against the stevedores and other workers on the docks in Honolulu: it was they who were most often prosecuted for absenteeism. The exigencies of tight shipping schedules and sensitive military and naval

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[82] OKIHIRO, *supra* note 18, at 241. A total of 513,130 man-days of labor was supplied by the plantations to the Army Engineers during 1941-1944, according to a 1945 report. *See* Hawaiian Sugar Planters' Association, The War Record of Civilian and Industrial Hawaii: A Documentary History of the Assistance extended to the Armed Forces by the Civilian Community and the Sugar Plantations 24 (1945) (unpublished copy in File 1.03 of the Hawai'i War Records Depository, Hamilton Library, University of Hawai'i).

[83] Provost Court Judges in Conference Transcript, *supra* note 79, at 22. It was reported that about one quarter of the total number of cases reported for job delinquency were actually prosecuted, with 585 cases taken to the provost courts in all. *Id.*

[84] ANTHONY, ARMY RULE, *supra* note 3, at 44-45. For a detailed account, *see* Paul R. Van Zwalenburg, Hawaiian Labor Unions under Military Government (1961) (unpublished M.A. thesis, University of Hawai'i, 1961). *See also* EDWARD D. BEECHERT, WORKING IN HAWAII: A LABOR HISTORY 287-95 (1985); OKIHIRO, *supra* note 18, at 240-43.

[85] ANTHONY, ARMY RULE, *supra* note 3, at 43-44.

operations in the harbor facilities, the Army contended, meant that there was an "absolute necessity of keeping the men on the job"; and there were hundreds of prosecutions for "flagrant absenteeism" which, the Army stated, were mainly against Filipinos—who were characterized by General Richardson in stereotypical terms as "notorious in the laxity of their work habits"—and against citizens of Japanese descent, who presumably required especially tight control for security reasons.[86] Richardson went on to mention, without comment, the fact that overtime work was compulsory for the workers on the docks; in fact, a mandatory 70-hour week was not unusual.[87] If he considered it at all, Richardson apparently rejected the idea that the physical and mental toll of such a regimen at heavy physical labor might have had more to do with absenteeism than "work habits" of an Asian minority.

The business community's general support for the Army was reflected in the way the Honolulu Chamber of Commerce became a reliable ally of the Military Governor. When, for example, rumors from Washington in 1943 indicated that Army control of the Islands' economy might be curtailed, the Chamber's leadership issued statements of public support for the commanding general and sent cables to Washington urging that the military be left with all its powers intact—asserting, for good measure, that "our Military Governor has been eminently fair and considerate of our civil rights this past year."[88] The territorial attorney general confronted Frank Midkiff, president of the Chamber and one of the giants of the territory's business community, and asked why the cables had made such claims concerning civil liberties. "Midkiff told me that the Chamber was not interested in the courts or the rights of civilians," the attorney general reported to the delegate in Congress, "but was only interested in the obtaining of priorities and the freezing of labor."[89] Although doubtless there were shades and variations of opinion in the business community, the prevailing interpretation given such incidents in the Department of the Interior was that the Army and the major corporate interests were working in tandem, under the banner of patriotism and wartime loyalty, to maintain a tight hold on the working people of the Islands. Perhaps the harshest expression of this view—which, as will be seen later in the present analysis, had an important

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[86] Letter from General Robert Richardson to Assistant Secretary John J. McCloy (Feb. 10, 1944) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives). In an interview with a provost judge in early 1942, a similar attitude with respect to racial and ethnic stereotyping is evident: Willard Brown, *Has Solomon Role*, PARADISE OF THE PACIFIC, Feb. 1942, at 24-25.

[87] Letter from General Robert Richardson to Assistant Secretary John J. McCloy (Feb. 10, 1944) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[88] ANTHONY, ARMY RULE, *supra* note 3, at 28-29.

[89] Letter from Garner Anthony to Joseph R. Farrington (Jan. 26, 1943) (on file in the Papers of Delegate Joseph R. Farrington, Hawai'i State Archives).

impact on the position of the Interior Department in policy negotiations over Hawai'i—came from the Director of the Division of Territories and Island Possessions, who advised the Secretary that "a small number of fascist-minded business men" were mainly responsible for the way in which the rights of laborers were being handled so abusively in Hawai'i. "They are influential with the 'Office of the Military Governor,'" he wrote:

> This group favor the military regime with all its stringent controls of labor, severe and arbitrary penalties for infractions of orders. To be sure, they want to win this war, but they are also interested in profits and find it extremely convenient to obtain whatsoever they desire in the form of an order from the military authorities. They are not hampered either by democratic processes, such as legislation, or by territorial civil servants who, as a rule, are far more able to deal with the shrewd men of business than the average army officer.[90]

All the general orders that governed labor as well as general criminal and civil matters were issued in the name of military security. The Army established an advisory "Labor Control Board" under the Office of the Military Governor; its membership consisted of three representatives nominated by the Honolulu Chamber of Commerce and three by organized labor, plus an Army Engineers officer and a Navy representative. John Read, a former plantation manager, was appointed Director of Labor Controls, again operating under direct supervision of General Green. A U.S. Department of Labor investigation of the Army's record on labor control reported in late 1943 that the military and the administrative agencies it had created were operating systematically in favor of management interests over the interests of labor—a charge hotly denied by General Richardson as a criticism nurtured by the "radical element of labor in the territory," expressing a view "not concurred in by the established stable element of labor in this community."[91] To give further weight to his point, Richardson attested that the radical leadership was concentrating its organizing efforts upon Japanese-American workers, and that the real objective of their organizing drive was to overcome the influence of conservative labor leaders' collaborative stance toward Army controls, and ultimately to undermine martial

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[90] Boardman Report, *supra* note 77. It was General Green's private view that Ickes and his top aides in Interior were (as he wrote of Fortas, the Assistant Secretary) "completely prejudiced against local [Hawai'i] business, whom he thinks is hand and glove with the military because the military have obtained its cooperation." Marginal notes in Green's hand on copy of a letter from General Thomas H. Green to Assistant Secretary John J. McCloy (Dec. 19, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.) (notes referred to Fortas and to Attorney General Francis Biddle).

[91] Radio from General Robert Richardson to General George C. Marshall (Dec. 18, 1943) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (Radio W81110).

law itself—withal, "to organize labor along subversive lines, which then becomes a matter of military security."[92]

Thus, with "military security" as its justification, martial law pervaded every aspect of civilian life. Throughout the first two years of the war, every violation of the military's general orders—from the most violent crime to the most trivial misdemeanor, and including labor relations issues basic to workplace conditions—was prosecuted in military courts, with no provisions for the usual constitutional guarantees of due process.[93] It is little wonder, then, that Army-administered justice, with its sweeping effects on civil liberties and everyday life, eventually became a storm center of political controversy both in the Islands and in the Roosevelt Administration's civilian leadership in Washington.

C. "Drum-head Justice"? The Military Courts[94]

A key legal and constitutional issue was the suspension of the writ of habeas corpus—a fundamental constitutional right, by which persons taken into custody could seek to have a court of law determine the legality of the proceedings that had led to their detention. At the outbreak of the war, when the civilian courts were first suspended, the Army had created a "military commission" of civilians and Army officers to try serious criminal offenses, including capital crimes, and to try crimes of war such as sabotage. Shortly after the Pearl Harbor attack, Colonel Green summoned to his office some leading members of the bar, the federal district judges, and the chief justice of the territorial supreme court; and he sought their support for the creation of this commission, as well as for the general takeover of the civilian courts. The lawyers and judges extended less than enthusiastic support, however, especially after Garner Anthony (a partner in one of the Islands' leading law firms and counsel to at least two of the "Big Five" companies that controlled much of Hawai'i's economy) expressed concern regarding the legality of the commission. In Anthony's view, any civilian who served on such a commission might later be found liable in civil suits for wrongful imprisonment

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[92] *Id.*

[93] Scheiber and Scheiber, *supra* note 6, at 348-50.

[94] In a memorandum for Secretary Ickes in December 1942, Warner W. Gardner, Solicitor of the Department of the Interior, referred to "the drum-head justice of the provost courts," stating further that "the administration of justice is among the worst features of the military conquest of the civilian government." Memorandum from Warner W. Gardner to Harold Ickes (Dec. 10, 1942) (on file in the Papers of James Rowe, Jr., Box 36, Franklin D. Roosevelt Library, Hyde Park, N.Y.). Anthony quotes other passages from this memorandum, a copy of which he examined from Department of the Interior files. ANTHONY, ARMY RULE, *supra* note 3, at 26.

and other harms to defendants. His view was disputed by Colonel Green—whose anger at Anthony for this intervention proved undiminished throughout the ensuing period of Green's service as Executive, marking out Anthony for him (as Green confided to his diaries) as a personal enemy, a man of bad judgment, and at best a misguided foe of Army rule.[95] A few senior members of the bar and bench, however, found Anthony's advice sound, and so either declined to serve or else asked the Army to consider bonding them against any liability. Ironically, years later, as the war's end approached, Green and his military-lawyer colleagues would themselves worry about nothing more than the possibility of civil suits for their role in administering the Army's regime in Hawai'i.[96]

Thus conceived in controversy, the commission went into operation with a mixed board of civilians and military officers, but the Army soon decided to drop the civilian members. The commission in fact tried only a handful of cases during the entire war period, and so was of small significance as measured by the number of individuals its operations touched.[97] In one respect, however, the commission's operation proved to be of critical importance politically: It tried and convicted for murder, which the Army had designated a capital crime, a Maui Hawaiian resident named Saffrey Brown.[98] In March 1942, Brown—the 32-year-old father of seven children—was arrested by the authorities after shooting his wife during a domestic dispute in Honolulu, where she had gone to live, apparently gone *lalau* (astray), in this instance reportedly with a lover, and Brown had visited to beg her to return. Local civilian officials in Maui believed that the gun had gone off during a struggle set off by "a fit of jealousy," and there was some testimony that the gun might even have been set off when one of the children hit Brown's hand.[99] They did not believe that premeditated murder was at issue. They were outraged when the military commission passed a death sentence after denying Brown the right to a jury trial, reportedly permitting him to be represented by a non-lawyer (against a highly qualified Judge Advocate General lawyer for the Army's prosecution

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[95] Diary of General Thomas H. Green (Oct. 20, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

[96] For discussion regarding concern about civil liability, *see infra* notes 336, 385, 494 and accompanying text.

[97] *See* ANTHONY, ARMY RULE, *supra* note 3, at 9-10 (discussing how the commission, initially appointed in December 1941, was superseded shortly afterward by an all-military commission that decided a number of cases, including a murder case).

[98] *Id.* at 20-21 (discussing both the Saffrey Brown case and the case of a German, Otto Kuehm, who was tried for espionage).

[99] Letter from A. S. Spencer to Samuel W. King (May 5, 1942) (on file in the Papers of Delegate Samuel Wilder King, M-472, Series 21, Miscellaneous Subject Correspondence, Folder 1449, Hawai'i State Archives). Spencer was the Chief Executive Officer of the County of Maui Board of Supervisors.

team), and failing to recognize explicitly any distinction between first and second degree murder. "This is the first time that the death sentence has ever been inflicted upon anyone living in the County of Maui," the county treasurer wrote to the Hawai'i territorial delegate to Congress, Samuel Wilder King, asking King to intercede if for no other reason than all who had attended the trial felt that premeditation had never been considered as a factor and that Brown's counsel had been unqualified.[100]

Delegate King was appalled by the information that came to him from trusted political associates concerning what seemed a serious abuse of Army authority, and he called upon Secretary of the Interior Harold Ickes to ask the War Department to head off the prisoner's impending execution. After study of the record by the Judge Advocate General, Secretary of War Stimson decided to order General Emmons in Hawai'i to hold the execution order "in abeyance"; and within a month's time—under continuing political pressure from Washington—Emmons formally commuted Brown's sentence to a life term.[101]

The controversy over the Saffrey Brown trial served, however, to dramatize the extent to which the Army had taken control of civilian governance and justice—and had set aside normal constitutional guarantees. It thus precipitated the martial law issue in a dramatic way, helping to influence the opinions of Army rule that were taking form in the minds of key political actors such as Secretary Ickes, Delegate King, and members of the territorial civilian officialdom and the Hawai'i bar, many of whom would take the lead in seeking an end to martial law. The attorney Garner Anthony, who, as we have noted, had been skeptical of the legality of the Army's initiatives even on Pearl Harbor day, was more than ever convinced that changes must be sought. While the commutation of Brown's sentence "answers the immediate question, *i.e.*,

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[100] Letter from Pia Cockett to Samuel W. King (May 8, 1942) (on file in the Papers of Delegate Samuel Wilder King, M-472, Series 21, Miscellaneous Subject Correspondence, Folder 1449, Hawai'i State Archives). Ickes had been informed in May 1942 by Frank Midkiff, a Hawai'i businessman generally supportive of the Army's authority and not critical of martial law, that "the governor [Poindexter] is now desirous of restoring civil government to all except essentially military affairs"; and stated that while General Short had intended "to operate on this basis but a short time," the military government under General Emmons showed no signs of turning functions back—and had even been "extended to many items that belong to and could be dealt with by the usual civil government." Letter from Frank Midkiff to Harold Ickes (May 28, 1942) (copy on file in the Papers of Governor Poindexter, Public Morale Section Records, Hawai'i State Archives). Letter from Samuel W. King to Maj. General James A. Ulio (May 15, 1942) (on file in the Papers of Delegate Samuel Wilder King, M-472, Series 21, Miscellaneous Subject Correspondence, Folder 1449, Hawai'i State Archives).

[101] Letters from Secretary of the Interior Harold Ickes to Delegate Samuel W. King (May 13, 1942); Henry Stimson to Samuel W. King (May 13, 1942); Samuel W. King to Pia Cockett, (June 30, 1942) (all on file in the Papers of Delegate Samuel Wilder King, M-472, Series 21, Miscellaneous Subject Correspondence, Folder 1449, Hawai'i State Archives).

whether the man should hang," Anthony wrote, "it is no solution of the problem." Anthony regarded the Army's conduct of trials, whether by the Military Commission or any other court, for those charged with purely civilian offenses as being clearly "illegal," and he wanted immediate action in Washington to assure restoration of proper civilian control of ordinary justice.[102] Anthony's view was of special importance, for not long after expressing these opinions he would withdraw from the Robertson, Castle and Anthony law firm and accept appointment as the territorial attorney general.

Far more important institutionally than the Military Commission were the provost courts, established to enforce the whole range of military regulations; they also conducted trials for felonies and misdemeanors under territorial and federal laws, which were continued in effect by military orders. The provost courts were for more than three years the principal institutions of justice in Hawai'i. As we have seen already, the provost judges were also the harsh enforcers of the notorious general orders against "chronic absenteeism" and job-switching by workers.[103]

Civilians brought before the provost courts were denied virtually all of the basic constitutional guarantees of due process contained in the Bill of Rights, including the right to trial by jury and freedom from unreasonable searches and seizures without a warrant. Often no written charges were presented, and defendants were not permitted to cross-examine witnesses against them nor to call witnesses in their own behalf. In the few trials that were appealed, the trial record that was kept often proved to be crude and inaccurate. A single officer (often wearing a sidearm) presided in the provost court, and he directly examined prisoners and any witnesses. Many of the judges were without legal training, at least in the first year of the war. Although defendants were formally allowed the right to counsel, the provost judges commonly told them that lawyers were neither necessary nor desirable. Word soon spread that contrite acceptance of the court's verdict was likely to yield a lighter sentence than appearing with counsel—an important piece of common wisdom, since the verdict could not be appealed.[104]

An investigation in Hawai'i conducted by the Solicitor of the Department of the Interior in late 1942 reported "defendants . . . convicted of violating 'the spirit of martial law' or 'the spirit' of general orders when the text has been found inadequate"; and that the sentences meted out were much more severe

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[102] Letter from Garner Anthony to Samuel W. King (June 10, 1942) (on file in the Papers of Delegate Samuel Wilder King, M-472, Series 21, Miscellaneous Subject Correspondence, Folder 1449, Hawai'i State Archives).

[103] *See supra* notes 78-81 and accompanying text.

[104] ANTHONY, ARMY RULE, *supra* note 3, at 38-39, 46-59; Office of the Chief of Military History, Civil Affairs, *supra* note 26, *passim*; Willard Brown, *Has Solomon Role*, PARADISE OF THE PACIFIC, Feb. 1942, at 24-25.

than those handed down by military courts against uniformed personnel for identical violations.[105] Members of the Hawai'i bar who represented those defendants who decided to risk appearance with counsel had some memorable experiences before the provost judges. For example, one Honolulu lawyer, Samuel Patterson, reported that a provost judge threatened him with contempt simply because he had requested reduction of a client's bail.[106] Authors of the Army's own official history of military government in Hawai'i would later conclude that "an orderly trial was practically unknown"; and they remarked upon serious "excesses" in the abusive way that hapless defendants were treated by the provost judges and other personnel of the provost courts, especially during the first year of the war.[107]

In a few documented instances, the Army appointed plantation managers to serve as provost judges even though they did not hold military commissions, and these men presided over trials of their own employees. The Army attempted to justify this practice on grounds that no officers were available for assignment and that "the number of white civilians [sic] was small"—an explanation that reflected the assumption, made explicit in several military communications out of Honolulu, that only Caucasians "of a high type" could be trusted with such authority.[108] Similarly, the Army rationalized that it could

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[105] Memorandum from Warner W. Gardner to Harold Ickes (Dec. 10, 1942) (on file in the Papers of James Rowe, Jr., Franklin D. Roosevelt Library, Hyde Park, N.Y.). In a commentary on a draft history of security controls in wartime Hawai'i, Neal Franklin (who had been chief judge of the Honolulu provost courts for the Army) pointed out that although the public was excluded from provost court trials "newspaper reporters from all Honolulu papers . . . were in constant attendance." Colonel Neal Franklin, Judge Advocate General Division, "Notes Relative to Part Eight of Wartime Security Controls in Hawaii, 1941-1945" (undated manuscript, on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

The practice of holding the provost court trials in closed session, with the public excluded, was defended by General Green on grounds that it served the purpose of "avoid[ing] public curiosity." Green Notes, *supra* note 22.

[106] *Provost Courts Opposed*, HONOLULU STAR-BULLETIN, Apr. 7, 1944, at 1, 6.

[107] Office of the Chief of Military History, Civil Affairs, *supra* note 26, at 3226, 3227-47 *et passim*. General Robert Richardson admitted it in a letter to John J. McCloy. *See infra* note 108. Also, in presenting the Army's position in the Washington talks in August 1942, General Green conceded that "the Provost Courts may have been more severe than was necessary in the beginning, but the severity applied to all alike. No Provost Court was admonished, and there has been no modification of attitude, namely, equal justice to all. The severity of the punishments has been reduced because [it is] no longer necessary." Green Notes, *supra* note 22.

[108] The discussion in this paragraph and the next closely follows the text of Scheiber and Scheiber, *supra* note 6, at 352. "With reference to [one] plantation employee being a provost court [judge]," General Green argued, "the job is not an enviable one in Hawaii . . . . No Army officer was available and the number of white civilians was small. Plantation managers, generally, are of a high type and in normal times exercise considerable control over plantation

not tolerate the prospect of restoring the right to trial by jury in civilian courts because it would mean that citizens of Asian ancestry would serve, leading to questions of loyalty and security as well as risking vengeful decisions taken out of ethnic hostility—a risk that the Army apparently did not fear would come into play when all-white juries deliberated.[109]

As a result of these practices, trial in a provost court only superficially resembled a civil court trial operating under constitutional rules of procedure. Their trials were "among the worst features of the military conquest of the civilian government," amounting to nothing more than "drum-head justice," an Interior Department lawyer charged in a report written just a year after Pearl Harbor.[110] If the jurisdiction of the courts was challenged by a defendant, the provost judges were advised by the command, they should "arbitrarily deny the claim, and if they want to contest the matter let them get out a writ of habeas

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personnel. There is no legal or other objection to such a person serving as Provost Court." Green Notes, *supra* note 22.

Six months later General Richardson wrote to McCloy in defense of the provost courts, conceding that sentences of excessive severity had been imposed but indicating that a review was being undertaken:

> The early operations of these courts undoubtedly justified some criticism. However, Governor Stainback's remarks at this time are not justified . . . . A Board has been established and is presently reviewing all earlier cases where the accused is presently in confinement, with a view to granting clemency or parole consistent with Territorial practice.

Letter from General Robert Richardson to Assistant Secretary John J. McCloy (Feb. 10, 1944) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

Eleven months later, Richardson reported as follows to the War Department on the status of those imprisoned under martial law, and on the history of the process for review of sentences:

> On January 1, 1945 there will be 18 prisoners in Oahu penitentiary . . . . By the end of 1945 all but 4 of the 18 prisoners will be released due to sentence expiration assuming they do not lose credit for good [behavior] time . . . .
>
> Since the inception of martial law . . . all cases tried by the military commission and the provost courts were carefully reviewed as to their legal sufficiency and the sentences imposed.
>
> During 1943 a Military Commission and Provost Court Reviewing and Parole Board was appointed to again review all the cases . . . . At that time there were 83 prisoners [and review resulted in adjustments and paroles of many]. *Sentences generally were adjusted to make them consistent with penalties imposed by the Federal and territorial courts for similar crimes.*

Radio from General Robert Richardson to Assistant Secretary John J. McCloy (Dec. 7, 1944) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (Radio No. R72230) (emphasis added).

[109] *See infra* note 134 (on juries and ethnic conflict).

[110] Memorandum from Warner W. Gardner to Harold Ickes (Dec. 10, 1942) (on file in the Papers of James Rowe, Jr., Franklin D. Roosevelt Library, Hyde Park, N.Y.). It is also quoted at the beginning of this Section, *supra* note 94.

corpus."[111] The average trial in provost courts took five minutes or less, and of the 22,480 trials conducted in Honolulu's provost court in 1942-43, some 99 percent resulted in convictions![112] Several hundred persons were sentenced to prison, at least two hundred of them for terms between six months and life; and more than $500,000 in fines were imposed in the first eight months of the war alone. No distinction was made between juveniles and adults, and defendants as young as fourteen years of age were tried by provost judges.[113] Little wonder, then, that the administrator of the provost courts, Captain John Wickham, advised the judges at a 1944 conference that they should avoid publicity: "I would be very careful getting into the papers under any circumstances . . . . If there are any reporters in your courtroom, edit their stories. Establish a relationship with the reporter. If something pops up of unusual interest with dynamite in it request to see the story before [it is] published."[114]

The Army command was not insensitive to the possibility that racism might come into play in the enforcement, especially by military police, of the general orders when violations were charged against any of the approximately 6,000 African-American troops and the many African-American civilian workers on the Islands. Thus at the 1944 conference of provost judges, one of the senior officers recounted a case in which a military policeman had obviously singled out a "colored boy" for a speeding ticket, so that the case was not pressed. But a higher-ranking officer, Colonel William F. Steer, the Provost Marshal, stepped in quickly to cast the story in an entirely different light: "Probably if you check up," Steer declared, "he was from Alabama. There are a certain

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[111] Provost Court Judges in Conference Transcript, *supra* note 79, at 16 (quoting Lt. Colonel Slattery). Of course, the military was engaged in denying, consistently, the jurisdiction of the federal courts to hear any habeas petitions that might come forward!

[112] *See* Transcript of Record, Duncan v. Kahanamoku, U.S. Supreme Court, October Term, 1945, at 467 [hereinafter *Duncan* Transcript]; ANTHONY, ARMY RULE, *supra* note 3, at 52-53; *see also* Scheiber and Scheiber, *supra* note 6, at 352-53. There is no reason to believe that the conviction rate declined in the late years of the war. Some 55,000 cases were disposed of in total by the provost courts, as noted in text *infra* note 117.

[113] "Extract from Report of the Attorney General, Territory of Hawaii, to the Governor on the Crime Situation in the Territory of Hawaii, and on Civilian-Military Relations" (not dated, but July 1944) (copy in "Hawaii" file, Box 9, Papers of Samuel Rosenman, Franklin D. Roosevelt Library, Hyde Park, N. Y.) (on 67 prisoners in civilian jails and 123 in Oahu Military Prison serving time between six months and life, as of June 30, 1943); Office of the Chief of Military History, Civil Affairs, *supra* note 26, at 3230-31 (on juveniles tried in provost courts); ALLEN, WAR YEARS, *supra* note 13, at 183; ANTHONY, ARMY RULE, *supra* note 3, at 48 (on fines paid), 50-52; *"Kangaroo" Trials Charged To Army*, NEW YORK TIMES, July 2, 1944 (a Hawai'i attorney's statement regarding a 100 percent conviction rate of 819 people who pleaded "not guilty" during one period of time in the provost courts).

[114] Provost Court Judges in Conference Transcript, *supra* note 79, at 27.

class of negroes who are race conscious fighting for their rights. That isn't race discrimination."[115]

Because records were minimal or garbled in many provost court proceedings, particularly at the beginning of the war, fully reliable data on verdicts and sentences is lacking. Thus Lt. Colonel Slattery, one of General Green's two top aides, spoke in 1944 to the provost judges about the difficulties of documenting cases. "The court is extremely busy. If the court does like I do, I sign almost anything that is presented to me by the staff. We have men that are experienced. When they say sign here, we do."[116] The most reliable estimate is that the provost courts tried in all some 55,000 civilian cases during the war.[117] Sentencing policy was an especially egregious feature of military justice. Punishments almost invariably were stiffer than those prescribed by civil law on conviction for similar offenses; and although the Army did establish procedures for review and for grants of clemency, no review was instituted before a prisoner had been incarcerated for three months or more (six months in the case of those sentenced for terms of a year or longer). Many persons who were jailed were forced to do hard labor, whether or not the sentence had specifically required it. The Army also authorized the provost courts to exact compulsory purchases of war bonds from prisoners in lieu of fines (a practice that the Treasury Department later disallowed), and often persons convicted by these courts were required to donate blood, or else were given a choice between serving time or donating blood.[118]

For most of the war period, however, public criticism of the provost courts was muted; private mail was censored by the Army, as were newspapers and radio broadcasts. To be critical of Army rule was to risk a suspicion of "dis-

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[115] *Id.*

[116] *Id.* at 15. Given the pace of work and the possibilities of oversight and error, he stated, there were many charge sheets that did not establish the basis of jurisdiction or cite correctly (if at all) the General Orders that was involved in the violation. The proper signatures were often missing, too, from the records. *Id.* at 15-16.

[117] Letter from General Robert Richardson to the Judge Advocate General (Dec. 4, 1945) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives); Radio from Commanding General Mid Pacific to War Department (Dec. 4, 1945) (copy on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.) (Radio RJ 73740). Of the 55,000 cases, only approximately 200 convictions resulted in a prison term of one year or more, the Army reported. *Id.*

See also ALLEN, WAR YEARS, *supra* note 13, at 183; ANTHONY, ARMY RULE, *supra* note 3, at 50-52.

[118] ANTHONY, ARMY RULE, *supra* note 3, at 18, 54-58; Office of the Chief of Military History, Civil Affairs, *supra* note 26, at 3232-36 (on policy and implementation regarding reviews for clemency).

loyalty" that could all too easily lead to summary internment. Thus the civilian territorial governor complained in fall of 1942:

> The military authorities take the attitude that any slightest suggestion or criticism of any move is disloyal. They use as a club the threat of "failure to cooperate." Regardless of the stupidity of their demands and the fact that they [their general orders] may have no relation to public defense, they must not be questioned under penalty of "failure to cooperate."[119]

Six months later, the Solicitor of the Department of Interior reported from Hawai'i that he found the press being "rigidly censored," with a licensing system imposed by the Army.[120] An editor had been warned, he wrote, against publishing any outright criticism of Army rule: "The press cannot report murders and rapes, and cannot discuss prostitution, and cannot even say that prostitution is under Army control. A complete, rigid and entirely illegal [sic] censorship is imposed over all mail to the mainland. Telephones are tapped, and recordings made, at will."[121]

Doubtless many (perhaps most, at least at first) civilians in Hawai'i were thoroughly convinced that the Army's control of the justice system was justified, and that sacrifice of some traditional liberties was a reasonable price to pay for military security, as memories of the devastating Pearl Harbor attack did not fade quickly. The Army's decision to try nearly all civilians charged with significant civil and criminal violations in the provost courts was based in the first instance on the premise that "civil judges could not be sufficiently severe under existing civil law, and they could not be given appropriate powers [to exercise sanctions] by us."[122] What the Army deemed appropriate severity

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[119] Letter from Governor Ingram Stainback to Secretary Harold Ickes (Sept. 2, 1942) (on file in the Secretary's Files, Papers of Harold Ickes, Library of Congress, Washington, D.C.).

[120] Memorandum from Warner Gardner to Secretary Harold Ickes (Dec. 10, 1942) (on file in the Papers of James Rowe, Jr., Franklin D. Roosevelt Library, Hyde Park, N.Y.). We do not deal much with censorship in this Article, but the reader is referred to the detailed study by RICHSTAD, *supra* note 74. *See also* SLACKMAN, *supra* note 77, at 241-43; BAILEY AND FARBER, *supra* note 77, at 240 n.37.

[121] Memorandum from Warner Gardner to Secretary Harold Ickes (Dec. 10, 1942) (on file in the Papers of James Rowe, Jr., Franklin D. Roosevelt Library, Hyde Park, N.Y.).

[122] Diary of General Thomas H. Green (Jan. 4, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.). This entry was apparently in the original diary, differentiated from handwritten commentaries and emendations apparently made by General Green in later years. Such obviously retrospective additions and emendations will be noted in citations herein. In other entries from early January 1942, General Green reported that Judge Stainback of the U.S. District Court in Honolulu, U.S. District Attorney Angus Taylor, and several other important figures in the justice system advised the Army against permitting jury trials or relaxing other restrictions on the civilian courts. Stainback is paraphrased as warning that "juries here were even worse than those on the mainland" and so might cause problems for administration of the Army's emergency measures. *Id.*

in the administration of justice became evident soon enough. When the full record of the provost courts was reviewed in 1946 by a leading authority on military law who was then serving as special counsel to the Army, he concluded: "From all I have been able to learn, they were unfair, unjudicial, and unmilitary. If any officer ever ran a summary court the way these people ran a provost court you would fire them out to Canton Island or a little farther .... It's a very, very nasty, unpleasant picture, and you just cannot justify it in any way."[123] A federal district court judge in Hawai'i put it rather more bluntly, characterizing the military regime in Hawai'i as simply "the antithesis of Americanism."[124]

III. POLITICAL CHALLENGES

> It is essential that civil authority be unified in Hawaii, which is not only in a theater of operations, but is an acutely confined area and of vitally [sic] strategic importance. I therefore recommend that the Governor of Hawaii be informed that he will be subordinate to the Military Governor and that he should accept this situation as his duty arising from the consequence of the war and the importance of Hawaii in the strategy of the Pacific.
>
> —General Delos Emmons, December 1942[125]

> If the military necessities do not forbid the operations of the civil government there is no possible ground in a democratic nation upon which to subject those operations to military rule .... American institutions have no place for a military bureau whose task is to supervise and to [compete] with the regular civilian government in the latter's appropriate sphere of action .... [T]he provost courts, in disregard of the safeguards of our judicial tradition and of the Constitution, impose punitive and lawless discipline upon the civilian population.
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> —U.S. Attorney General Francis Biddle and Deputy Secretary of the Interior Abe Fortas, December 1942[126]

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[123] Transcript, "Oral Report Made by Mr. Frederick B. Wiener, 11 May 1946" [to Maj. General Moore et al.] 10 (on file in the Papers of General Robert C. Richardson, Jr., Hoover Institution Archives, Stanford, Cal.) [hereinafter Wiener Report].

[124] *Ex parte* Duncan, 66 F. Supp. 976, 980 (D. Haw. 1944).

[125] Letter from General Delos Emmons to Assistant Secretary John J. McCloy (Dec. 15, 1942) (on file in the Assistant Secretary of War Files (McCloy Files), Box 32, War Department Records, Record Group 107, National Archives).

[126] Letter from Francis Biddle and Abe Fortas to John J. McCloy (Dec. 19, 1942) (on file in the Assistant Secretary War Files (McCloy Files), Box 32, War Department Records, Record Group 107, National Archives).

A. Alarms and Responses

As the months wore on and especially after the American victory in the Battle of Midway in June 1942, the threat of a Japanese invasion seemed to recede. So, too, in the minds of many civilians and their leaders, did the need for martial law. The military regime was openly challenged in the courts beginning in early 1942, and by 1943-44 the Army's role in governing Hawai'i was also emerging as a major issue in the national political arena; no longer could anyone responsibly say, as the prominent Hawai'i business leader Walter Dillingham had said before a joint congressional committee in the period immediately following Pearl Harbor, that civil liberties and "the rights of American citizens" were seen as "hooey that nobody cared a damn about" in the Islands.[127]

The attempt to restore civilian control to Hawai'i featured a struggle over control of policy between the military on the one side, and the Interior and Justice departments, joined by the territorial governor and delegate to Congress, on the other side. At the heart of this political struggle was the question of whether martial law and the suspension of the writ of habeas corpus were in fact necessary for the security of the Islands. The necessity for martial law must be judged, of course, in the context of the situation in the Territory in December 1941. While the actual attack on Pearl Harbor came as a stunning surprise to both the military and civilian authorities, both had, in fact, been preparing for months for war with Japan. As we have already noted, the territorial legislature had passed the Hawaii Defense Act in October.[128] This statute authorized the governor to assume more sweeping legislative and administrative powers than had ever before been delegated by any state of the Union to its executive in war emergencies. But under the statute's terms, enforcement was to be in the civilian courts, with significant elements of standard due process for any person accused of violations.[129] Ironically, the Army commander at the time of the law's enactment, General Short, had testified to a skeptical legislature (reluctant, at that time, to yield its powers so entirely) that the only alternative to the Hawaii Defense Act would be the draconian measure of complete military control—an alternative the Army did not favor, Short declared. Indeed, while the M-Day Act was being debated in

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[127] *See* Israel, *supra* note 18, at 251 (quoting Joint Congressional Committee on the investigation of the Pearl Harbor attack). Professor Israel's article provides a well documented overview of the debate at the Cabinet level in Washington during 1942 over Hawai'i martial law issues. *Id.* at 251-59.

[128] *See supra* note 28 and accompanying text.

[129] *See, e.g.*, Hawaii Defense Act (Act 24), section 15, 1941 Laws Terr. Haw. 1, 16-17 (codified as amended at REV. L. HAW. ch. 324 (1945)) (addressing challenges to the constitutionality of the Act).

October 1941, General Short stated that among its great virtues was the way the law covered a host of governmental functions "that can be done better by the civil authorities than by the military authorities"; and even if the Army did have to impose martial law, Short continued, he anticipated that many of the ordinary functions of civilian governance would remain with the governor, under the broad powers the act afforded him.[130]

Governor Poindexter declared the M-Day Act to be in effect by 11:30 a.m. of the day Pearl Harbor was attacked, within hours afterward. Poindexter relinquished his extraordinary M-Day powers in favor of a military regime that would take over supervision of the entire government, including the courts. Whether he did so on his own judgment, or because General Short had told him that only full Army authority could protect Hawai'i, would become a matter of dispute later.[131]

From that day forward, until martial law was fully lifted in October 1944, nearly three years later, the Army remained faithful to its basic position as to the legal and practical rationalization for martial law, *viz.*, that martial law was essential for the security of Hawai'i. The cornerstone of the Army's argument —which was supported by the Navy and the War Departments—was that Hawai'i was a "fortress," and that every aspect of civilian life must be regarded as part of the military effort and vital to the efficiency of military operations.[132] "The administration of criminal justice is an essential element of martial law, as this is a theater of operations," wrote General Short's successor, Commanding General Delos Emmons, in July 1942.[133] Emmons also relied upon the argument that any restoration of right to trial by jury in civilian courts would require use of panels reflecting the demographic fact that "the Caucasian population is only about one third of the total"—and that it was impossible to imagine "substantial justice" being obtained by juries, given "the racial setup" in the Islands.[134] With Chinese, Korean, and Philippine minorities, as well as Japanese-Americans, eligible for juries under the law, General Green declared, "all the racial hatred, and there is plenty of it here under cover, will come to the fore, and justice, whether it be criminal or civil, is simply out of the

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[130] Anthony, *Hawaiian Martial Law*, *supra* note 21, at 28 (quoting Short).

[131] *See supra* text accompanying notes 30-31.

[132] Thus General Emmons wrote of the importance of retaining military control over the "overlapping and closely integrated war functions of this Fortress . . . ." Radio from General Delos Emmons to Assistant Secretary John J. McCloy (Jan. 3, 1943) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (Radio No. 284).

[133] Letter from General Delos Emmons to Assistant Secretary John J. McCloy (July 1, 1942) (on file in the Hawaii Military Government Records, Record Group 338, National Archives).

[134] *Id.*

window."[135] Hence, even when partial reopening of the civilian courts was permitted in 1942, jury trials were excluded from the authorization.[136]

The Army and Navy commanders in Hawai'i both also insisted that the presence of a large population of Japanese alien residents and Japanese-American citizens constituted *per se* a security risk that could be handled only by martial law. And as late as the summer of 1944 the Army was still contending that there was a strong possibility of another Japanese air strike, for which the Islands had to be prepared.[137] In light of this, General Emmons argued he alone, as military governor, "must be the one to determine what functions can be returned to the civilian authorities and the courts."[138] Martial law, Emmons insisted,

> has been highly successful in this community and it has the confidence of the people generally. Its success has been due to the fact that it has been administered with the utmost regard for the feelings, the civil rights and the interests of the local population. *In other words the administration of martial rule here has been in effect martial rule without a bayonet.* The fairness and impartiality of both the provost courts and the Military Commission and the treatment of the public under martial rule generally is now well recognized in the territory, and the civil rights of the public have been interfered with as little as possible.[139]

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[135] *See* Letter from Col. Thomas Green to Col. Archibald King (July 18, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.). In notations Green made after the war—apparently as late as the early 1960s—on copies of wartime correspondence, he indicated again his view that to have permitted ethnically mixed juries would have been "ruinous to Japanese Americans" (presumably defendants). Green's handwritten notations on copy of Letter from Abe Fortas to John J. McCloy (Dec. 19, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.). According to Green's diaries, Federal District Judge Metzger agreed with the decision against permitting jury trials, but on different grounds: Metzger was concerned that jury service would divert too many persons from essential war work. Diary of Thomas H. Green (July 27, 1942) (on file in the Papers of Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

[136] *See* General Orders No. 135 (Sept. 4, 1942), *reprinted in* ANTHONY, ARMY RULE, *supra* note 3, at 162.

[137] *Duncan* Transcript, *supra* note 112, at 1030-31 (testimony of Richardson and Nimitz).

[138] Radio from General Delos Emmons to Assistant Secretary John J. McCloy (July 2, 1942) (on file in the Hawaii Military Government Records, Record Group 338, National Archives) (Radio No. 1224) (much of the language also being reproduced in "Paraphrase of Secret Radiogram No. 1224 dated July 2, 1942 from the Commanding General, Hawaiian Dept., to Mr. John J. McCloy," attached to Letter from J. L. Mckee to R. H. Tate (July 10, 1942) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives)).

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

A premise underlying the Army commanders' arguments throughout the war period was that civilian government, and especially administration of justice, was subject to "politics" and was therefore unstable and unreliable.[140] Especially reprehensible to General Green was what he regarded as the arrogance of the civilian territorial governor, Ingram Stainback, who, Green asserted, "feels he should be the Number 1 man here."[141] In December 1942, General Emmons was still pressing on the War Department his argument that "in time of war the Hawaiian Islands, in spite of the fact that there is large and highly organized [sic] civilian community within them, are predominantly military in all their aspects. [Hence] the civil governor must, in the last analysis, be subordinate to the Military Governor."[142] In mid-1942, an Interior Department official reported a statement by General Green to the effect that "direct administration of all controls over civilian life by the military authorities is necessary [and] that *the powers of the Military Governor under martial law are absolute and all-inclusive.*"[143] In a memoir written after the war, General Green insisted that the leading figures on the bench in Hawai'i supported the Army's view as to the necessity for comprehensive control of civilian life, even including reducing the courts to the status of agencies of the Military Governor and Commander.[144] An intriguing item of evidence in corroboration of Green's claim is a letter to him from Judge Delbert Metzger of the U.S. District Court, written on March 4, 1943, commending Green and the Army for their administration of the Islands: "There were times," Judge Metzger wrote, "when I thought you could have received much valuable and safe aid from the civil courts, but I realized that the army trained men, such as you had to work with, are more familiar with the workings of provost and military courts—which are certainly speedier—and that the use of civil courts might have tended to introduce a division of responsibility."[145]

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[140] *See id.* This theme was also voiced in the testimony of General Richardson in a point that drew comment from the Supreme Court when it ruled in favor of Duncan on appeal in 1946. *Duncan* Transcript, *supra* note 112, at 1027-30.

[141] Letter from General Thomas Green to Assistant Secretary John J. McCloy (Sept. 15, 1942) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[142] Letter from General Delos Emmons to Assistant Secretary John J. McCloy (Dec. 15, 1942) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[143] Memorandum from E. K. Burlew to the Secretary of the Interior (May 25, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.) (emphasis added) (reporting Green's view).

[144] General Thomas H. Green (unpublished manuscript, on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.) (untitled memoir of the war years).

[145] Letter from Judge Delbert Metzger to General Thomas Green (Mar. 4, 1943) (on file in the Papers of Thomas H. Green, Judge Advocate General's School Library, Charlottesville,

How the Army command's formal legal view of its authority translated into practice is encapsulated in a retrospective comment by General Green: "Factually I had authority from General Emmons to do whatever was necessary to be done in any emergency but to keep him informed . . . . My authority was substantially unlimited."[146] (After the war, however, when the Supreme Court ruled in *Duncan* that Army rule had been illegal, so that Green faced the prospect of civil damage suits, Green took a very different line: he had acted only as the agent of the President, the Secretary of War, and the Army command, he contended, and should not be held responsible for the Army's record.)[147] At any rate, during the war itself—and indeed until the very last months of the fighting—the Army command in Hawai'i continued to insist upon the legitimacy of its "absolute and all-inclusive" powers. Even the federal courts could not be trusted to enforce the law consistent with the requirements of military necessity, the Army argued as late as February 1944: for to rely on the federal judiciary would make the military "dependent upon the civilian authorities and the discretion of the prosecutors and the usual political factors that pervade civil enforcement agencies."[148]

A very different view was taken, however, by officials of the Interior Department, which formally retained jurisdiction over the Territory. As early as mid-1942, the department's solicitor had written an advisory memorandum for the Secretary arguing that the Army's takeover of all judicial functions was manifestly unconstitutional.[149] Meanwhile, the First Assistant Secretary, E. K.

Va.). Only a few months later, ironically, Judge Metzger would contend, quite to the contrary, that Army rule was illegal and unconstitutional. *See* discussion of the *Glockner* case, *infra* notes 297-305.

[146] Notation on Manuscript, "Development of the Office of Military Governor," *supra* note 67.

[147] Memorandum from General Thomas H. Green to Chief, Bureau of Public Relations, War Department (no date, but late 1945) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

[148] Letter from General Robert Richardson to Assistant Secretary John J. McCloy (Feb. 10, 1944) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives). At this time, General Green's successors in the legal division in the Hawai'i command were pushing the idea of transferring all Interior Department responsibilities to the War Department, a plan designed to solidify Army control and insulate it against lateral attack at the Cabinet level. Memorandum from Colonel E. V. Slattery to Colonel William R. C. Morrison (Feb. 17, 1944) (copy on file in the Hawaii Military Government Records, Record Group 338, National Archives) (accompanying a draft bill (untitled)).

[149] Memorandum from Solicitor Nathan Margold 28 (June 8, 1942) (on file in the Papers of Delegate Samuel Wilder King, M-472, Series 21, Miscellaneous Subject Correspondence, Folder 1449, Hawai'i State Archives) (a copy is enclosed with a letter from Harold Ickes to Samuel W. King dated June 15, 1942). The conclusion of this report, focused upon the decisions of the Military Commission in two capital cases. It declared: "The extension of martial law in Hawaii is not conclusive of the necessity therefor. Moreover, such facts as are of public

Burlew, had set forth formally the legal position to which the department would steadily adhere in future discussions. The mere fact that the Army had declared martial law in Hawai'i, Burlew stated, did not constitute a sufficient factual basis for regarding it as a necessity and thus warranting it legally:

> The duly constituted civil authorities are ready and able to perform not only their ordinary functions, but also to undertake the administration of any emergency controls of civilian activities which may be necessary, such as rationing, price controls, food production and so forth.
>
> It is felt that while the responsibility for the security of the islands rests with the Commanding General, the actual administrative functions should be carried out to the greatest extent possible by the civil government. Moreover, although military necessity may require the establishment of military tribunals to try civilians for offenses against the security of the territory and the military forces, there is every reason to restore the jurisdiction of the criminal courts in all other cases and to infringe as little as possible on constitutional guarantees.[150]

Although Secretary of the Interior Harold Ickes initially had been fully supportive of martial law in Hawai'i, as the war progressed he grew increasingly uncomfortable with the prospect of prolonged military rule in the Islands. The issue had become, for Ickes, what he termed the liberation of "the American 'conquered territory' of Hawaii"![151] Moreover, Ickes harbored a robust concern about the effects of militarism; and if President Roosevelt seemed quite unconcerned about "the constitutional question," Ickes was deeply concerned about it.[152] This is not to say that Ickes was satisfied with the prewar social and economic regimes in the Islands: as an old-line Progressive, he had long considered Hawai'i to be in need of deep reforms because of the extraordinary concentration of power that the famed "Five Companies" had come to exercise over the plantation economy and the financial, commercial, and public-utilities sectors. His concerns about militarism and concentrated power merged in his views of Army rule in Hawai'i during the war. Thus Ickes wrote in June 1942 that information reaching him from the Islands confirmed that the Big Five—"as tight a little oligarchy as ever existed"—had formed under the military government's regime an unholy alliance with the Army that potentially threatened "what may remain of the rights, privileges, and liberties

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record tend to establish that the closing of civil courts to persons accused of crime is not legally justified." *Id.*

[150] Memorandum from E. K. Burlew to John J. McCloy (May 28, 1942) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[151] Letter from Harold Ickes to Henry Stimson (Nov. 20, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

[152] On President Roosevelt's view, at least in the early months of the war, *see supra* note 42.

of the Hawaiian people."[153] The Big Five oligarchy had perhaps created "a more or less benevolent despotism," Ickes said; but whatever one thought of their benevolence, they had come to dominate absolutely the economy of the Islands and thus their close ties to the Army command and martial law were all the more insidious.[154]

Whether because of Governor Poindexter's apparent inability to resist the Army's takeover of civilian government functions, or simply because Poindexter was manifestly weak from illness and unable to function effectively under stress, the Department of the Interior sought to replace him as the end of his term approached in spring of 1942.[155] Ickes thus invited to Washington for an interview Judge Ingram Stainback, a liberal Democrat who had been serving on the federal district court bench in Honolulu. If Secretary Ickes' purpose was (as Army officials believed) to find a governor who would offer staunch resistance to any prolongation of Army rule, that purpose was well served; for Stainback catalogued a long list of complaints about the military's governance of Hawai'i and aligned himself firmly with the prevailing view in the Department of Interior, *viz.*, that the civil courts should be reopened and the scope of Army jurisdiction over civilian activities cut back at once.[156] While in Washington, Stainback even put the War Department on notice directly as to his views of the legality of Army rule. Meeting with Colonel Archibald King, a high-ranking Judge Advocate General staff officer, he contended that

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[153] Letter from Harold Ickes to Donald Nelson, Chairman, War Production Board (June 3, 1942) (on file in the Secretary's Files, Papers of Harold Ickes, Library of Congress, Washington D.C.). Ickes named in particular Messrs. Budge, President of Castle and Cooke; Russell, executive of Theo. H. Davies & Co., and Mr. Carden, a high executive of the Bank of Hawaii, as three of the Hawai'i business executives in the "Five Companies" or "Big Five" group. *Id.* *See* Frank, *supra* note 2 (discussing the views of Ickes and the Department of the Interior toward the Big Five).

[154] Letter from Harold Ickes to Donald Nelson (June 3, 1942) (on file in the Secretary's Files, Papers of Harold Ickes, Library of Congress, Washington D.C.).

[155] *See supra* note 30.

[156] Even before the Pearl Harbor disaster, a high-ranking Justice Department official conveyed information to the White House that Poindexter was ill and expected to resign, recommending Judge Stainback as his successor. He characterized Stainback as "able, fearless, unshakable, and forthright, . . . a good tough lawyer, faithful to the Democratic ideal and to the President" who had not been intimidated by the Big Five companies when he served as U.S. District Attorney in Honolulu and who had demonstrated an "understanding of the native problems" and the issues of land tenure. Letter from Assistant Attorney General Littell to Jos. McIntyre (White House aide) (Nov. 14, 1941) (on file in the Secretary's Files, Papers of Harold Ickes, Library of Congress, Washington, D.C.). Ickes stated that he did not fully share "Littell's volunteered enthusiasm about Judge Stainback, but I admit that the difficulty in obtaining the right kind of a man . . . is a major one." Letter from Harold Ickes to Jos. McIntyre (Nov. 28, 1941) (on file in the Secretary's Files, Papers of Harold Ickes, Library of Congress, Washington, D.C.).

Governor Poindexter had lacked the authority under the martial law provision (Section 67) of the Hawai'i Organic Act to abrogate civilian authority altogether. The United States Constitution applied to Hawai'i no less than to the states of the Union on the mainland, Stainback declared; and although emergency authority obviously had to be exercised by the military, there were limits upon how far that authority could go. It must be for "national defense," Stainback said, and could not be extended so far as was being done in Hawai'i, *e.g.*, the trial in provost courts of civilians for neighborhood disputes or drunkenness, crimes that "[had] no relation to national defense and . . . therefore [were] not justiciable as an exercise of martial law."[157]

When Colonel King asked Judge Stainback whether the presence of "a large number of aliens of doubtful loyalty" in islands that were in a combat theater, did not justify the extraordinary measure of "full martial law," Stainback stood firm. Even under such conditions, he contended, "the whole civilian government does not fall within [Army control],"[158] and the military could not assume the power to bring civilians into its courts for all offenses. It was an ominous portent, from the Army's standpoint, that Stainback also advanced the argument that because the governor acting alone had turned over the Territory to the Army, it was in the governor's power, again acting alone, to "revoke his call upon the commanding general to take charge and [to revoke] his declaration of martial law."[159]

Both during his June visit to Washington and after his appointment as Governor, approved by the Senate in August, Stainback continually pressed Ickes and his top aides in the Interior Department to work at the Cabinet level for the immediate restoration of civilian governmental functions. Like Ickes, Stainback was particularly outraged by the Army's use of the terms "Military Governor" and "Military Government"—terminology that had historically been used only in conquered territories. Stainback also complained bitterly of the Army's handling of shipping priorities, its labor policies, and General Green's detailed administration of the most trivial subjects of local government. He also denounced, of course, the self-proclaimed jurisdiction and the irregular procedures of the provost courts.[160] Stainback's signature message as governor,

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[157] Memorandum for the files from Archibald King (June 16, 1942) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (reporting conversation with Stainback).

[158] *Id.*

[159] *Id.* Colonel King, it should be noted, was no stranger to the legal and constitutional issues surrounding the martial law controversy, since he was probably at that very time in the course of preparing a rejoinder to a law review article by Garner Anthony that challenged Army rule in Hawai'i on both statutory and constitutional grounds. *See* discussion of the academic debate, *infra* text accompanying notes 174-85.

[160] *See* Letter from Governor Ingram Stainback to Secretary Harold Ickes (Sept. 2, 1942) *cited in* Boardman Report, *supra* note 77; Letter from Governor Ingram Stainback to Secretary

during his service from June 1942 to the war's end, would be the maxim: "War does not abolish the Constitution."[161]

Governor Stainback's views on these matters had been presaged and, indeed, been set out in almost identical terms by Hawai'i's territorial delegate to Congress, Samuel Wilder King. Along with many other political leaders in the Islands, Delegate King had initially become alarmed about Army rule when the record of the Military Commission's procedures in the Saffrey Brown murder trial came to light. Then, by mid-1942, King had become convinced that both martial law and military government had lasted too long and gone too far.[162] Calling upon members of the Roosevelt cabinet to support restoration of civilian government functions, just about the time that Stainback was summoned to Washington in June for interviews, King wrote: "For a civilian community to live for months under what is in effect a military government is detrimental to the maintenance of self-government and repugnant to every principle for which we are fighting."[163]

It is noteworthy that King went to the Cabinet secretaries rather than seeking to obtain redress from Congress in the form of legislation that would restore key elements of civilian rule in Hawai'i. He did so, King wrote, because he regarded the congressional route as a parlous one. Especially in light of bitter opposition in Congress to Hawai'i statehood proposals that had led senators and representatives to vent overt racist sentiments against Hawai'i's plural ethnic society, King concluded: "Any legislation sponsored at this time to clarify the situation might be used as a vehicle for more drastic measures than actually [were] needed," and so result in legitimating the Army's extreme position. It was far more desirable, he argued, for the executive branch to formulate a plan that would establish a new and clear-cut division of authority between the Army and civilian officers in Hawai'i.[164]

Harold Ickes (July 25, 1943) (on file in the Secretary's Files, Papers of Harold Ickes, Library of Congress, Washington D.C.).

[161] Letter from Ingram Stainback to Harold Ickes (Nov. 17, 1942) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[162] On the Saffrey Brown trial and reaction to it in Hawai'i, *see supra* notes 98-102 and accompanying text.

[163] Letter from Samuel Wilder King to Harold Ickes (June 17, 1942) (on file in the Papers of Delegate Samuel Wilder King, M-472, Series 21, Miscellaneous Subject Correspondence, Folder 1449, Hawai'i State Archives).

[164] Letter from Samuel Wilder King to Garner Anthony (July 6, 1942) (on file in the Papers of Delegate Samuel Wilder King, M-472, Series 21, Miscellaneous Subject Correspondence, Folder 1449, Hawai'i State Archives). On the statehood fights, especially the vicious and unrestrained racism of Representative John Rankin of Mississippi, directed against the Hawai'i Japanese, *see* United Press release (June 3, 1943) (copy on file in the Papers of Delegate Joseph R. Farrington, Hawai'i State Archives) (reporting Rankin press conference). Rankin later would oppose the Army's formation of a Japanese-American combat unit; in this instance, too, he

Delegate King was especially courageous in giving publicity in mid-1942 to his criticism of the military regime, because at that time he was also speaking out prominently in defense of Hawai'i's Japanese-Americans against loose charges of disloyalty. Writing to a political associate in the Islands who had reported to King that he was suffering politically for his willingness to attest to the loyalty of the Japanese-Americans in the Islands, King replied with a succinct statement of his faith: "Our entire American democracy," King wrote, "is based on the assumption that every person is entitled to a square deal, regardless of race, creed, color or class . . . ."[165] Moreover, when Garner Anthony stepped forward to criticize the Army policies in public forums, King encouraged him to stand firm: "Despite those who question your raising the issue at this time," he told Anthony, "I agree with you that we are not meeting our responsibilities if we dodge the issue."[166] There is little doubt that King—a graduate of the U.S. Naval Academy, of part-Hawaiian descent, and scion of one of the Islands' best known families—suffered anguish as the result of his outspoken stand: "I have defended [residents of Japanese descent]," he wrote, "solely as a matter of principle, knowing that my position would be misunderstood and severely criticized even by many of my best friends. Once racial intolerance is permitted, there is no saying where it will end . . . ."[167]

Eager to play an active role in the war effort, but also manifestly weary of the vicious political attacks upon him at home and in Washington, King in 1942 initiated reactivation of his Navy commission and was subsequently assigned to active duty in the Pacific combat zone.[168] Elected to succeed him in November 1942 as Hawai'i's delegate in Congress was Joseph Farrington, Jr., publisher of the *Honolulu Star-Bulletin*, one of the two leading newspapers in the Islands, and the son of a former governor. Farrington lost little time after his election in assuming a public stance critical of the Army's Hawai'i regime.

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couched his views in an especially virulent racist rhetoric. *"Quit Coddling the Japs: Speech of Hon. John E. Rankin of Mississippi*, CONG. REC. (Feb. 3, 1943). *See also infra* note 591.

[165] Letter from Samuel Wilder King to Henry Holstein (May 14, 1942) (on file in the Papers of Delegate Samuel Wilder King, M-472, Series 21, Miscellaneous Subject Correspondence, Folder 1449, Hawai'i State Archives).

[166] Letter from Samuel Wilder King to Garner Anthony (July 6, 1942) (on file in the Papers of Delegate Samuel Wilder King, M-472, Series 21, Miscellaneous Subject Correspondence, Folder 1449, Hawai'i State Archives).

[167] Letter from Samuel Wilder King to Henry Holstein (May 14, 1942) (on file in the Papers of Delegate Samuel Wilder King, M-472, Series 21, Miscellaneous Subject Correspondence, Folder 1449, Hawai'i State Archives).

[168] *See* Letter from Joseph R. Farrington to Riley Allen (Jan. 25, 1943) (on file in the Papers of Delegate Joseph R. Farrington, M-473, Series 4, Miscellaneous Subject Correspondence, Folder 760, Hawai'i State Archives). Farrington reported that the transition went smoothly with King's full cooperation, and noted that King was immediately preoccupied with reestablishing his family in Hawai'i, several members apparently having just returned from the mainland. *Id.*

Not only did Farrington call for restoration of the civilian courts' ordinary jurisdiction, he also intensified the public debate by focusing upon the Army's use of the terms "Military Government" and "Military Governor" in its administration of the Islands. In a policy statement issued in December 1942, Farrington condemned the kind of military government that the Army had devised in Hawai'i as being "contrary to every tradition of America" and "without constitutional or legal foundation."[169] The question of nomenclature was thus made symbolic of the issues regarding the basic legitimacy of Army rule—and, as was indicated by the Army's adamant refusal to consider abandoning the nomenclature, both sides understood it precisely that way.[170]

Like the views of Garner Anthony, who served as territorial attorney general under Stainback in 1942-43, and the views of other lawyers who joined later in the criticism of the Army's regime, Farrington's critique of the military did not call for a complete return of power to civilian officials, nor did it amount to a complete denial of the validity of martial law. Indeed, his critique stopped far short of that: his objections were not to the vesting of extraordinary emergency powers in the Army by order of the President, nor to martial law by authority of the governor and/or the President. He objected, rather, to the closing of the courts to habeas petitions—and to the way in which the Army (with the initial consent of Governor Poindexter) had entirely displaced civilian governance and reduced the civilian judiciary to an agency of the military authorities. Farrington thus demanded as the bedrock minimum an acknowledgment of the federal courts' authority to rule independently on whether or not a "military necessity" prevailed and therefore warranted the military's takeover of all control. That is to say, he backed Anthony in demanding strict application of the *Milligan* standard of constitutionality. Beyond that, however, they desired restoration to Hawai'i's civilian government of executive and legislative powers other than those clearly related to defense and security—but still recognizing all the while that where to draw the line separating military from civilian

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[169] ANTHONY, ARMY RULE, *supra* note 3, at 28 (quoting a Dec. 21, 1942 public announcement by Farrington). A few months earlier, a former territorial governor, Lawrence M. Judd, had added his influence to that of others in the Islands elite who were expressing concern about the reach of Army rule. Questioning whether so great a suspension of civilian judicial institutions as had been instituted in Hawai'i could be justified, and declaring that "civilian activities should be in the hands of civilians," Judd wrote:

> The uncertainties are not healthy in a Democracy. The situation presents a profound problem. No obstacle should be placed in the path of the military commander . . . . Yet an American community, such as ours is entitled to a "practical reign of law" with the substance of the Bill of Rights preserved.

Letter from Lawrence M. Judd to Joseph R. Farrington (Aug. 22, 1942) (on file in the Papers of Delegate Joseph R. Farrington, Jr., Hawai'i State Archives).

[170] *See infra* text accompanying note 199.

functions was a question that had to be decided in light of the changing military needs and security status of the Islands.[171]

While some of the most prominent members of the political elite in the Islands were thus demanding a reduction of the military's powers, back in Washington Secretary Ickes was sending the War Department a constant flow of letters urging restoration of civilian government in the Islands. Ickes denied that security considerations warranted comprehensive martial law, and he further contended that any trials in military courts—whose procedures, as he wrote, "do violence to American concepts of civil rights"—should be very rigidly restricted to security cases alone.[172] Under the Hawaii Defense Act, Ickes argued, the territorial governor and the civilian courts had been given more than adequate powers to handle all ordinary matters of criminal justice. If prosecuted under the Defense Act's terms, at least Hawai'i's citizens would have the benefit of trial by jury—an institution which Ickes sternly reminded the War Department, was "fundamental to the concept of liberty which we are fighting to defend."[173]

Although as a lawyer and as a politician he had long been a strongly principled civil libertarian, the irascible Ickes was also a master bureaucrat. Thus he was also agitated, no doubt, that control of the Territory, which in peacetime was under his Interior Department's supervision, had passed summarily to the Army; and he frequently expressed frustration that President Roosevelt seemed little interested in ending "military usurpation" and returning

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[171] ANTHONY, ARMY RULE, *supra* note 3, at 28 (for Farrington's views); Letter from Garner Anthony to Joseph R. Farrington (Aug. 27, 1943) (on file in the Papers of Delegate Joseph R. Farrington, M-473, Series 4, Miscellaneous Subject Correspondence, Folder 772, Hawai'i State Archives); *cf.* Anthony, *Martial Law in Hawaii*, 30 CAL. L. REV. 371 (1942). In this respect, it may be said, Anthony and Farrington simply wanted a strict application of *Milligan* standards. *See supra* text accompanying note 2.

In April 1944, when the federal district court was hearing the *Duncan* petition for habeas corpus, Anthony told the press that if Hawai'i were placed under the same regime as the mainland states on the West Coast and treated as a military area or military district, under terms of Executive Order 9066—in which the Army was given extraordinary powers by executive order of the President, but with the military's orders "enforceable in federal court" rather than by unilateral authority of the military itself—it would be "the complete answer to all questions of military security." Charles Corddry, *Military Area Here Possible*, HONOLULU STAR-BULLETIN, Apr. 8, 1944, at 6. Similarly, Governor Stainback told the press that if the Army treated Hawai'i as a military district, as was done on the West Coast, a declaration of martial law might always be made anew in a serious emergency. *Governor Expects Hawaii to Become Military District*, HONOLULU STAR-BULLETIN, Apr. 8, 1944, at 1.

[172] Letter from Harold Ickes to Henry Stimson (Aug. 5, 1942) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[173] *Id.*

the Islands back under working control of his department.[174] Ickes repeatedly raised the issue with the President personally and in Cabinet meetings, but with little result.[175]

B. Academic Debate

Meanwhile the questions surrounding the legality of Army rule and the constitutional issues it implied became the focus of an emerging academic debate. The opening shot in the academic arena was fired by Garner Anthony in an article in the May 1942 issue of the *California Law Review*. Anthony's analysis contended that under the principles of the *Milligan* case, the Army was not competent to perpetuate martial law without submitting its determinations to review by the federal courts. While "political rights" were enjoyed by residents of a federal territory such as Hawai'i "[as] privileges held in the discretion of Congress," Anthony averred, "[their] personal and civil rights . . . are secured to them irrevocably by the Federal Constitution."[176] The Bill of Rights and the Constitution were intended to serve "for all exigencies," and not simply to provide a framework of government for "a fair-weather ship of state," as "some well-meaning but overzealous persons" might believe when they justified suspension of the Constitution because a state of war existed.[177] The "necessity" of a suspension of the right to writ of habeas corpus, the propriety of a continued closing of the civilian courts, and the need for martial law so comprehensive as the Army had undertaken, all were questions properly left to the judiciary—and not to the Army itself. In fact, Anthony argued, the military government itself had reopened the civilian courts—albeit only for non-jury civil trials—so it was evident that these courts were able to function. Only insofar as the Army itself had restricted their jurisdiction and procedures were these courts "disabled," the condition that under the *Milligan* standard would warrant the military courts' conducting criminal trials and other actions in matters that were purely of a civilian character. And further, again under the *Milligan* standard, there must be conditions of actual, not merely anticipated, invasion of the territory to justify the position the Army had arbitrarily assumed with respect to the administration of justice. Anthony quoted the majority opinion in the *Milligan* case: "Martial law cannot arise from a threatened

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[174] Letter from Harold Ickes to Henry Stimson (Nov. 30, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

[175] Numerous references to his frustration with the President on this score appear in the Diary of Harold Ickes (Aug. 10, 1942, Aug. 16, 1942) (on file in the Papers of Harold Ickes, Library of Congress).

[176] Anthony, *Martial Law in Hawaii*, *supra* note 25, at 374.

[177] *Id.* at 376.

invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."[178]

It must be stressed that Anthony did not believe that the suspension of habeas corpus or other extraordinary measures were under all circumstances illegal or unconstitutional. He urged that instead of allowing the Army to write its own charter of powers in Hawai'i, any emergency measures should be explicitly authorized by congressional statute and then approved, as to their constitutionality, by the federal courts.[179] Moreover, Anthony persuasively argued that there was no accepted definition of martial law and its reach: "While Congress has authorized in Hawaii the declaration of martial law in case of a threatened invasion, it has not said what martial law is and has given no content to that elusive expression."[180] He was emphatic, however, that "we must not establish by law within our own borders the very tyranny that we are now pledged to destroy" on the battlefields of war.[181]

Colonel Archibald King, a leading officer in the Judge Advocate General's staff in Washington, responded to Anthony in the same journal's September 1942 issue, presenting the argument for constitutionality and legality of Army rule.[182] Colonel King rested his justification for Army rule both on the general grounds of a military emergency requiring extraordinary action and upon the specific terms of the Hawai'i Organic Act and its provisions for declaration of martial law. Whether there was imminent danger of invasion was not a proper matter for speculation by legal commentators, nor indeed by civilian officials. King averred: "No one knows more about these matters than Lieutenant General Emmons," and his entire pattern of decisions since taking command

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[178] *Id.* at 381 (quoting *Ex parte* Milligan, 71 U.S. 2, 127 (1866)). Anthony regretted Judge Metzger's closing of his court and unwillingness to hear a petition for writ of habeas corpus in the *Zimmerman* case. *See infra* text accompanying notes 302-08.

[179] Anthony, *Martial Law in Hawaii*, *supra* note 25. Writing after the war, Anthony observed that when he thus suggested that Congress might establish combat areas that would "give the military authorities any needed powers," he was unaware that Congress had already enacted such a measure, *viz.*, the Act of March 21, 1942, 56 Stat. 173, 18 U.S.C. 97(a), under terms of which the legislative branch had in effect given its authorization for the removal under executive order of the Japanese-American population from the West Coast on the mainland. ANTHONY, ARMY RULE, *supra* note 3, at 61 nn.2,4.

[180] Anthony, *Martial Law in Hawaii*, *supra* note 25, at 388. *See also* Fairman, *The Law of Martial Rule*, *supra* note 3. When the Supreme Court finally ruled on the Hawai'i military rule issues, Justice Black took the same positions as Anthony's on the difficulty of defining "martial law," whereas Chief Justice Stone insisted that the term "martial law" as used in the Organic Act was not "devoid of meaning." Duncan v. Kahanamoku, 327 U.S. 304, 319 (1946); *Duncan*, 327 U.S. at 335 (Stone, C.J., concurring).

[181] *Id.* at 390.

[182] Archibald King, *The Legality of Martial Law in Hawaii*, 30 CAL. L. REV. 599 (1942). It was King with whom Stainback had conducted an intensive discussion of the legal and constitutional issues, *see supra* text accompanying notes 157-59.

(e.g., the mass evacuations of women and children) bespoke Emmons' premise that there remained imminent danger of an invasion by the enemy. "The resident of that beautiful archipelago may live in a paradise," King asserted, "but if he thinks that there is no danger of its being invaded, his is a fool's paradise."[183]

Colonel King also pointed out that the *Milligan* case doctrine had been controversial among lawyers since the day the decision came down in 1866. Even if the doctrine had been formulated correctly in the first place, he argued, the new technologies of warfare—and especially the kind of air power that Japan had thrown against Pearl Harbor—provided strong reason to reconsider the meaning of concepts such as "imminent invasion."[184] Quite apart from questions of military necessity and constitutionality, King continued, there was ample evidence that the territory's political leaders themselves recognized that extraordinary measures—albeit temporary ones—were legitimate in time of war. For this proposition he cited the specific terms of the Hawaii Defense Act (the M-Day law) of October 3, 1941, which had provided for suspension of ordinary legislation and vested sweeping powers in the governor to control the economic and social life of the population. That the governor had decided to devolve these powers on the Army was but part of a valid process by which the people of Hawai'i adapted to the exigencies of modern warfare and surrendered "a large part of their ordinary rights and privileges . . . in order that prompt and effective action may be taken to protect the islands."[185]

Meanwhile, in its June 1942 issue, the *Harvard Law Review* published an extended analysis by Charles Fairman entitled "The Law of Martial Rule and the National Emergency,"[186] supporting in very sweeping terms the Army's position. Fairman, who held a reserved Army commission as major, was a formidable protagonist in this debate, for he was author of the leading legal treatise on martial law and had a faculty position at Stanford University. He took the broadest possible grounds, contending that the Army was the only competent authority to determine whether an emergency in wartime required extraordinary measures; the civilian courts must defer. Defending not only Hawai'i martial law but also the Army's removal and internment of the Japanese-American population, both citizens and aliens, from the West Coast—which had become an even more prominent public issue in that day—Fairman declared laconically that as a matter of common reason the

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[183] King, *supra* note 182, at 624.

[184] *Id.* at 625.

[185] *Id.* at 633.

[186] Fairman, *The Law of Martial Rule*, *supra* note 3. Later Fairman, who held the rank of major, joined with other high-ranking Army legal officers to advise McCloy on how to deal with issues raised by General Orders No. 135, setting out anew a broad claim for Army control of civilian affairs and civilian justice, on which *see infra* text accompanying notes 209-13.

jurisdiction and procedures of the military courts, including the virtually unlimited discretion that the Army orders had given them to impose "appropriate sentence[s],"[187] might "sound startling, but . . . is about what one acquainted with such situations would expect."[188] As to the West Coast internments, Fairman contended that the "circumstances surrounding [the war's] outbreak argued for security as against trustfulness"; and that the matter was in the last analysis a military one, in the discretion of the Commanding General.[189] Although no one would contend that all Japanese-Americans were potentially disloyal, Fairman argued, they were a people apart, having "lived among us without becoming a part of us"—they were "inscrutable to us," because of "fundamental differences in mores."[190] For a people thus inscrutable and unassimilated to be taken from their homes and placed in camps, citizen and alien alike, was an "inconvenience" but seemed to Fairman "only one of the unavoidable hardships incident to the war."[191] It was a reasonable guess, he believed, that the courts would ultimately rule in favor of administrative discretion for the Army, both in Hawai'i and in the internment situation; such a course, after all, would be consistent with the judiciary's tendency in the 1930s to give constitutional approval to administrative discretion in civilian regulatory matters.[192]

As to the contention advanced by Anthony and some other critics of Army rule that the term "martial law" was not well defined in the law, Fairman offered his version of "the essential truth" that was discernible "through [the] maze" of Anglo-American legal history on the question: "[M]artial law, so far as now consistent with the English constitution, is simply an application of the common-law principle that measures necessary to preserve the realm and resist the enemy are justified."[193] He wrapped this historical lesson, moreover, in the mantle of the legal realism which had recently become dominant in American jurisprudential theory and to an increasing degree in constitutional law: "Just as in the construction of the commerce clause and other grants of national power the Court of late has notably sought to make them adequate to the conditions which we face, almost certainly it would so construe the war power as to include all that is requisite 'to wage war successfully.'"[194]

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[187] Fairman, *The Law of Martial Rule*, *supra* note 3, at 1295.

[188] *Id.* at 1296.

[189] *Id.* at 1299.

[190] *Id.* at 1301.

[191] *Id.* at 1302.

[192] *Id.*

[193] *Id.* at 1259.

[194] *Id.* at 1287. Fairman, who by then had been called up to actively serve as Lt. Colonel in the Judge Advocate General's department, published a second edition of his treatise in 1943, incorporating into it nearly verbatim the concluding section of his article. *See* FAIRMAN, THE LAW OF MARTIAL RULE 239-61 (1943). *Cf.* FAIRMAN, RECONSTRUCTION AND REUNION, *supra*

The publication of Anthony's May 1942 article and its circulation in Hawai'i gave increased visibility to the issue of the legality of martial law and military governance generally. This prompted General Emmons to issue a press release in Honolulu replying to Anthony's criticisms: Emmons declared that the Organic Act and the President's acceptance of the martial law decision—which all agreed had been conveyed to the White House by Governor Poindexter and General Short at the time martial law was first declared, though there was controversy as to whether a declaration of martial law authorized full military control of all civilian government functions—rendered fully legal all the Army's measures to control Hawai'i's civilian population and government.[195] Acknowledging, although obviously grudgingly, the propriety of "academic discussion regarding the legal technicalities" of martial law, Emmons remarked: "No doubt the history and operation of martial law in Hawai'i will be the subject of many interesting legal debates in years to come . . . ."[196] This, however, was not in the general's view the time for such intellectual exercises, and he warned sternly that the "academic" criticisms of Army rule would have no effect upon his administration of the Islands: "[I]n this theater of operations," he declared, "we are not going to question the wisdom of our Congress in passing the Organic Act nor question the judgment of our President in approving the declaration of martial law by the civil governor."[197] Commenting privately upon this reaction to his article, Anthony wrote: "Some may say that this is no time to talk about martial law, that it should be postponed for the post-mortem examination of the legal historian, [but] I believe that straight thinking, together with intelligent and orderly action, is vital to success. Playing the ostrich simply because a problem is delicate or hard will not advance the war effort."[198]

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note 1 (a work, written two decades after his wartime role, in which Fairman, by then professor of law at Harvard, took a rather different view of the constitutional mandate deriving from *Milligan*); *see also infra* text accompanying notes 566-70.

[195] On the controversy regarding presidential authority of such scope as of Dec. 7, 1941, *see supra* notes 148-52. Anthony contended that while the action of Governor Poindexter in suspending the privilege of the writ of habeas corpus and placing the territory under martial law, acted within the terms of the Organic Act; nonetheless the President's authority, as the immediate emergency passed and the military displaced civil government, was not without limitations: "[T]here is no legislative authority given to the President that authorizes him to erect military tribunals for the trial of citizens." Anthony, *Martial Law in Hawaii*, *supra* note 25, at 387. Later, Anthony wrote: "[N]either the President with Congress, nor the President alone, have authorized a military government for Hawaii." Anthony, *Martial Law, Military Government and the Writ of Habeas Corpus*, *supra* note 21, at 479.

[196] ANTHONY, ARMY RULE, *supra* note 3, at 109 (quoting Emmons).

[197] *Id.* at 109-10 (quoting Emmons).

[198] Letter from Garner Anthony to Samuel Wilder King (June 10, 1942) (on file in the Papers of Delegate Samuel Wilder King, M-472, Series 21, Miscellaneous Subject Correspondence, Folder 1449, Hawai'i State Archives).

The sweeping claims on behalf of the Army's discretionary authority made by Colonel King and General Emmons lent additional urgency to the continuing concern about Army rule that was being voiced by Delegate King and his successor, Farrington, and also by Governor Stainback, middle-ranking Department of the Interior officials, and civil liberties-minded officers of the Justice Department. Especially troubling was the fact that the Army command in Hawai'i had proven uncompromising in its contentions that martial law actually was popular with the civilian population and was fair in its administration. Thus when the War Department, in response to Ickes' demands, queried General Emmons as to how martial law might be eased, Emmons—doubtless relying upon Green for much of his text—responded that even abolition of the title of Military Governor would weaken his authority to an unacceptable degree; and that rationing and price control "would be wholly ineffective if left in the hands of civilians." The civil courts, the General wrote, could not be entrusted with prosecution of criminal matters ("the administration of criminal justice [being] an essential element of martial law as this is a theatre of operations"); hence the Army must continue to administer a "police power covering all phases of economic life in the community," and in any case the presence of so large a Japanese-American population must continue to be taken into account.[199] Finally, Emmons advanced an argument based upon broad strategic and security considerations. "It would appear that the Interior Department considers that the danger to Hawaii from attack has passed," he stated: "Such a feeling is unwarranted as these islands are in danger from attack at any time, and as the situation develops in the Middle East [sic] and in Russia the situation here may become increasingly hazardous."[200]

To Secretary Ickes and other critics of the military regime in Hawai'i, it therefore was becoming obvious that the Army was digging in to resist any concessions whatsoever on martial law. Hence Ickes and his inner circle of associates intensified the pressure upon the War Department to specify a timetable for the restoration of civilian rule. Consequently General Green was ordered back to Washington from Honolulu in August 1942—just at the time that Stainback's appointment as governor was being approved in the Senate—to engage in formal discussions of whether and how Army rule might be modified.[201] Green was well prepared for the task as he saw it—that is, to

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[199] Radio from General Delos Emmons to Assistant Secretary John J. McCloy (July 1, 1942) (on file in the Papers of General Thomas H. Green, Hawaii Military Government Records, Record Group 338, National Archives).

[200] *Id.*

[201] Letter from E. K. Burlew to John J. McCloy (July 15, 1942) (on file in the Assistant Secretary of War Files (McCloy Files), Box 32, War Department Records, Record Group 107, National Archives); Green Notes, *supra* note 22. *See also* Scheiber and Scheiber, *supra* note 6, at 360. Interestingly, Colonel King—whose views in his *California Law Review* article had

resist any reduction in the military's authority—because the Army censorship office that operated under Green's supervision in Honolulu had been turning over to him copies of Governor-designate Stainback's correspondence with the Department of the Interior in which his specific objectives and tactics were set forth. Similarly, Green had been seeing the correspondence of Justice Department and other Washington officials who were reporting from Hawai'i after being sent out to the Islands to engage in fact-finding and make policy recommendations.[202] Thus, by the simple expedient of reading his opponents' mail, Green was able to obtain information that helped him to fortify himself for the bureaucratic battles that lay ahead for him in Washington.

C. Toward "Delineation": Negotiations In Washington, August 1942

Once talks began in Washington, General Green found himself confronted with a concerted effort by the Department of the Interior and members of the Attorney General's top staff to gain agreement for a significant reduction in the Army's powers in Hawai'i. Green earlier concluded that the Interior's real motive in raising issues about the legitimacy of martial law was to undermine Army rule entirely: "The very purpose of the present controversy," he told his War Department superiors, "is to divest the Military from control."[203] In talks with Interior and War civilian officers, Green proved completely intransigent:

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seemed to support the hard line taken by Generals Emmons and Green—was behind the scenes counseling the Army that a partial restoration, at least, of jurisdiction in the civilian courts was advisable. *See* Memorandum from Jaretski to John McCloy (June 5, 1942) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives); *see also supra* note 182.

[202] Radio from General Delos Emmons to General Thomas H. Green (Aug. 19, 1942) (on file in the Green Files, Hawaii Military Government Records, Record Group 338, National Archives) (Radio No. 2338) (referring to "report[s] from usual source" and detailing material in Stainback's correspondence and the correspondence of Samuel Clark of the Justice Department). The Army archives contain, for example, a copy of a confidential report by the territorial attorney general on the subject of military rule, together with a questionnaire that the attorney general sent to the U.S. district attorney in Honolulu, marked that the addressee "is unaware of our possession of the letter." Form letter from Attorney General Tavares (questionnaire) (date illegible, but June or July 1944) (copy on file in the Hawaii Military Government Records, Record Group 338, National Archives) (filed with a copy of a memorandum from Fowler Harper to Abe Fortas dated Aug. 17, 1944). Even as late as December 1944, the censors, now under civilian control but cooperating with the Army command, were still opening correspondence between civilian officials in Hawai'i and their superiors in Washington, leading Under Secretary Fortas to complain that this was "a serious violation of the right of free and confidential communication," in the particular case in question involving a letter from Governor Stainback's office to the Interior Department. Letter from Abe Fortas to Byron Price, Director of Censorship (Dec. 25, 1944) (on file in the Deputy Secretary of the Interior Files (Fortas Files), Box 8, Record Group 48, National Archives).

[203] Green Notes, *supra* note 22.

he denied categorically that General Short had promised Governor Poindexter anything with respect to how long martial law would be kept in effect; he defended the necessity of the provost courts' procedures, insisting that the military operated with advice from local judges and other qualified civilians; and he averred that the military regime had broad support. "Every thinking citizen," according to Green, recognized that if the Army withdrew from civil governance it would leave the Territory open to a "hard time."[204]

Doubtless the negotiations were rendered tense enough by the fact that Ickes had already become convinced that the Army did not recognize in Hawai'i the very principles "fundamental to the concept of liberty which we are fighting to defend."[205] He wrote of Emmons' regime that he could find no precedent in American history in which "an American 'Military Commander' in a martial law area . . . abolished jury trials, closed courts, and assumed various civil powers because, in his opinion, it was 'better for the people.'"[206] Moreover, Benjamin Thoron, head of the office of territories in the Department of the Interior and a participant in the discussions, had already concluded from a visit to Honolulu earlier in the year that there was evident in Army rule a "drift to a complete military dictatorship" which hardly seemed justified by a security situation fundamentally different from what had prevailed just after the Pearl Harbor attack, when martial law had commenced.[207]

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[204] *Id.* In this regard, Green's position was unchanged from what Ickes' special representative, Benjamin Thoron, had learned in discussions on the ground in Honolulu earlier in the year, reporting to Ickes as follows:

> From my conversation with Colonel Green it became apparent to me that he has reached the conclusion that direct administration of all controls over civilian life by military authorities is necessary; that the powers of the Military Governor under martial law are absolute and all inclusive; and that the extent to which they shall be exercised lies in the sole discretion of the Commanding General. He maintains categorically, and it seems to me dogmatically, that the control of civilian life through the civil authorities acting with the approval and support of the military authorities is not feasible, even in phases which are not in any degree apparent to the layman related to military activities or the security of the Territory.

Memorandum from Benjamin Thoron to the Secretary of the Interior, "Civilian Defense and Military Government in Hawaii, Report #4" (May 25, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.). Here and in the following two paragraphs, we follow closely from Scheiber and Scheiber, *supra* note 6, at 360-62.

[205] Letter from Harold Ickes to Henry Stimson (Aug. 5, 1942) (on file in the Hawaii Military Government Records, Record Group 338, National Archives) (a copy was also filed with General Green's notes on the August negotiations).

[206] *Id.*

[207] Memorandum from Benjamin Thoron to Harold Ickes (May 12, 1942) (on file in the Secretary's Files, Papers of Harold Ickes, Library of Congress, Washington D.C.).

Against this tense background, an interdepartmental agreement was reached in August 1942 that provided for restoration of the civilian courts' jurisdiction over criminal law matters, but only a partial one. The exceptions were highly significant. First, members of the armed forces and persons engaged in defense activities under the Army's direction (numbering about 80,000, or about half the work force outside homes) were to be tried only by military tribunals. Second, specified violations of military general orders, bearing directly on security of fortifications and the like, would continue to be enforced only by the provost courts. And third, the writ of habeas corpus continued to be suspended, and the continued existence of martial law—now as modified by the agreement—was explicitly recognized. General Green returned to Hawai'i with the agreement in hand, and the Army announced the new division of jurisdiction on September 2, 1942, in General Orders No. 133.[208]

For two quiet days, it seemed that the long-awaited restoration of significant powers to the civilian government had been put in place effectively. But then General Emmons' office dropped a legal bombshell, issuing a "delineation" order (General Orders No. 135, September 4, 1942) that purported only to clarify the terms of the new civilian-military division of authority. Green contended that this further clarification was necessary because the agreement negotiated in Washington—and embodied in General Orders No. 133—was only an agreement on "general principles," leaving open uncertainties as to the specific meaning of activities related to "security" and therefore giving the courts (provost courts and civilian courts alike) inadequate guidance as to their respective jurisdictions.[209]

In fact, however, the "delineation order" (No. 135) reversed a substantial portion of the concessions that Green had agreed to in the Washington negotiations. In this order, the Army clarified the meaning of the "general principles" by specifying that the provost courts' jurisdiction would continue to include control of any "violations in connection with the war effort," which specifically included prostitution, all traffic violations on public roads after blackout hour, and a range of selected crimes under the terms of federal and territorial law. The new order also specified that all military proceedings would

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[208] Scheiber and Scheiber, *supra* note 6, at 360; General Orders No. 133 (copy on file in the Hawai'i War Records Depository, Hamilton Library, University of Hawai'i); ANTHONY, ARMY RULE, *supra* note 3 at 159-60.

[209] Memorandum by General Thomas H. Green, "Notes Regarding Issuance of General Orders Nos. 133 and 135" (Sept. 24, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.) (also on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives attached to a letter from General Thomas H. Green to John J. McCloy dated Sept. 25, 1942) [hereinafter Green Memorandum, "Notes Regarding Issuance of General Orders Nos. 133 and 135"].

be conducted, as before, without normal due-process guarantees; and there would be no right to a jury trial in the Army courts. Any jurisdictional disputes—whether concerned with the federal courts, the territorial courts, or the provost courts—would be decided by the commanding general *qua* Military Governor, "whose decision shall be final."[210]

Green told the War Department that prior to issuing the delineation order, he had consulted diligently with the federal district attorney and with various civilian judges as well as with Governor Stainback, encountering no opposition to his proposals for dividing jurisdiction.[211] In fact, Green professed, he had originally "had in mind turning over to the civilian authorities for disposition such common crimes as drunkenness, drunken driving, prostitution, vagrancy, and the like," but that then a senior civilian judge (unnamed in Green's memorandum) had objected tellingly to such a course:

> This judge advised me strongly against turning any of these over. In the case of drunkenness, he informed me that the civil courts would be entirely unable to cope with the situation among defense workers when the maximum penalty allowed by Territorial law was only a small fine . . . . He also pointed out to me that in the case of drunken driving, the civil courts were required by Territorial law to revoke the license of the person convicted, and that to do so in the case of a defense worker who happened to be a machine operator, would be contrary to the best interests of the war effort. He informed me that the control of prostitution under civil courts would be ineffective and that they would have no more control over the subject during war time than they had in peace time, which was just about nil. He pointed out that the subject of vagrancy would clearly be best handled by the Military courts. This is, of course, in line with our Labor Order No. 19, in which continual vagrancy is punishable by trial before a Provost Court.[212]

How accurate this account might be—and also the identity of the jurist whom General Green found to provide a cloak of legitimacy for General Orders No. 135—remain matters for speculation.

In any event, Governor Stainback interpreted Green's moves as a blatant and unprincipled subversion of the Washington agreement on the terms of restoration.[213] Within the Justice Department, too, the top staff people were

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[210] General Orders No. 135 (copy on file in the Hawai'i War Records Depository, Hamilton Library, University of Hawai'i); *see also* ANTHONY, ARMY RULE, *supra* note 3, at 162.

[211] Green Memorandum, "Notes Regarding Issuance of General Orders Nos. 133 and 135," *supra* note 209.

[212] *Id.*

[213] Stainback's angry objections to the terms of General Orders No. 135 are described in Green Memorandum, "Notes Regarding Issuance of General Orders Nos. 133 and 135," *supra* note 209. Green presented the issue to the War Department in a way that served to discredit Stainback, writing that the governor "on many occasions . . . has gotten very angry over the matter. However, I know him quite well and have discounted his fits of anger as a thing that is

appalled when the text of General Orders No. 135 reached their office. The concessions made to the Army in the previously negotiated agreement, wrote Assistant Attorney General Rowe, apparently were being taken by Green and Emmons "merely as an invitation to further encroachments upon civil jurisdiction"—a clear indication, Rowe concluded, that any further reliance upon the Army's good faith would be at best "unwise."[214] Rowe advised Attorney General Biddle that the only effective solution to the problems posed by Army rule in the Islands would be to have General Green transferred to another post at once, and at the same time to persuade the President to order a wholesale restoration of the civilian territorial government's authority.[215] The Solicitor of the Department of the Interior reacted with similar outrage, declaring that General Orders No. 135 represented "the violation of the premises which underlay the entire agreement," and that it "in effect constitutes the Military Governor [as] a fifth tribunal whose executive decision will replace the judicial processes."[216]

Even the Army's top legal officers in Washington—who obviously had not been consulted before Green and Emmons had issued the delineation

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usual with him . . . ." Letter from General Thomas H. Green to Assistant Secretary John J. McCloy (Sept. 15, 1942) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives); *see also* ANTHONY, ARMY RULE, *supra* note 3, at 23-27.

General Green made a regular practice of consulting civilian judges and former judges in matters of Army legal policy. Although the judge who was consulted by Green in this instance is identified in the memorandum only as a "district judge," it is unlikely that it was U.S. District Court Judge Delbert E. Metzger; rather, we think it was a Hawai'i territorial judge. Still, it may be relevant—and is noteworthy in any event—that at a later date Metzger praised General Green for his having had the "wisdom to use nearly all the established functions of local government" in the Military Government plan, and especially his not chancing any loss of "time or efforts through dual governmental managements, and no possibility of division of authority, or division of responsibility" that would have hampered the effectiveness of the Army just after the Pearl Harbor disaster. Letter from Judge Delbert Metzger to General Thomas Green (Mar. 3, 1943) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.). If the advice regarding Order No. 135 did in fact come from Judge Metzger, it would have been ironic, since it was Metzger's court that struck the first solid blow against continuation of martial law in the habeas corpus cases of mid-1943, on which *see infra* text accompanying notes 313-24.

[214] Draft copy of proposed letter (not sent) from the Attorney General and Secretary Ickes to the President (apparently prepared by James Rowe and Sam Clark) (Oct. 7, 1942) and Memorandum from James Rowe to Mr. [Samuel] Clark (Oct. 5, 1942) (both on file in the Papers of James Rowe, Jr., Box 36, Franklin D. Roosevelt Library, Hyde Park, N.Y.).

[215] Draft copy of proposed letter (not sent) from the Attorney General and Secretary Ickes to the President (Oct. 7, 1942), *supra* note 214.

[216] Memorandum from the Solicitor of the Department of the Interior to the Secretary of the Interior (not dated, but Sept. or Oct. 1943) (copy on file in the Papers of James Rowe, Jr., Box 36, Franklin D. Roosevelt Library, Hyde Park, N.Y.).

order—found it impossible to defend the document. When the text of the order reached McCloy, he called upon the Judge Advocate General, Major General Myron Cramer, for an opinion on it. General Cramer, who surely must have felt that he had been ambushed by the Hawai'i command, was unequivocal in his counsel: he advised McCloy that the terms of the order by which the Military Governor asserted final authority over jurisdictional questions in all judicial proceedings, federal or territorial as well as military, was at best a serious affront to the courts and in any case a claim "of doubtful legal validity."[217] The Judge Advocate General's analysis continued:

> [T]he question whether a particular case falls within the jurisdiction of the civil court is, like all other jurisdictional issues, for determination by the court itself. For him [Emmons] to tell the court that it shall not exercise jurisdiction in a particular case, which otherwise would be triable by it, or of which it has decided that it has jurisdiction, is . . . inconsistent with the dignity of the court and amounts to the exercise of judicial power by the [Military] Governor himself."[218]

Cramer advised McCloy that if these provisions of doubtful legality were struck out, along with those that were in patent violation of the War-Justice-Interior agreement reached earlier in Washington, then "very little indeed of General Orders 135" would be left standing.[219]

In light of these responses from the Army's chief attorney himself as well as from ranking civilian officials, the chances that the position staked out by Green and Emmons in the delineation order could survive intact seemed slim indeed.

D. The Delineation Issue Resolved: Restoration Agreement, 1943

Among the Army's critics both in Hawai'i and back in the nation's capital, the reaction to General Orders No. 135 was not only swift; it was angry.[220] Governor Stainback, geared up for a full-scale effort to win back the control that he believed had been stolen from his office by Green's deviousness, now

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[217] Memorandum from Major General Cramer, Judge Advocate General to the Assistant Secretary of War, "Subject; Change in General Order 135, Office of the Military Governor of Hawaii, September 4, 1942" (Oct. 23, 1942) (Confidential) (on file in the Assistant Secretary of War Files (McCloy Files), File 370.8, War Department Records, Record Group 107, National Archives).

[218] *Id.*

[219] *Id.*

[220] Governor Stainback angrily claimed that he had not been properly consulted, and that the Army had rushed to issue its General Orders No. 135 before its terms could be properly analyzed and the civilian government's reaction obtained. All this Green denied. Green Memorandum, "Notes Regarding Issuance of General Orders Nos. 133 and 135," *supra* note 209.

appointed Garner Anthony to the post of territorial attorney general. Anthony was on record through his scholarly writings, of course, as being opposed to many aspects of martial law and Army rule; and so, unsurprisingly, the Hawai'i command was deeply concerned about his appointment. Anthony was approved for his new position despite the fact that the Army command in Honolulu had gone on record earlier as being opposed to his appointment—then a matter of rumor—as the U.S. district attorney for Hawai'i: Green had called upon the War Department to help in scuttling the consideration of Anthony for that position, pointing out he could not be relied on to defend the Army if any challenge to the legality of martial law or military rule should come before the courts.[221] Relations between Green and Anthony were not improved when, immediately after Anthony took the job as territorial attorney general, they had an angry confrontation over the Army's continuing occupation of the offices of territorial officers in Iolani Palace and, more important, over whether the territorial attorney general should operate independently of any obligation to adhere to the Army's line on disputed policy matters.[222]

One of Anthony's first duties in his new post was to prepare for the governor a lengthy analysis of the legality and operations of martial law. This document, which was transmitted on December 1, 1942, reiterated the legal and constitutional arguments that Anthony had published earlier in his *California Law Review* piece.[223] He followed with a wholesale condemnation of the seizure by the military of nearly all civilian governmental functions, and in even sterner terms he denounced the wholesale suspension of the right to petition for a writ of habeas corpus and also the abuse of power that he found manifest in the procedures and operations of the provost courts. As to censorship, Anthony

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[221] Memorandum from General Thomas H. Green to the Assistant Secretary of War (Aug. 21, 1942) (on file in the Papers of Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.) (stating that Anthony was author of the May 1942 *California Law Review* article challenging the legality of Army rule in Hawai'i, and that this "disqualifies him from holding a position in which it would be his official duty to maintain the opposite view [i.e. opposite to the Army's]").

[222] Two versions exist as to what transpired in this confrontation in the office Green occupied, one Green's own (in Green's diary, on file in the Papers of Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.), and the other a desk memorandum that Anthony wrote immediately after returning to his own office from the meeting with Green (original copy in the possession of Mrs. Garner Anthony). We think that the differences in factual detail are not so important as the clear indication both versions offer that the men had come to a difficult pass in their personal relationship: Anthony clearly was dubious of Green's integrity and deplored his absolutism; and Green, for his part, resented the independence of mind that Anthony displayed on the issues of martial law's constitutionality and on the need to respect the prerogatives of the civilian government—a characteristic of mind that Green viewed as dangerous to the unity of the war effort.

[223] Anthony, *Martial Law in Hawaii*, *supra* note 25. *See* ANTHONY, ARMY RULE, *supra* note 3, at 191 (the December 1 report is reprinted in Appendix E).

argued, there was no legal basis for the policies by which the Army had overridden the fundamental rule of law that supported a free press, let alone the way in which it managed news on such issues as prostitution controls. "Perhaps the greatest inroad on the liberty of the individual, next to abrogation of the Bill of Rights," Anthony added, was the way in which the military orders controlling labor had virtually set aside the Thirteenth Amendment and its prohibition of involuntary servitude.[224]

Anthony's conclusion was that a four-point program restoring to civilian authorities their proper jurisdiction should be made the object of a new agreement among the relevant agencies in Washington. The first point in Anthony's approach was "the restoration of the courts to their normal functions," leaving to the federal district court in Hawai'i the authority to determine what specific cases involved palpable questions of sabotage, espionage, or loyalty. Second, he recommended "relinquishment by the military of all the civil functions presently usurped under military rule, such as food, price, and liquor controls"; and third, that the Army should accept relinquishment of the title and substantive claims of "military governorship." Finally, he wanted a suspension of any general order currently in effect that was not actually "based upon military necessity," together with agreement that "except in case of a real emergency which will not admit of delay," any new orders purporting to deal with such security matters should be submitted to the civilian governor prior to being issued by the Army. The only alternative to such an agreement that Anthony would find acceptable was the termination altogether, through formal action by the President, of martial law.[225]

Anthony's report immediately became the agenda for Governor Stainback in a renewed campaign to obtain restoration of the civilian government's authority. Its viewpoint was, of course, anathema to the Army and in fact disputed all the basic premises that the Hawai'i command had repeatedly set forth since December 1941 as the rationale for military government and martial law. "Restive and indignant," Stainback won Secretary Ickes' support for renewed negotiations in Washington that might lead to a more acceptable "delineation" of functions and meaningfully restore civilian government.[226] Indeed, Ickes was determined that as part of any new agreement the War Department must find another position "for the 'estimable General Green,'" and he told his allies in the negotiations that followed that he was "not going to smile again until this happens, as I believe it will if we will allow time for a

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[224] ANTHONY, ARMY RULE, *supra* note 3, at 191-97.

[225] *Id.* at 199.

[226] *Id.* at 24.

little face-saving delay . . . . There are a lot of faces in these parts that ought to be smashed rather than saved, but we go on saving them."[227]

The mood indicated by Ickes' rhetoric in this communication quickly came to pervade the negotiations, which were intense and difficult. The talks mainly involved the Departments of War (with Assistant Secretary McCloy usually participating personally), Interior (with both Ickes and Assistant Secretary Abe Fortas participating), and Justice (with Attorney General Biddle and several aides variously involved). In addition, Generals Emmons and Green were both recalled from Hawai'i in early December to participate directly; and later in the month Governor Stainback and Territorial Attorney General Anthony also came to Washington to negotiate personally in the case of full restoration of civilian functions.[228] In the immediate background, Joseph Farrington, the newly elected territorial delegate to Congress, made his own contribution to the discourse through press releases, correspondence with constituents, and comments upon draft agreements—making clear his support for the position that Garner Anthony had set out, and that had been adopted entirely by Governor Stainback, demanding a severe curtailment of Army control.[229]

Green's arrogant and unyielding defense of the provost courts and all other aspects of martial law simply hardened the perception in the Interior and in the Justice Department that he was a rigid, undemocratic individual with a vested interest in maintaining the Army's monopoly of power in Hawai'i. Confiding in his diary and personal notes that Ickes' staff in the Interior were anti-military to the core—"vermin," "pink," and otherwise deplorable in their character and political ideas, men lacking any realistic conception of what it took to provide an adequate defense for the Islands—Green made no friends in the negotiations.[230] The antagonism clearly was mutual. Thus Ickes opened the private interdepartmental discussions with the civilian officers in the War Department, before the talks with General Green himself began, by announcing

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[227] Letter from Harold Ickes to James Rowe, Jr., Assistant to the Attorney General (Dec. 14, 1942) (on file in the Secretary's Files, Papers of Harold Ickes, Library of Congress, Washington D.C.).

[228] The record of the intense negotiations of December has been pieced together from General Green's diary and from the relevant departmental archival records and personal correspondence. *See* Diary of Thomas Green (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.); *see also infra* notes 231-37.

[229] Letters from Joseph R. Farrington to Garner Anthony (Aug. 27, 1943 and Sept. 10, 1943) (on file in the Papers of Delegate Joseph R. Farrington, M-473, Series 4, Miscellaneous Subject Correspondence, Hawai'i State Archives). *See also* ANTHONY, ARMY RULE, *supra* note 3, at 105-06; *Military Rule Here Modified*, HONOLULU STAR-BULLETIN, Sept. 2, 1942, at 1 (civil courts restored).

[230] Diary and personal memoranda of Thomas H. Green (Dec. 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

that he simply no longer trusted Green's motives or willingness to abide by any decision to return significant power to the civilian authorities.[231] In memoranda to Secretary Stimson in the War Department, Ickes caustically referred to the problem of "the American 'conquered territory' of Hawaii."[232]

Attorney General Biddle's top assistant, James Rowe, was a strong civil libertarian and had now begun to take a strongly critical view not only of General Orders No. 135 but also, more generally, of both the Army's stalling tactics and of Stimson's and McCloy's excessive tolerance of an American variant of totalitarianism (as Rowe viewed it) in Hawai'i.[233] The atmosphere was not made any calmer by the fact that Secretary of War Stimson and his assistant secretary, McCloy, both were thoroughly convinced that martial law was popular with the people of Hawai'i, so that the pressure for change—in Stimson's words—was coming from "starry-eyed departments in Washington," and not from civilians in the Islands.[234] Just before the Washington talks began, moreover, McCloy had visited Hawai'i personally to assess the situation. Though he acknowledged that there was "considerable agitation among the lawyers," as he reported to the White House, he found general acceptance of martial law and came away prepared to support the Army against its critics.[235]

Attorney General Francis Biddle, who like Ickes had long been associated with the cause of guarding the citizenry's civil liberties, shared Ickes' opinion of the Hawai'i situation. Initially Biddle had supported the President's decision to approve the Poindexter declaration of martial law. But by late 1942 Biddle had run out of patience with the Army's policies, and especially with the operation of the provost courts. Finding that Green would never make a single concession of Army authority without putting up a struggle, he concluded that the officers who were running Hawai'i "lock stock and barrel, don't want to give an inch."[236] Biddle was angry enough now that he took the matter directly

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[231] ANTHONY, ARMY RULE, *supra* note 3, at 27.

[232] Letter from Harold Ickes to Henry Stimson (Nov. 20, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

[233] Letter from James Rowe to the Attorney General (Dec. 26, 1942); Letter from James Rowe to the Attorney General (Apr. 10, 1943); Letter from James Rowe to the Attorney General (Aug. 27, 1943) (all on file in the Papers of James Rowe, Jr., Franklin D. Roosevelt Library, Hyde Park, N.Y.). *See also supra* notes 214-15.

[234] Diary of Henry L. Stimson (Jan. 9, 1943) (on file in the Yale University Library, New Haven, Conn.) (microfilm copy available in University of California, San Diego Library).

[235] Letter from John J. McCloy to Harry Hopkins (Oct. 19, 1942) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives). However, McCloy was also prepared to make some important concessions if the Army command would agree. What he suggested (transferring criminal jurisdiction to the civilian courts) eventually became one of the key compromises in the agreement worked out in the December talks. *See infra* notes 264-72.

[236] Letter from Attorney General Francis Biddle to President Franklin D. Roosevelt (Dec. 17, 1942) (confidential) (on file in the Papers of Francis Biddle, Franklin D. Roosevelt Library,

to the President, declaring that the Army's administration in Hawai'i had proven itself "autocratic, wasteful, and unjust"; and he denounced General Green as a "stuffy and overzealous" martinet who ought to be relieved of his post immediately.[237] Popular resentment of Army rule in the Islands had not received much attention as yet, but only because "criticism is suppressed," Biddle wrote; the generals were getting most of their opinions about conditions among the citizenry from a handful of elite leaders in the "Big Five." It was, in sum, a "situation [that] has the makings of a lurid Congressional investigation."[238]

The Justice and Interior departments thus joined formally to propose the restoration to civilian agencies not only of ordinary civilian governance but also even of such security-related functions as civil defense, price control, and censorship of the mail.[239] The Interior-Justice Department joint position in the matter was perfected in a December 9 meeting (only a few days before Biddle

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Hyde Park, N.Y.) It should be noted that Biddle, despite his misgivings about the violation of mainland Japanese-Americans' civil liberties in the evacuation and internment situation, in the end deferred to the military and took the position that it was an Army problem, not the Justice Department's. *See* IRONS, JUSTICE AT WAR, *supra* note 9, at 17-18, 52-54.

[237] Letter from Attorney General Francis Biddle to President Franklin D. Roosevelt (Dec. 17, 1942) (confidential) (on file in the Papers of Francis Biddle, Franklin D. Roosevelt Library, Hyde Park, N.Y.). Ickes, too, directed his fire against Green, charging, for example, that the "military usurpation" which persisted in Hawai'i "still exists there as a result of the bad faith of General Green." Letter from Harold Ickes to Henry Stimson (Nov. 30, 1942) (copy on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.). Interestingly, Judge Metzger, whose conflict with General Richardson revealed the depths of his concern that the Army had gone far beyond its legal authority in ruling Hawai'i, in March 1943 provided General Green with a confidential letter of recommendation stating that Green was "an able executive, firm but fair, and ever ready to hear the views of others . . . ." Letter from Judge Delbert Metzger to General Thomas Green (Mar. 4, 1943) (on file in the Papers of Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

[238] Letter from Francis Biddle to President Franklin D. Roosevelt (Dec. 17, 1942) (confidential) (on file in the Papers of Francis Biddle, Franklin D. Roosevelt Library, Hyde Park, N.Y.). The Army command cannot possibly have been unaware that criticism was blunted and dissent chilled under martial law. As an example, an Army intelligence report of mid-1942, on the subject of opposition to reappointment of Governor Poindexter (whose appointment ran out that year, and he was succeeded by Stainback), declared: "Never was there any public frontal attack on martial law *as such* or on the Governor's action [in turning the government over to the Army] *per se* . . . . Some competent observers have confided that had it not been for . . . reluctance to offend the military authorities, the criticism would have been much more blunt and open." "Political Report to Kendall J. Fielder, G-2: The Governorship of Hawaii, July 31, 1942" (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

[239] Letter from Francis Biddle and Abe Fortas to John J. McCloy (Dec. 19, 1942) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

wrote to the President), at which Governor Stainback and Attorney General Anthony, Angus Taylor (Acting U.S. Attorney for Hawai'i), James Rowe and Samuel O. Clark of the Justice Department, and Under Secretary of the Interior Abe Fortas came to agreement on the following bargaining strategy: First, their optimal objective was to obtain "drastic modification of military control" by presidential order restoring the territorial civilian government to its pre-Pearl Harbor status, with the M-Day legislation to be effective under the governor's direction. Second, failing agreement with the War Department to approve the optimal objective, "steps would be taken to assure that any violations of the Military Governor's general orders would be triable by the civilian courts." And finally, at the very minimum, the civilian courts would be restored in their jurisdiction over all crimes except those specified in the Articles of War; otherwise, only crimes specified in proclamations of the Military Governor—which must apply only to defense and security—would remain triable in military tribunals. "Under all plans," the group agreed, "it is essential that the civilian courts and not the military authorities be given the power to determine their own jurisdiction over the various classes of crimes which they are to try."[240]

The Justice-Interior memorandum did explicitly concede that some elements of martial law might need to be continued; they included suspension of the writ of habeas corpus, and also the military's jurisdiction over violations of the Articles of War and criminal prosecutions of uniformed personnel. But civilian authorities, federal and territorial, should be reinstated in their jurisdiction in many vital areas, including "(a) civil defense matters, (b) price control, (c) public health, (d) censorship of civilian mail, (e) selection of residents [stranded on the mainland] who may return to the Territory [according to previously agreed priorities], (f) production and distribution of food, (g) rationing, (h) liquor control and prostitution, (i) schools, (j) rents, (k) banking, currency and securities, and (l) collection of garbage."[241] The most important principle advocated by Biddle and Fortas was expressed in their unequivocal rejection of General Emmons' view that civilian government must be subordinated in all particulars to the military, with authority devolved upon civilian officers

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[240] Samuel O. Clark, Jr., "Memorandum for the Attorney General, In re: Military Government in Hawaii, Dec. 9, 1942" (on file in the Papers of James Rowe, Jr., Franklin D. Roosevelt Library, Hyde Park, N.Y.). Compare the terms of the Burlew legal memorandum, *supra* note 143. One has to think that District Attorney Angus Taylor had little influence on the outcome of the meeting, in which his superiors in the Justice Department decided the departmental position—especially so as Taylor had been a strong advocate, earlier in the year, for internment and expulsion of large numbers of Japanese-Americans in Hawai'i, and for tougher security measures. *See supra* note 37.

[241] Letter from Francis Biddle and Abe Fortas to John J. McCloy (Dec. 19,1942) (on file in the Papers of Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

(including civilian judges) only at the Army's discretion. "No such proposition has ever before been advanced with respect to American territory," Biddle and Fortas told the War Department: "If the military necessities do not forbid the operations of the civil government, there is no possible ground in a democratic nation upon which to subject those operations to military rule."[242]

The Attorney General's personal intervention with President Roosevelt to present the Interior and Justice view clearly was decisive in what followed.[243] Until that time, the White House had shown little concern about the Army's rule in Hawai'i, except for the quarrel with the Army over whether Japanese-Americans should be interned en masse or removed. As Biddle later recalled, the President "thought that rights should yield to the necessities of war. Rights came after victory, not before."[244] Now, however, more than a year after Pearl Harbor, Roosevelt displayed a clear impatience with the troublesome news coming out of the Islands—especially, he wrote: "I know from many other sources that Emmons gets most of his knowledge of conditions from The Big Five."[245] The President therefore penned a memorandum, dated December 13,

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[242] *Id.* The language is also in a Dec. 9, 1942 memorandum from Samuel O. Clark to the Attorney General which is on file in the Papers of James Rowe, Jr., Franklin D. Roosevelt Library, Hyde Park, N.Y.. *See supra* note 240.

[243] Biddle recorded in his notebooks that he handed his letter directly to Roosevelt's secretary for the President's personal attention, and that FDR had acted promptly upon it. Biddle Notebooks (not paginated) (on file in the Papers of Francis Biddle, Franklin D. Roosevelt Library, Hyde Park, N.Y.).

[244] FRANCIS BIDDLE, IN BRIEF AUTHORITY 219 (1962).

[245] Memorandum from President Franklin D. Roosevelt to Attorney General Francis Biddle (Dec. 13, 1942) (on file in the Papers of Francis Biddle, Franklin D. Roosevelt File, Franklin D. Roosevelt Library, Hyde Park, N.Y.). The "Big Five" or "Five Companies"—as the small group of giant companies controlling the sugar plantations and most of the large infrastructural business (public utilities, shipyards, and processing) was known—were suspected in many quarters of calling the tune even for the Army in Hawai'i during the war. Ironically, one high federal civilian official believed that the Big Five were exercising influence in the defense of dangerous Japanese-American residents: Angus Taylor, acting federal district attorney in Honolulu at the war's outset, filed a report to the Justice Department charging that the sugar planters and the Dillingham enterprises (part of the Big Five) had assumed "complete and insidious command" in Hawai'i, and "for purely selfish and economic reasons have succeeded in neutralizing [sic] all of the responsible military leaders to the Japanese menace in the Islands . . . ." He called for immediate removal of "all of these potential soldiers and saboteurs." Memorandum from James Hickey to James Rowe (Apr. 3, 1943) (on file in the Papers of James Rowe, Jr., Franklin D. Roosevelt Library, Hyde Park, N.Y.) (summary of Angus Taylor memorandum on internal security in Hawai'i (no date indicated)).

The FBI's chief agent in Honolulu responded that, while authorities did believe there was some potential danger in disloyalty among the Japanese-American community, there was no need for evacuation and that Taylor's comments on sabotage were "incorrect, fanciful, and far-fetched." Summary of FBI Reply to Angus Taylor's Memorandum, *supra* note 37.

The range of opinion that incorporated anti-Big Five sentiment into the perception of Army rule in Hawai'i is illustrated by two other examples: John P. Frank, a young lawyer in the

1942, conveying his displeasure with the conflicts that were plaguing governance of the Islands and indicating that he expected the War Department "to clean this thing up."[246] In addition, Roosevelt decided that the Army must transfer General Green out of Hawai'i, where his presence seemed to be a powerful magnet for controversy and a source of angry conflict with the civilian authorities.[247]

Ironically enough, when Assistant Secretary McCloy made his October visit to Hawai'i, he himself concluded that—although he would not override the commanding general's view—there was in fact little reason to object to returning to the civilian courts jurisdiction over all criminal cases that did not have clearly "a military aspect."[248] McCloy thus apparently was finally ready

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Interior Department and a strongly pro-labor New Deal liberal, agreed with Taylor on the matter of the Big Five and their strangle-hold on the Hawaiian economy and much of Hawai'i public policy. *See* Frank, *supra* note 2. And after the war, one of the most ardent right-wing (but populistic) anti-Roosevelt radio news columnists in America, Fulton Lewis, Jr., took up the theme, declaring that Hawai'i had been ruled by the Army in what amounted to "fascism in the classic sense—a dictatorship made up of a combination of government force, on the one hand, in partnership with employers and financial interests, in the suppression of the rights and liberties of the working classes." Transcript of Nov. 7, 1945 radio broadcast by Fulton Lewis, Jr. (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

[246] Memorandum from President Franklin D. Roosevelt to Attorney General Francis Biddle (Dec. 13, 1942) (on file in the Papers of Francis Biddle, Franklin D. Roosevelt File, Franklin D. Roosevelt Library, Hyde Park, N.Y.).

[247] Letter from Assistant Secretary John J. McCloy to General Delos Emmons (Jan. 6, 1943) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.). At the urging of Attorney General Biddle, who was pushing for General Green's immediate removal, President Roosevelt instructed Secretary Stimson and Biddle to discuss the possibility of replacing Green with a prominent Democratic politician, William O'Dwyer of New York City, then serving as a lieutenant colonel in the Army. Letter from Attorney General Francis Biddle to President Franklin D. Roosevelt (Dec. 17, 1942) (on file in the Papers of Francis Biddle, Franklin D. Roosevelt Library, Hyde Park N.Y.); Letter from Franklin D. Roosevelt to Francis Biddle (Dec. 18, 1942) (on file in the Papers of Francis Biddle, Franklin D. Roosevelt Library, Hyde Park N.Y.) (stating that O'Dwyer "would be an excellent man to clean this thing up"). McCloy wrote to Emmons a few weeks later, stating that O'Dwyer might be sent out not as Green's replacement but instead as a second-in-command to Green's successor. Letter from Assistant Secretary John J. McCloy to General Delos Emmons (Jan. 6, 1943) (on file in the Papers of General Robert C. Richardson, Jr., Hoover Institution Archives, Stanford, Cal.) For reasons that are not clear from the available evidence, the idea was dropped; and when Green was relieved of his position and transferred to Washington his own top aide, Colonel William R. C. Morrison, was named to succeed him.

[248] Letter from John J. McCloy to Harry Hopkins (Oct. 19, 1942) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives). Meanwhile the Judge Advocate General was preparing an analysis for McCloy that would find most of the content of General Orders No. 135 unacceptable on policy grounds, and some of it on legal grounds. *See supra* notes 217-19.

to concede that Green and Emmons had gone too far in defining security-related and military-related crimes in their delineation of jurisdiction in General Orders No. 135.

Now, with the President's weight thrown so dramatically into the balance, the disputing parties moved to hammer out a compromise agreement. This agreement was finally reached at the end of January after a series of tense and detailed negotiations among the Departments of War, Interior, and Justice. It embodied the basic idea of moving the line of delineation, as it were, over to the civilian side and narrowing the range of military- or security-related jurisdiction. The accelerated talks had gone on almost daily, and they turned clearly upon intense confrontation over what Fortas and Biddle termed "the basic issue of military supremacy over civilian government."[249] General Emmons did not participate except by correspondence, having returned to the Islands, but General Green remained fully involved—and remained intransigently resistant to concessions. Continued personal antagonism was evident throughout the talks, as indicated, for example, by Green's complaint (in a report to General Emmons) that three developments were causing things to go badly for the Army:

> In the first place, the propaganda of our opponents has been severe and not refuted. In the second place, our opponents have worked hard to get the ear of the President, and it looks as if they had succeeded. In the third place Mr. McCloy seems to feel that the civilians should run civilian activities . . . . This you must admit is a tough outlook, and it now looks to me as if we are faced with the problem of salvaging whatever is possible.[250]

The Army's political problems meanwhile were multiplying, for newspaper columnists hostile to the Roosevelt Administration had begun to pick up the Hawai'i story, condemning the signs of alleged dictatorship that were to be found in the martial law regime.[251] At the same time, the Supreme Court

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[249] Letter from Francis Biddle and Abe Fortas to John J. McCloy (Dec. 19, 1942) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives). McCloy's assessment of the Army-civilian issue in Hawai'i was no different: "The new man [Gov. Stainback] has a new platform and the military are not disposed to relinquish martial law. Accordingly there is a fundamental disagreement on which it is most difficult to build cooperation." Letter from John J. McCloy to Harry Hopkins (Oct. 19, 1942) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[250] Letter from General Thomas Green to General Delos Emmons (Jan. 1, 1943) (on file in the Hawaii Military Government Records, Record Group 338, National Archives).

[251] Drew Pearson's widely syndicated "Merry-Go-Round" column was the source of a series of strongly hostile commentaries. The Drew Pearson column appeared in the *Washington Post*, Dec. 26, 1942. Secretary Ickes stated in his diaries that Pearson's critical account of Army rule in Hawai'i and the military's ties with the Big Five (a story based on information, Ickes thought, obtained from either Farrington or Anthony) "was exceptionally accurate and quite full." Diary

handed down its decision in the *Quirin* case,[252] a habeas corpus case raising the issue of whether suspected Nazi saboteurs enjoyed any constitutional rights to due process when a presidential proclamation had apparently denied them access to the courts. The language of the Supreme Court, at least from General Green's standpoint, was ominous: "The duty . . . rests on the courts in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of liberty."[253] Governor Stainback leapt upon the language of this decision to press anew for an end to the "stupidity and bungling" of Army control of civilian life in Hawai'i, contending it was now time for a restoration of civilian government: "For eleven months," he wrote, "Hawaii has cooperated with the military and I believe endured the loss of civil rights such as no other community in the United States would endure! . . . It is difficult to locate any constitutional safeguards of civil liberty that remain unimpaired in Hawaii."[254]

A counter-propaganda campaign was in order, Green concluded, advising his office in Hawai'i that it "should put out appropriate information," including a series of newspaper articles by sympathetic journalists, and also organize a

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of Harold Ickes (Dec. 27, 1941) (on file in the Library of Congress, Washington, D.C.). Pearson had tried to obtain the story from his deputy Abe Fortas, Ickes noted, but Fortas said he had refused to give the columnist any information. "I was glad to have this published," Ickes recorded, "but I was also glad that Pearson had not gotten it from anyone in the Department." *Id.*

James Rowe, in the Justice Department, received a phone call on the day that the article appeared. He was called by a Washington lawyer, Lee Warren, "to express outrage" and to urge "that we talk to General Green to get the other side of the story, that Governor Stainback and 'his henchmen' were nothing but a bunch of politicians . . . [and that] it was of the utmost importance that the Military continue its rule." Pressed by the secretary who took the call, Rowe reported, Mr. Warren admitted he was the Washington attorney for one of the most powerful figures in the business establishment, Walter Dillingham. Memorandum from James Rowe to the Attorney General (Dec. 26, 1942) (on file in the Papers of James Rowe, Franklin D. Roosevelt Library, Hyde Park, N.Y.). Dillingham was one of the Army's most trusted civilian advisers, a staunch public defender of martial law and military governance, who later would be appointed to head the Army's control of food supply. He had stated before a closed hearing earlier in the war that civil liberties was a bunch of "hooey" for which he and others cared little in light of the military emergency. *See supra* note 127 and accompanying text.

[252] *Ex parte* Quirin, 317 U.S. 1 (1942).

[253] *Id.* at 6. This passage was quoted by Gov. Stainback from advanced sheets, in Letter from Ingram Stainback to Harold Ickes (Nov. 17, 1942) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[254] Letter from Governor Ingram Stainback to Secretary Harold Ickes (Nov. 17, 1942) (copy on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives). Ten days earlier, Stainback had written to complain, on the same line, that "[t]he so-called 'Military Governor' is still exercising his complete and unrestrained authority over the citizens of the Territory in matters that can have little bearing upon military subjects. He seems determined to regulate and rule everything . . . ." Letter from Ingram Stainback to Harold Ickes (Nov. 7, 1942) (copy on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

press conference that would stress "that the future of the Pacific revolves around Hawaii."[255] He also solicited support from the Navy Department, obtaining from Admiral Nimitz a cable stating his command's opposition to "any change in status quo or any limitation of the authority of the Military Governor."[256]

Once General Emmons returned to Honolulu in December, he raised objections by cable at virtually every step of the negotiations when any real diminution of military authority was considered. The cornerstone of his position remained, as always, that Hawai'i was a "fortress," so that every aspect of civilian life was integral to the military effort. Also basic to his argument was his view that the continued presence of so many Japanese-American citizens and aliens required special powers for the military.[257] In fact Emmons was a moderate, compared to the Army leadership on the mainland, with respect to how residents of Japanese ancestry should be treated; indeed, he had spoken out on several occasions against mindless racism directed against them. He also led a controversial campaign within the government to encourage enlistment of Japanese-Americans for Army Engineer service in the Islands; and, against much resistance within the War Department, he staunchly championed the formation of an Army combat unit to be composed of Nisei volunteers—an important matter of principle to Hawai'i's Japanese-American community, and a proposal that came to fruition in early 1943 with organization of the famous 100th Infantry Battalion and the 442nd Regimental Combat Team.[258] In standing firm on the need for continued military control, however, he stressed that the Japanese-American residents of the Islands included "some . . . disloyal and many others of doubtful loyalty."[259] Emmons also insisted that further air attacks on Hawai'i were not only possible but were likely. This

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[255] Radio from General Thomas Green to Colonel William R. C. Morrison (Dec. 23, 1942) (on file in the Hawaii Military Government Records, Record Group 338, National Archives) (Radio No. 1995).

[256] Radio from General Thomas Green to General Delos Emmons (Dec. 25, 1942) (on file in the Hawaii Military Government Records, Record Group 338, National Archives) (copy in same file of Radio 040321, Dec. 4, 1942, from Admiral Nimitz to Admiral King) (also basing his recommendation upon the existence of a "large Japanese population here which cannot be placed in protective custody and of [the] continued ability of [the] enemy to inflict damage.")

[257] Letter from General Delos Emmons to Assistant Secretary John J. McCloy (Dec. 15, 1942) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives). The ensuing passages follow closely from our article, *see supra* note 6, at 262-64.

[258] ALLEN, WAR YEARS, *supra* note 13, at 263-73; *cf.* Eileen O'Brien, *Making Democracy Work*, PARADISE OF THE PACIFIC, Dec. 1943, at 42-45.

[259] Letter from General Delos Emmons to Assistant Secretary John J. McCloy (Dec. 15, 1942) (on file in the Assistant Secretary of War Files (McCloy Files), Box 32, War Department Records, Record Group 107, National Archives).

threat required full military authority over the civilian population in order to avoid another Pearl Harbor-style disaster or even a successful invasion of Oahu, whose loss, he warned, "could mean loss of the war."[260]

Emmons thus found completely unacceptable the concept underlying the Justice and Interior proposals, *viz.*, that certain functions were purely civilian and irrelevant to security—and also the corollary proposition, espoused by Anthony, that only with the governor's permission could he as commander assume emergency powers except in the most extreme circumstances.[261] Because civilian affairs in Hawai'i had military significance "in all their aspects," the General argued, he as commanding general must retain his power as the final source of all authority: "[T]he civil governor, in the last analysis, [must] be subordinate to the Military Governor."[262] Emmons concluded his appeal by reiterating the idea that the commander was uniquely qualified to decide what functions belonged where in any delineation between civilian and Army agencies: "The Commanding General, being responsible for the security of the Islands," he averred,

> must be the one to determine what functions can be returned to the civil authorities and the courts. I promise to consider sympathetically every recommendation from the Governor of Hawaii for the return of such functions; but, on the other hand, I feel that he must leave to me the final determination . . . . and that when I so determine he loyally accept that determination and cooperate with me and the other personnel of the military government . . . . Furthermore, it is my firm opinion that a decision as to the distribution of functions between the military and civil government cannot wisely be made . . . in Washington by persons unfamiliar with the military situation or local conditions.
>
> Martial law, according to the natural meaning of the words, means that the military commander controls and that his decision and orders are final. Otherwise the term is meaningless.[263]

A compromise understanding by which the military would have to surrender a significant range of powers was probably a foregone conclusion, however, from the time Biddle contacted the President personally with his recommendations. The plan that finally won agreement, after a virtual standoff during late January and the personal intervention of Secretaries Ickes and Stimson to break the deadlock, provided that the military would retain in force a modified form of martial law, and that the privilege of the writ of habeas corpus would remain suspended. The military also retained its regulation of

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[260] *Id.*

[261] See *supra* text accompanying notes 223, 239-42.

[262] Letter from General Delos Emmons to Assistant Secretary John J. McCloy (Dec. 15, 1942) (on file in the Assistant Secretary of War Files (McCloy Files), Box 32, War Department Records, Record Group 107, National Archives).

[263] *Id.*

labor in areas of employment under direct military control (i.e., in defense jobs). At its insistence, the Army also retained its jurisdiction over prostitution.[264] The administration of justice, however, for both civil cases and criminal cases not directly related to security—now well understood on all sides to cover the great majority of offenses specified in the territorial statutes—was returned to the civilian courts.[265] Thus, with the extremely important exception of the writ of habeas corpus, due process was restored in non-defense-related cases. Food and price controls, significant aspects of labor control, and the censorship of civilian mail, all were to be transferred back to federal and territorial civilian agencies.[266]

The agreement also incorporated a "recapture" clause that authorized the commanding general to reinstate full martial law in case of an acute military emergency. Its inclusion was critical in the final stages of negotiation: Generals Emmons and Green regarded it as a *sine qua non*. Thus Green commented that, while the overall agreement "will hamper [the Army] considerably," so long as recapture of full power was possible "it will always be a club by which we can compel efficiency and fair dealing."[267] Hence this clause was "at the

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[264] *See Duncan* Transcript, *supra* note 112. A highly detailed account of the inside negotiations in Washington and the resulting agreement appeared in testimony of the *Duncan* case. *Id.* The proclamations of the governor and commanding general that promulgated the final agreement are in the transcript and reprinted in ANTHONY, ARMY RULE, *supra* note 3, at 129-32. On the troubled history of argument between the civilian government and Army for the control of Honolulu's red-light district and its denizens, *see* BAILEY AND FARBER, *supra* note 77, *passim*.

Judge Metzger, in *Ex parte* Glockner, read the language of the preamble to the agreement (a "whereas" clause stating that martial law existed) as being merely an historical statement rather than an affirmation that martial law was being continued. All the parties directly associated with the negotiations, however, were in agreement that Metzger was in error on this important point. Thus Ickes wrote to McCloy that Metzger was badly mistaken, stating: "We agree with you that it was our intention [in framing the Restoration agreement] that martial law should be continued." Letter from Harold Ickes to John J. McCloy (Aug. 30, 1943) (on file in the Papers of Harold Ickes, Library of Congress, Washington, D.C.). McCloy's own view was that "the Judge's decision was a crazy one under the law, and certainly under the facts it was completely unjustified." Letter from John J. McCloy to Harold Ickes (Aug. 27, 1943) (on file in the Papers of Harold Ickes, Library of Congress, Washington, D.C.).

[265] *See* ANTHONY, ARMY RULE, *supra* note 3.

[266] The military retained control of press censorship, a feature of the agreement to which Interior officials acceded only reluctantly. Thus Ickes wrote to Stimson that he believed that only "where there is clear and unmistakable necessity" was press censorship of any kind warranted even in wartime. Letter from Harold Ickes to Henry Stimson (Jan. 27, 1943) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives). *See also* RICHSTAD, *supra* note 74.

[267] Letter from General Thomas Green to General Delos Emmons (Jan. 1, 1943) (on file in the Hawaii Military Government Records, Record Group 338, National Archives). "I fully expect that 'Francis' [Biddle] will fight it to the end," Green wrote of the recapture clause that

heart of the whole thing," and if the recapture clause were not included as integral to the agreement Green thought the entire policy of martial law must collapse as unworkable.[268] Pushing in the same direction, McCloy asked Stimson to stand firm on the need for the commanding general to have final authority. "If any discussion arises in the Cabinet meeting," McCloy urged,

> I think that you should take the note that there has been an eagerness on both sides to arrive at a solution of the difficulty but that there is a fundamental principle to which the military properly adhere: namely, that one man must be the final authority in the Islands and that he should be military rather than civilian; that a scrambled jurisdiction violates the principle of unified command in a spot where it is most important to have it.[269]

Agreeing with these contentions, Secretary of War Stimson made the question of "final power" for the commanding general the linchpin for his department's approval of the agreement. "The main point we have been fighting for [in the negotiations]," he recorded in his private diary, "is that the commander, who is responsible for the successful defense of the fortress, necessarily must have the last say on defense measures and he must have at bottom power to determine what defense measures are necessary."[270] In the end, Stimson observed, once his department and the Army had agreed to "all relaxations possible," a process of "patient discussion" with Ickes and Biddle had permitted him to produce the overall formula that won assent.[271] Once the agreement was reduced to specific language, Assistant Secretary McCloy radioed it to Emmons in the form of a formal proclamation for publication in Hawai'i, urging Emmons "to interpret the proclamation broadly in the direction of returning functions to the civil authorities"—even including functions beyond those specified for immediate transfer.[272]

Stainback was unhappy with the outcome of the talks. For him, the continuation of even a modified form of martial law was an unfortunate

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was included. "At this moment it seems to me that we are destined to be compelled to let Stainback have his fling and in the event he fails we must pick up the pieces. A good recapture clause may change the entire complexion, however . . . [but] I feel as if I am operating with both feet in a bear trap and my hands in handcuffs." *Id.*

[268] Letter from General Thomas Green to General Delos Emmons (Jan. 7, 1943) (on file in the Hawaii Military Government Records, Record Group 338, National Archives).

[269] Memorandum from Assistant Secretary John J. McCloy to Secretary Stimson (Dec. 16, 1942) (copy on file in Assistant Secretary of War Files (McCloy Files), Box 32, War Department Records, Record Group 107, National Archives).

[270] Diary of Henry Stimson (Dec. 28, 1942) (on file in the Yale University Library, New Haven, Conn.) (microfilm copy in the University of California, San Diego Library).

[271] *Id.*

[272] Letter from John J. McCloy to Abe Fortas (Jan. 24, 1943) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

concession. His allies in Washington hoped that he could handle the situation without any major political missteps, for as Ickes observed: "A good deal will depend now on how Governor Stainback comports himself because the Army will undoubtedly be glad of any opportunity to slip in and try to take over power [entirely]."[273] For his part, General Emmons was no less unhappy than Stainback: he predicted "indecision, confusion, and endless and unhappy arguments" from divided authority.[274] An equally gloomy assessment came from General Green, who, as the negotiations moved inexorably against him, reflected that if the Islands were ever again subject to Japanese attack, there would be chaos and possible disaster. "God help us if the Japs ever did take Hawaii," Green wrote in confidence to Colonel Morrison, his right hand man in Honolulu; they [Fortas, Biddle and other critics] just do not understand, or if they do they won't believe the possible danger."[275]

The White House and the civilian officialdom left no choice, however, but for Stainback and the Army to go along with the compromise agreement. President Roosevelt instructed Secretary Stimson on February 1, 1943, to put the agreement into effect immediately, writing:

> In an area of such strategic importance as the Hawaiian Islands . . . , I can readily appreciate the difficulty in defining exactly the boundaries between civil and military functions. I think the formula which this proclamation applies meets the present needs.
>
> I know that General Emmons will do all that he can, consistent with his military responsibility, to refrain from exercising his authority over what are normally civil functions. I am confident that the military and civil authorities will cooperate fully . . . .
>
> I hope also that there will be a further restoration of civil authority as and when the situation permits.[276]

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[273] Diary of Harold Ickes (Jan. 9, 1943) (on file in the Papers of Harold Ickes, Library of Congress, Washington, D.C.).

[274] Letter from General Delos Emmons to Assistant Secretary John J. McCloy (Jan. 3, 1943) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[275] Letter from General Thomas H. Green to Colonel William R. C. Morrison (Jan. 3, 1943) (on file in the Hawaii Military Government Records, Box 65, Record Group 338, National Archives).

[276] Letter from President Franklin D. Roosevelt to Secretary Henry L. Stimson (Feb. 1, 1943) (copy on file in the Assistant Secretary of War Files (McCloy Files), Box 57, War Department Records, Record Group 107, National Archives). Averring that "negotiations [had been] concluded in very friendly atmosphere," and anticipating presidential approval of the agreement, McCloy instructed General Emmons to work toward "having the spirit of the proclamations carried out fully and to the end that further talk of conflicts between civil and military in Hawaii will be put to rest." Letter from John J. McCloy to General Delos Emmons (Jan. 24, 1943) (copy on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives). In another communication of the same date, McCloy wrote to

Accordingly, on February 8, the governor and commanding general issued for publication in the Islands identical proclamations embodying the agreement's terms.[277] Power was officially transferred on March 10—termed "Restoration Day" in the accompanying publicity, though there was some *sub rosa* talk on the Islands about "E-Day," for "Emancipation Day"! The event was celebrated with a festive gala in the legislature, featuring Island music and dancing. An ominous signal of continuing tension was sounded in the background, however, as the Army scheduled an anti-aircraft gun drill for the same hour as the celebration.[278]

The commanding general (*qua* Military Governor) revoked the 181 general orders relating to civilian affairs that had been issued under martial law. These orders were replaced by regulations promulgated by the governor, acting under the power invested in him by the Hawaii Defense (M-Day) Act, and by a new series of military general orders. As was just noted, President Roosevelt had

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Richardson: "Although I am not on the ground, I have an idea that the secret of having the thing work effectively is more free consultation with the Governor than has taken place in the past . . . . Also, it was the spirit [of the agreement] that the military would do what it could to assist the civilian authorities in making the arrangement work. We should not take a stand-offish attitude, but on the contrary should make it our business to do all that we can to assist the civilian authorities to perform the returned functions efficiently." Letter from John J. McCloy to General Delos Emmons (Jan. 24, 1943) (copy on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives). It appears that both letters were sent on the date indicated. These were about the strongest and most direct instructions to the Hawai'i command, respecting civil-military relations, in all of the McCloy correspondence with Emmons and Richardson during the war period that the authors have examined.

[277] Radio from General Demos Emmons to Chief of Staff (U.S. Army) (Mar. 14, 1943) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (Radio No. 1716).

The editors of the magazine *Hawaii*, which hewed to a solidly pro-Army line on the martial law question to the very end of the war, found reason for optimism despite the coming turnover of power, declaring:

> Fortunately, behind the scenes, the military governing structure sits like an indulgent father giving his small son his first opportunity to drive the car—maintaining hands off as long as everything goes well, but ever alert and ready to take hold of the controls in time to prevent serious accidents . . . .
>
> If politicians want to play at running a war-zone community, they will be allowed to play—so long as their amusement does not jeopardize the strategic value of Hawaii as an advance base in the Pacific war zone.

John Public Has Cause for Worry!, HAWAII: A MAGAZINE OF NEWS AND COMMENT, Feb. 1943, at 1, 8.

[278] William Ewing, *A Unique Experience in Government*, PARADISE OF THE PACIFIC, Apr. 1943, at 2 (describing the ceremonies); Letter from Riley H. Allen to Delegate Joseph R. Farrington (Feb. 18, 1943) (on file in the Papers of Delegate Joseph R. Farrington, Box 19, folder 772, Hawai'i State Archives) (on the "tremendous amount of rearrangement and adjusting" that had to be done before "what might be called E-Day (E for emancipation)").

urged the War Department in February to expedite "further restoration of civil authority as and when the situation permits."[279] Despite FDR's explicit instructions, however, from Restoration Day in March 1943 until October 1944 there were only minor adjustments made to the new regime under the compromise agreement for modified martial law. Then, on the latter date, after additional debate in the Cabinet, a Presidential order would finally restore full control over civil affairs in Hawai'i to the civilian authorities.[280]

A more immediate event of significance for Army rule when the new agreement first went into effect in March 1943 was the War Department's response to the President's order for transfer and reassignment of General Green. He was made "to walk the plank," Green wrote privately, because he had to take the heat for his superiors—and also because unscrupulous politicians and lawyers in the other agencies hated him.[281] Green bitterly resented the compromises he had been required to accept. Of Ickes, Biddle, Fortas, and other civilian officials who had opposed him, Green declared: "I can't understand which side of the war they are on." He told the man later to succeed him in the Hawai'i command structure, Colonel Morrison, that "they seem to have a private war with the Army and Navy which seems to supplant completely the war with the Japs."[282] Green regularly termed the Cabinet officers and other civilian officials "politicians," a term not meant as a compliment: "Our opponents are simply sold on the idea that the military is wrong and anything and any cost to throw off the yoke will be satisfactory to them," partly because of their own predispositions and partly because they had been so badly misinformed as to the facts of life under Army rule in Hawai'i—misled mainly by Governor Stainback and by what Green regarded as a cabal of Interior Department ideologues and their bureaucratic underlings.[283] The outcome of his removal from Hawai'i was hardly damaging to Green's career, as it turned out: McCloy reassigned Green to Washington, and two years later, he was appointed to be the Judge Advocate General for the

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[279] *See supra* text accompanying note 276.

[280] On the end of martial law in 1944, *see* ANTHONY, ARMY RULE, *supra* note 3, at 101-18.

[281] Diary and personal memoranda of Thomas H. Green (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

[282] Letter from General Thomas H. Green to Colonel William R. C. Morrison (Jan. 5, 1943) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

[283] Letter from General Thomas H. Green to Colonel William R. C. Morrison (Jan. 9, 1943); Diary of Thomas H. Green (Dec.-Jan. 1943) (both on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

Army despite the rising public criticism of his record while administering the military government in Hawai'i.[284]

In what was apparently a routinely scheduled move, completely unrelated to the martial law issues, General Emmons was also reassigned. He was succeeded in June as commanding general by General Robert C. Richardson, Jr. Any expectation by the Army's critics in Washington and Hawai'i that Richardson would be less obdurate than Emmons in demanding fullest possible authority as well as retention of the "Military Governor" title—and in defending with equal vigor the record of the provost courts—was to be disappointed. For as events would prove, Richardson was ready to confront civilian authorities directly, albeit on the basis of some sadly misguided advice from his legal advisors (Green's successor, Colonel Morrison, and his staff), in far more forceful and even inflammatory ways than Emmons had ever been moved to do.[285]

An intriguing insight into the conflicts of basic mentalities that were in play at the highest level of government during the Washington talks may be found in a candid exchange of views between Secretaries Ickes and Stimson in late January. Only because he did not want to trouble the beleaguered president, Ickes asserted, had he reluctantly agreed to permit the Army to continue to exercise certain powers—such as licensing and compulsory censorship of the press—which "offend our most cherished traditions." He considered "unfortunate and unnecessary," and, more important, appropriate only to conquered territory, the continued use of the title "Military Governor" by the Army's commander in Honolulu. He also objected to any kind of "regimentation of free labor by military edict," even in the face of military

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[284] *See* ANTHONY, ARMY RULE, *supra* note 3. The "recapture" clause that the Army had insisted upon (*see supra* notes 267-69) authorized the commanding general to reinstate full martial law in case of an acute military emergency.

McCloy had arranged as early as January to transfer Green to the Judge Advocate General's staff in Washington. Letter from Assistant Secretary John J. McCloy to General Delos Emmons (Jan. 6, 1943) (on file in the Papers of General Robert C. Richardson, Jr., Hoover Institution Archives, Stanford, Cal.). Green's promotion to major general and his appointment as Judge Advocate General of the Army was done in a quiet manner, Anthony has written: "Not until after the Senate had acted did the public in Hawaii realize that his name was under consideration." ANTHONY, ARMY RULE, *supra* note 3, at 116. A former chief justice of the territorial high court, James L. Coke, denounced Green's appointment on grounds that he was "not fit for the position in view of his record in Hawaii." *Id. Contra*, in Green's personal correspondence (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.), there are numerous letters of congratulation on his appointment from former associates, including civilians, in the military government, praising his performance of duties during military rule in Hawai'i.

[285] *See* discussion of the *Glockner* habeas hearing, *infra* note 319, and General Orders threatening a federal judge, *infra* note 321.

necessity, and especially if enforced by provost courts rather than the civilian judiciary.[286]

Secretary Stimson replied to Ickes immediately in terms that located him squarely in the tradition of American imperialist diplomacy and policy of an earlier era of history: "Some day I should like to sit down with you over the fire," Stimson wrote, "and discuss some of the historical cases of military government in our American history with which I happen to be personally familiar, namely the governments of Cuba, Puerto Rico, and the Spanish War."[287] His former partner Elihu Root had been Secretary of War during the time of those occupations, Stimson continued, and out of his close friendship with Root he had gained a thorough understanding of "his principles and accomplishments in the solution of those problems"—*viz.*, the military occupation of the former Spanish possessions—which manifested "the American traditions of freedom." Thus Stimson found in the memory of the Army's role in those occupations of conquered provinces reason to regard them as "one of the brightest pages of enlightened administration in all our American history."[288] He regretted the "fear and abhorrence" of military governance that Ickes seemed to harbor, Stimson wrote, and he hoped for a chance at some future time "to try to remove it."[289]

It is difficult to imagine an intellectual and ideological impasse more intractable than this exchange of views revealed. Ickes, tenacious as always, did draft a courteous reply—one that stated eloquently his constitutionalism and the civil liberties creed that it embodied. "In some ways I suppose that I am an old-fashioned conservative," Ickes averred, in that he could never accept that a military government could ever "be consistent with 'the American tradition of freedom.'"[290] He regarded "the very conception" of military government as a dangerous one:

> I have a deep and abiding faith in the principles, theories, and institutions which have resulted in the freedom and liberty that Americans have enjoyed. Among

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[286] Letter from Harold Ickes to Henry Stimson (Jan. 27, 1943) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

Ironically—in light of the declaration by Ickes and other critics such as Anthony, that only a conquered nation should be ruled as the Army was ruling in Hawai'i—General Green believed that one important "reward" that would be reaped from the experience of martial law in Hawai'i was that it would provide "a proving ground for the Military government of Japan"! Letter from General Thomas H. Green to General E. C. McNeil (July 9, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

[287] Letter from Henry Stimson to Harold Ickes (Jan. 29, 1943) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[288] *Id.*

[289] *Id.*

[290] Letter from Harold Ickes to Henry Stimson (Feb. 4, 1943) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

> these is the theory of the supremacy of civilian officials, directly or indirectly elected by and responsible to the people, and I am particularly afraid of government which is not responsible and which is administered by men who have military traditions and training. In specific instances, these men may provide model government, but there is a fundamental danger that their desire for directness, efficiency, and obedience may lead them to secure these benefits at the price of sacrificing the laborious, inefficient but precious virtues of democracies . . . . By and large, it seems clear that any gain in efficiency must come from shortcutting those involved processes of democracy upon which our civilization is founded.[291]

Although Stimson kept himself well informed of the Hawai'i conflict, in fact he delegated to Assistant Secretary John McCloy all the day-to-day responsibility in dealing with the Army's administration there—just as he vested McCloy at that time with authority over the Army's Japanese-American removal and internment policy.[292] It is not clear whether or not McCloy shared the depth of Stimson's profound admiration for the Army's record as administrator of civilian populations; but it is not particularly relevant to our analysis, since he faithfully implemented Stimson's views. This translated, for McCloy, into a highly pragmatic and instrumental style of oversight. Even as he became enmeshed in the daily negotiations of a new delineation agreement in December, McCloy expressed to Attorney General Biddle his serious doubts about the wisdom of trying to reduce the division of authority to a written document: To do so, McCloy warned, would mean "an undesirable and dangerous inflexibility" in a situation that demanded broad discretionary power.[293] "General principles may certainly be outlined," he conceded, "but you can't draft Magna Carta for the Hawaiian Islands in time of war in the Pacific."[294]

McCloy's support of the Army command's demands for final authority in the Islands seemed to be based principally upon his bedrock conviction that the commanding general in Hawai'i must be seen as "the man on the ground who is responsible for such a large element in the protection of this country," and who thus must be given deference so that "his abilities to defend the area [would not] be compromised."[295] The best approach, McCloy insisted both then and for nearly a year thereafter, was "to let them work out on the ground

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[291] *Id.*

[292] On McCloy's central role in the internments policy, *see* IRONS, JUSTICE AT WAR, *supra* note 9, *passim.*

[293] Letter from John J. McCloy to Francis Biddle (Dec. 23, 1942) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[294] *Id.*

[295] Letter from John J. McCloy to Abe Fortas (Jan. 24, 1943) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

just what can be turned over, and when."[296] The seemingly benign and self-regulating process, pragmatically driven, as McCloy thus described it, was in fact not easy to put in motion, when one of the parties "on the ground" was an Army general and his legal staff unwilling to concede that any civilian activity of significance properly belonged under the control of anyone except the Army —at least so long as Hawai'i remained, as they insisted nearly to the end of the combat in the Pacific that it did, a "fortress" open to attack at any moment.

IV. THE HABEAS CORPUS CASES: ARMY RULE ON TRIAL

> I would like to see the courts decide the habeas corpus issue. If we are still an orderly and constitutional government the courts are the place to settle that issue.
>
> —Harold Ickes, August 1943[297]

> This is a combat zone in which one third of the population has ethnic ties with our worst enemy, Japan, and it is essential that I have full authority to adopt such security measures as are deemed necessary for the safety of these Islands and for the protection of the operations in this theatre which will soon commence . . . . In my judgment no chances can be taken with the security of these Islands, as the American people would never forgive another Pearl Harbor. Security measures now in effect could not be enforced under civil control. As a matter of fact, martial law imposes no hardship on anyone in this community. Nor does it really deprive the civil authorities of any [sic] of their real powers to administer the Territory. I feel certain that if a plebiscite could be taken, 95 percent of the population would vote for martial law.
>
> —General Robert Richardson, Jr., October 1943[298]

While the political challenge to martial law was thus put to rest, or at least seemingly so, with the Restoration agreement, the legal challenge remained; and the federal courts were the locus of continuing debate of the constitutional issues. The command lived in constant fear that "a multitude of likely court injunctions which will delay military effort" could easily bedevil all the Army's operations in Hawai'i.[299] The military's determination to keep the courts out

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[296] Letter from John J. McCloy to Francis Biddle (Dec. 23, 1943) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[297] Letter from Harold Ickes to John J. McCloy (Aug. 30, 1943) (on file in the Papers of Harold Ickes, Library of Congress, Washington, D.C.).

[298] Letter from General Robert Richardson to Assistant Secretary John J. McCloy (Oct. 13, 1943) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[299] Radio from General Delos Emmons to Assistant Secretary John J. McCloy (Jan. 3, 1943) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (Radio No. 284).

of their way continuously influenced the formal policy and legal positions that the Army set forth in its dealings with the civilian agencies of government; and the same determination to resist judicial oversight in any form dominated the Army's litigative tactics when challenges to the military's authority under martial law did inevitably arise.

A. The Zimmerman, Glockner, and Seifert Cases

A series of three cases involving German-born U.S. citizens, all of whom had been imprisoned by the Army as security risks, was brought into federal court in Honolulu in 1942 and 1943. In each case, there had been no formal charges, no chance to see the evidence or cross-examine witnesses, and no access to the written record of administrative proceedings that led to the imprisonment. And in each case, the prisoner also petitioned for a writ of habeas corpus. The Justice Department lawyers representing the Army argued in all three hearings that the military had the exclusive power to decide whether martial law was necessary. Denying the authority of any civilian court—even the federal courts—in such a grave matter during a time of war and possible invasion, the government contended that the military commander must have absolute authority over civilian affairs and power to intern anyone deemed to be a threat to security. Indeed, in internal discussion of one of these internee cases, General Green in the Military Governor's office in Hawai'i and a high-ranking officer in the Judge Advocate General's office underlined the position that "the sufficiency or insufficiency of [the substantive] evidence" in a case involving an internee (whether the prisoner was a citizen or not) "has no bearing on our legal right to hold him in custody."[300] Another commonality was that, in each of the three cases, the Army released the prisoner on the mainland, thus mooting the cases and assuring there would be no consideration by the Supreme Court.

The first of these German-American internee cases involved Hans Zimmerman, a naturopathic physician with a successful practice in Honolulu whose patients and personal contacts included many persons highly placed in the Islands' social elite. The hearing board inquired of witnesses whether Zimmerman spoke German in private conversations (he did) and whether he had visited Germany since Hitler assumed power there (he had done so, to visit family). The prisoner was not permitted to see any of the allegations or to

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[300] Letter from General Thomas H. Green to Colonel Archibald King (Sept. 24, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.); *see also* Letter from Colonel Archibald King to Thomas H. Green (Sept. 4, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.) (the evidence "is no part of the record and has no bearing on your legal right to hold him in custody").

confront witnesses against him, though he and his wife suspected that medical physicians jealous of his success in an unconventional practice had made this trouble for him. Despite lack of any verification of disloyal acts or even of hearsay that Zimmerman had expressed admiration for Hitler's regime in Germany—and despite abundant positive testimony concerning his character and loyalty from acquaintances and medical patients that included, among others, a prominent member of the bar, a high-ranking territorial official, and Joseph R. Farrington, Jr., the *Star-Bulletin* publisher who was later elected as territorial delegate to Congress—the hearing board recommended that he be placed in detention. Army intelligence officers did not object; and the head of the Federal Bureau of Investigation office in Hawai'i, Robert L. Shivers, finally signed off on the internment papers without (as he later testified) taking time to read the record. Zimmerman was then transported to a prison camp in Fort McCoy, Wisconsin; but when he threatened to file a habeas corpus petition there, with assistance of the American Civil Liberties Union, the Army quickly returned him to its Oahu detention facility on Sand Island, confident that with martial law in effect in the Islands no habeas petition would succeed. His wife thereupon engaged counsel to pursue the habeas proceeding in the federal district court in Honolulu.[301]

Upon receiving the petition in February, Judge Delbert Metzger of the federal court declined to exercise jurisdiction in light of the war emergency, declaring that his court was immobilized "under duress" since the Army's general orders had suspended its operation.[302] Zimmerman appealed unsuccessfully in the Ninth Circuit Court of Appeals, which ruled in favor of the Army on the face of the petition itself—because the facts showed, the court said, that detention had been ordered "after an inquiry related in some way to the public safety" in an area legally under martial law.[303]

The arguments of counsel and *amici* before the circuit court panel in the *Zimmerman* appeal presented very ably some of the key legal and constitutional issues that would run through a line of subsequent cases testing martial law; included among them were the issues that three years afterward would be at the core of arguments and the opinions in the *Duncan* case in the Supreme Court.

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[301] This summary of Zimmerman's fate in the hands of the Army is based on testimony in a postwar civil liability suit that Zimmerman pressed against the military officers involved in his internment ("Deposition of Robert L. Shivers, . . . former FBI head in Hawaii, in the trial of a $575,000 damage suit brought by Dr. Hans Zimmerman, . . . September 24, 1948" (Notes taken by Gwenfread E. Allen) (copy in Hawai'i War Records Depository, File 36, No. 8, Hamilton Library, University of Hawai'i [hereinafter Allen Notes]); and upon the various other sources cited *infra* in notes 307-11.

[302] Zimmerman v. Walker, 132 F.2d 446 (9th Cir. 1942), *cert. denied*, 319 U.S. 744 (1943). The *Zimmerman* case is discussed in ANTHONY, ARMY RULE, *supra* note 3, at 61-64.

[303] *Zimmerman*, 132 F.2d at 446.

The government's defense of the Army rested squarely on the arguments from necessity in emergencies threatening the public safety, but especially from "military necessity" in wartime. Asking the court to take judicial notice—to acknowledge without need for formal argument on the evidence—of the Pearl Harbor attack that had occurred only a few weeks before Judge Metzger's court heard Zimmerman's petition, and of the continuing existence of a war in the Pacific Ocean area, and, finally, of the declaration of martial law in response to these events, the government asserted that it would be improper to review the judgment of the military as to "necessity." Similarly, the government contended that the review board's determination that Zimmerman was a security risk should be taken as sufficient cause, in this situation whose seriousness justified extraordinary procedures, for his internment.[304]

Counsel for Zimmerman and the American Civil Liberties Union, in an impressively argued *amicus* brief submitted by A. L. Wirin, argued from the principles in the 1866 decision in *Milligan* that the conditions for imposition of martial law were not fulfilled in Hawai'i. The ACLU brief also contended that close scrutiny must be given, as mandated by the famous *Carolene* dictum by Chief Justice Stone,[305] to any governmental suppression of individual liberties essential to the political process. The briefs for Zimmerman contended that the government's "vague intimations" as to emergency conditions in Hawai'i, allegedly warranting incarceration of a United States citizen without even the most rudimentary kind of due process, were an entirely insufficient factual basis for a ruling. "Judicial notice" must be taken of actual conditions in Hawai'i, they declared, so that the court might make independent judgments on the facts as to whether "military necessity" actually pertained strongly enough to warrant suspension of all traditional guarantees of due process. To accept without scrutiny the Army's interpretation of the facts would be to abdicate the proper role of the court.[306]

Once the appeal was rejected in the Ninth Circuit, the American Civil Liberties Union announced that it would represent Zimmerman in an appeal to

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[304] Brief for the United States, Zimmerman v. Walker, 132 F.2d 442 (9th Cir. 1942) (No. 10,093), *cert. denied*, 319 U.S. 744 (1943) (copy on file in the Appellate Case Files, Hawaii Files, Record Group 21, National Archives, Sierra and Pacific Regional Branch, San Bruno, Cal.). The lead signature on the government brief was that of Solicitor General Charles Fahy, who had taken this role at the behest of the War Department—which in turn had been asked by General Richardson to seek the highest possible visibility of representation by the Justice Department. Letter from Oscar Cox to Solicitor General Charles Fahy (July 20, 1942) (on file in the Papers of Charles Fahy, Franklin D. Roosevelt Library, Hyde Park, N.Y.).

[305] United States v. Carolene Products, 304 U.S. 114, 152 n.4 (1935).

[306] *See* Briefs for the ACLU and Defendant, Zimmerman v. Walker, 132 F.2d 442 (9th Cir. 1942) (No. 10,093), *cert. denied*, 319 U.S. 744 (1943) (copy on file in the Appellate Case Files, Hawaii Files Record Group 21, National Archives, Sierra and Pacific Regional Branch, San Bruno, Cal.).

the Supreme Court. This move prompted the Army to consider whether it might be most prudent to avoid such an appeal. One factor in the decision was doubtless the internal high-level review given to the secret administrative record by Major General Myron C. Cramer, the Judge Advocate General, who concluded that "the case is a very weak one on the facts."[307] Justice Department lawyers had also advised that an appeal to the Supreme Court might result in an order sending the case back to the trial court, with the possibility that "the Court may without warrant incorporate some unfortunate language in their decision concerning martial law in general."[308]

After the war, it should be noted, Zimmerman filed suit for unlawful arrest against Emmons and other military personnel. In his deposition in this proceeding, Emmons would admit that the factual case against Zimmerman "relied on gossip, and that sort of thing," and that in the end he had deferred to the FBI for definitive evaluation of the file.[309] Similarly, years later General Green would write in a memoir of his war service that the case against

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[307] Memorandum from General Myron Cramer to Assistant Secretary John J. McCloy, "Release of Hans Zimmerman" (Jan. 3, 1943) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.). This memorandum indicates that General Green was not against the parole of Zimmerman, but that the G-2, the Army intelligence agency, and the board that examined Zimmerman were opposed to his parole. *Id.*

General Green had favored parole for Zimmerman before the Ninth Circuit appeal was filed: "Since the decision in his [Zimmerman's] case is so favorable [the Army] suggests that consideration be given to paroling him." Radio from Thomas H. Green to Colonel William R. C. Morrison (Dec. 24, 1942) (on file in the Hawaii Military Government Records, Record Group 338, National Archives) (Radio No. 2006).

[308] Letter from Assistant Secretary John J. McCloy to General Myron Cramer (Jan. 14, 1943) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.). Judge Delbert Metzger was reported by the Army's counter-intelligence division as having been a personal friend of Zimmerman before the war. Memorandum from Special Agent Charles Slabaugh for the Officer in Charge, "Subject: Delbert E. Metzger" (Aug. 25, 1943) (copy on file in the Papers of General Robert C. Richardson, Jr., Hoover Institution Archives, Stanford, Cal.) However, there is no explicit statement in the War Department and Army archives indicating that this information had an influence either way on the Army's tactical decisions in the litigation.

[309] *See* Allen Notes, *supra* note 301; Letter from Dr. Hans Zimmerman to Delegate Joseph R. Farrington (Nov. 26, 1942) (on file in the Papers of Delegate Joseph R. Farrington, Hawai'i State Archives). Dr. Zimmerman stubbornly resisted signing a waiver of indemnity even though the Army apparently indicated to him while in custody that his parole or release would be contingent upon his agreeing to the waiver. *Id.* In a letter to Farrington reviewing her futile efforts to obtain information of her husband's charges and to prevent his repeated transfers to and from the mainland, Zimmerman's wife stated that Dr. Zimmerman "would prefer vindication in the eyes of the public instead of just release because of the ending of the war." Letter from Clara Zimmerman to Joseph R. Farrington (Feb. 15, 1943) (on file in the Papers of Delegate Joseph R. Farrington, Hawai'i State Archives).

Zimmerman had consisted entirely of "circumstantial evidence" which (he averred) the FBI regarded as sufficient to warrant his detention.[310]

Thus given good reason to fear an appeal that might diminish or invalidate the martial law regime in Hawai'i, the Army decided to free Zimmerman. Hedging their bets against possible civil action against them, the Army demanded that Zimmerman first sign a waiver of liability; but he refused. In private correspondence at the time, the outraged and intransigent Zimmerman wrote: "I don't see how an innocent and law-abiding citizen can accept parole for something that [he] hasn't committed" and thereby succumb to "Gestapo methods and supreme Dictatorship right now in Hawai'i."[311] The Army backed down on the waiver question, and so, after having been shuttled back and forth between a Wisconsin internee camp and Hawai'i, Zimmerman was again transferred to the mainland and finally released there one day before the petition for a writ of certiorari was presented to the Supreme Court. On grounds that he was no longer incarcerated, so that the matter was moot, the Justices declined to hear his case.[312]

* * *

A year and a half later, in July 1943, events took a different turn; for by this time Judge Metzger proved to have changed his mind about the position of his court under martial law. Just after Pearl Harbor, Metzger had raised no objection when the Army closed the courts, including his own—as became evident in his refusal to hear the *Zimmerman* petition. But within six months, in July 1942, he was advising General Green that the federal courts should be permitted to resume jury trials within about three months.[313] His advice was rejected by the Army at that time, but with the passage of another year Metzger was clearly prepared to undertake confrontation, if necessary, over the prerogatives of his court. With the Japanese armed forces fully engaged thousands of miles away from Hawai'i, he no longer regarded the emergency as warranting suspension of the Constitution in the Islands. Thus when the next two internee cases challenging martial law came before him—four months after the partial restoration of civilian government—Metzger insisted that the Army

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[310] General Thomas H. Green (unpublished manuscript, on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.); *see supra* note 44. Green gave testimony in the postwar *Zimmerman* suit that "the security people" had believed Zimmerman was a spy. *See* Barnhart Research Notes (on file in the Papers of Edward Norton Barnhart, Hoover Institution Archives, Stanford, Cal.). But the Army's top security officer in Hawai'i during 1941-43, Colonel Fielder, testified that he had "had nothing to do with the decision." *Id.*

[311] Letter from Dr. Hans Zimmerman to Joseph R. Farrington (Nov. 26, 1942) (on file in the Papers of Delegate Joseph R. Farrington, Hawai'i State Archives).

[312] ANTHONY, ARMY RULE, *supra* note 3, at 64.

[313] Diary of Thomas H. Green (July 27, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

must produce the two petitioners and accept the court's determination of the legality of their detention.[314] A veteran of Army service in the Spanish-American war, Metzger was (as even General Green would admit privately) "not antagonistic to soldiers";[315] he was moved not by anti-military sentiment but by constitutional principle.[316]

There quickly developed a spectacularly embarrassing confrontation between the court and the Army, as the two new cases involving citizens of Germany ancestry (*Ex parte Seifert* and *Ex parte Glockner*) became the subjects of a truly extraordinary direct clash between the military authority in Hawai'i and the federal judiciary.[317] First, General Robert Richardson, successor to Emmons in 1943 as the commanding general and self-styled Military Governor in Hawai'i, flatly refused to acknowledge the court's authority. "I could not recognize the jurisdiction of the court," he wrote, declaring that the petition was nothing but a cynical ploy by which a cabal of politicians hoped to get martial law invalidated—and thus to undermine the decision of the President, who had approved the current basis of military government under terms of the formal Interior-Justice-War Department agreement.[318]

When General Richardson permitted his military guard to rough up a federal marshal who sought to serve the summons on him, Judge Metzger had had enough. After refusing to receive a statement from the General explaining why he declined to produce the prisoners in court, Metzger held over the proceedings for three days; when the hearing resumed, the following exchange took place:

> THE COURT: I ruled the other day that there would be no proceedings in this case until the petitioners were produced in court.
> MR. TAYLOR [U.S. Attorney for Hawai'i]: Your Honor, that is what I want to inform the court. That General Richardson has advised me that under no circumstances will the petitioners be produced before this court for proceedings.
> THE COURT: All right.
> MR. TAYLOR: If your Honor will allow me, I would like to read this statement to your Honor.

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[314] *See Ex parte* Seifert, No. 296 (D. Haw. 1943); *Ex parte* Glockner, No. 295 (D. Haw. 1943). (Both case files, including briefs and transcripts, are on file in the National Archives, Sierra and Pacific Branch, San Bruno, Cal.).

[315] Diary of Thomas H. Green (Apr. 7, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

[316] Diary of Thomas H. Green (Jan. 27, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

[317] *See* ANTHONY, ARMY RULE, *supra* note 3, at 64-77 for a full account of the cases and the incidents that surrounded their consideration in Judge Metzger's court.

[318] Letter from General Robert Richardson to Judge Brian Montague (Sept. 2, 1943) (copy on file in the Papers of General Robert C. Richardson, Jr., Hoover Institution Archives, Stanford, Cal.).

> THE COURT: No. The United States Attorney will then prepare a citation for contempt against General Richardson and bring him before this court.[319]

When Richardson refused to appear, Metzger found him in contempt and fined him $5,000, continuing to insist that the Army was required to produce the prisoners.[320] Richardson immediately responded with General Orders No. 31, a truly extraordinary document: it prohibited any court in Hawai'i from receiving a petition for a writ of habeas corpus, and, in a move without precedent in American military history since the War of 1812, it made Judge Metzger subject to trial by a military court or commission, with a sentence of up to five years at hard labor, if his court did not terminate its orders on the habeas petitions.[321] Judge J. Frank McLaughlin of the federal district court would later declare that General Orders No. 31 was "the most disgraceful threat ever made anywhere against the judicial branch of our government."[322] Assessing the role of Colonel Morrison, who had succeeded Green as Executive and was the commander's chief legal adviser when the confrontation with Judge Metzger occurred, a Justice Department investigator after the war declared that Morrison not only "showed himself to be a poor lawyer, which is bad, but that he acted like a damn fool, which is much worse."[323] Possibly Green himself may have played a role behind the scenes, however; for when Richardson issued General Orders No. 31, Green wrote in private correspondence that an Army response had been "prepared" in advance in

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[319] *Ex parte* Glockner, No. 295 (D. Haw. 1943) (transcript, copy in Habeas Case Files, Hawaii Files, National Archives, Sierra and Pacific Regional Branch, San Bruno, Cal.). On Richardson's guards roughing up the marshal, *see* ANTHONY, ARMY RULE, *supra* note 3, at 68. Anthony commented in a letter to Farrington that it was "incredible . . . that anyone could be so stupid as to advise the general to forcibly interfere with a United States Marshal in his endeavor to obey the federal statutes and the order of a federal court in his service of papers." Letter from Garner Anthony to Joseph R. Farrington (Aug. 27, 1943) (on file in the Papers of Delegate Joseph R. Farrington, M-473, Series 4, Miscellaneous Subject Correspondence, Folder 772, Hawai'i State Archives).

[320] ANTHONY, ARMY RULE, *supra* note 3, at 66.

[321] General Orders No. 31 (Aug. 25, 1943), *reprinted in* ANTHONY, ARMY RULE, *supra* note 3, at 179.

[322] Judge J. Frank McLaughlin, Address at the Social Science Association of Honolulu, Hawaii (May 6, 1946) (transcript, on file in the Papers of General Robert Richardson, Hoover Institution Archives) [hereinafter McLaughlin Speech]. Judge McLaughlin's speech was later published in the CONG. REC. A4931, Appendix (July 31, 1946). *See also* the story as recounted later by Judge Claude McColloch, *Now It Can Be Told: Judge Metzger and the Military*, 35 A.B.A.J. 365 (1949).

[323] Wiener Report, *supra* note 123, at 15-16 (also pointing out that Colonel Morrison at this time "went around trying to get Garner Anthony's clients to boycott their lawyer").

Hawai'i, in anticipation that Judge Metzger might take such a tough line on the habeas corpus issue.[324]

Officials in Washington were alarmed, of course, at this completely startling turn of events. Even Assistant Secretary of War John McCloy—who previously had been the wholly reliable defender of the commanding general—confessed his discomfiture with "the prospect of a federal judge held in military detention," a situation which "would be explosive."[325] Indeed the War Department was sufficiently upset by General Orders No. 31 that it obtained deferral of its printing in the *Federal Register*, "recognizing that its publication . . . might serve to operate against the public interest by agitating a controversial matter."[326] To Secretary Ickes, the Army's moves against Judge Metzger bore out the wisdom of the constitutional creed that demanded supremacy of the civilian government over the military. "I wish that the Judge had not granted the writ of habeas corpus," Ickes rather surprisingly admitted, but he deplored the way in which Richardson had gone "completely overboard" in responding: "I shudder to think what some general might do to the President and the Supreme Court over here if he became berserk."[327]

The Justice Department (now enjoying McCloy's cooperation) worked arduously to formulate some kind of compromise that would end the embarrassing impasse. The Army believed, however, that, whether or not General Richardson's action had been justified, for him to back down without some quid pro quo from the judge would "seriously impair [his] prestige and his ability to execute his mission."[328] Richardson himself meanwhile stood firm, explaining to his superiors that he felt that he "could not depend on any . . . verbal agreement" with Metzger, and that if the proceedings were to continue he might find it necessary to "risk the scandal which would result from

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[324] Letter from General Thomas H. Green to Harry Hassock (Sept. 8, 1943) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

[325] Letter from Assistant Secretary John J. McCloy to General Robert Richardson (Sept. 24, 1943) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[326] Memorandum from Captain John A. Hall to Captain Horan, "Subj: Publication in Federal Register of Hawaiian Military Governor's General Orders 31 and 38" (Nov. 23, 1943) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (apparently forwarded for McCloy's attention). *See also* ANTHONY, ARMY RULE, *supra* note 3, at 68-69 (describing how special measures had to be taken to protect General Richardson from service of court papers during a visit to Honolulu of Under Secretary of War Patterson).

[327] Letter from Harold Ickes to John J. McCloy (Aug. 30, 1943) (on file in the Papers of Harold Ickes, Library of Congress, Washington D.C.).

[328] Letter from John J. McCloy to Charles Fahy (Sept. 30, 1943) (on file in the Papers of Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

my seizing in open court the petitioners should Judge Metzger have ordered their release or let them out on bail."[329] Richardson also stood firm on the proposition that it was improper for the court "to initiate and discuss the question of the necessity of martial law in a theater of operations for the reason that it had already been so decided by the President of the United States"—a position which would become one of the critical issues in the course of appellate review that would occur in later cases.[330]

Indeed, the prospect of appellate review was appalling to the Army command, a view that doubtless hardened Richardson's stand against Judge Metzger. "If we lost" in Metzger's court, the General told the War Department,

> and the cases were then appealed, the most serious consequences would result pending an appellate decision. Every person prosecuted for violation of my General Orders would have the right to apply for a writ of habeas corpus and go free[,] and all enforcement of internal security matters now covered by my General Orders would break down.
>
> In other words the lifting of martial law by a court decision or by any other action would have a direct effect on the enforcement of the following items of security: control of [blackout] and curfew, control of restricted areas, waterfront areas and security, regulation of trans-Pacific travel control, control of civilian population during air raids, control of telephone and radio communications, control of the considerable alien population of these islands, . . . control and internment of citizens dangerous to the internal security of the United States, [and] control of all labor here vitally necessary to our war effort. Such labor is controlled by scales of wages and hours and failure to work subjects violators to punishment in Provost Court . . . .[331]

Predictably, Secretary Ickes was unpersuaded by such arguments; rather, the news from Hawai'i simply fueled his already considerable outrage, and he immediately shot off a letter directly to Secretary of War Stimson—who only rarely departed from his habit of leaving Hawai'i affairs almost entirely to McCloy's discretion—demanding that the Secretary intervene personally. Ickes roundly denounced Richardson's actions. "I should suppose," Ickes wrote, "that no competent lawyer or high ranking officer of the armed forces would any longer question that civil courts, and not military officers, have authority to determine this jurisdiction" with regard to habeas corpus: "It has come to be

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[329] Radio from General Robert Richardson to Assistant Secretary John J. McCloy (Aug. 27, 1943) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (Radio No. 5283).

[330] *Id.* The later appellate litigation is considered *infra* text accompanying note 507 *et seq.*

[331] Letter from General Robert Richardson to Assistant Secretary John J. McCloy (Sept. 5, 1943) (on file in the Commanding General Files, Hawaii Military Government Records, Record Group 338, National Archives).

accepted, in both our judicial and our military institutions, that a commanding officer in time of war may feel constrained to defy an order of a civil court, but in so doing he takes his chances with the results of judicial review of his actions, as well as with history. There can be no doubt that the decision as to the validity of his conduct will, in the final reckoning, be determined by the civil courts."[332]

Like Ickes, the Justice Department's top-ranking officials regarded General Richardson's action as legally insupportable, advising the War Department that Richardson's worries about his "prestige" deserved no consideration; they advised McCloy to require an immediate withdrawal of General Orders 31.[333] Solicitor General Fahy also joined with the Interior's Under Secretary Fortas in making clear to the military that both their departments were "absolutely firm"[334] on their demand that the order must be rescinded. Fortas did not allow to go unnoticed in the legal community one major irony manifest in the legal situation in which the Army now found itself: When the Restoration agreement had been worked out prior to being issued in March, the Interior officials had proposed that the civilian governor should issue an order explicitly continuing the suspension of the writ of habeas corpus. "The Army made objection to this on grounds that I considered to be fantastic," Fortas recalled; the "absurd proposition" that underlay the Army's position was that "once martial law had been declared, control passed to the military government, and that the civilian governor had no further power to do anything in the premises."[335] In order to bring the negotiations to closure, the Department of the Interior had reluctantly yielded; so the language of the Proclamation had fudged the issue of where power to suspend the writ lay, in the military or in the civilian branch. "We pointed out to the Army that if legal difficulties arose, the Army would suffer," Fortas continued, and the Army "is now pretty sheepish about the point" as it faced taking the entire responsibility for civil liability or political damage if Judge Metzger's opinion should prevail on appeal.[336]

While the departments were exchanging views on General Richardson's actions back in Washington, in Honolulu, Edward Ennis (acting for the Justice Department in the capacity of direct counsel to the Army) prepared a lengthy

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[332] Letter from Harold Ickes to Henry Stimson (Oct. 1, 1943) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[333] Letter from Solicitor General Charles Fahy to John J. McCloy (Sept. 29, 1943) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[334] Letter from Abe Fortas to Walter P. Armstrong (Oct. 15, 1943) (on file in the Papers of Harold Ickes, Library of Congress, Washington, D.C.) (copy provided by Professor Laura Kalman, University of California, Santa Barbara).

[335] *Id.*

[336] *Id.*

memorandum to Richardson explaining why the General's intransigent stand was unacceptable. The essence of Ennis' argument was that the issues that had provoked the confrontation with Judge Metzger transcended the boundaries of "a narrow technical, legal problem in which the Commanding General might feel bound to rely on, or justified in relying on, technical legal advice alone."[337] It was rather, Ennis continued, a serious *constitutional problem* that Richardson's order had precipitated, for it involved issues inherent in "[the] long-maintained balance between the Executive and the Judicial branches."[338] In a matter of this kind, which had the potential to blow up into a serious constitutional crisis, not narrow legal counsel but rather wisdom and "no little statesmanship" were required.[339] "In such a situation," Ennis counseled, "a page of history is worth a volume of logic—as Justice Holmes said in another connection."[340]

Ennis further reminded the General that even at the height of the Battle of Britain, when the military threat was far greater than in Hawai'i in late 1943, the privilege of petition for habeas corpus had not been suspended.[341] While Ennis thus founded his advice principally on the appeal that "history as well as the law teaches us that G.O. 31 is in error"—asking Richardson to recognize the need for statesmanship and for a respect for constitutionalism—he did not neglect the shorter-range tactical issues. Thus, while stating that he was willing to represent the Army in any appeal of Judge Metzger's decision—and while, like any lawyer, he would "be pleased to conduct such important historical constitutional litigation"—he did not believe it was wise to go forward. However that might be, Ennis continued, Glockner had been interned "for the unprecedentedly long time of nearly two years, and the case against him is not a strong one." Hence it seemed better to release Glockner and Seifert, and simply remove them to the mainland, away from the theater of war operations. Second, it was probably unwise to trouble the Supreme Court in time of war with issues that could be avoided. Finally, in case neither the appeal to high statesmanship nor the tactical route seemed acceptable to Richardson, Ennis indicated in polite but unambiguous terms that if Richardson failed to rescind the order, there doubtless would occur "a cause celebre in the courts which could not be successfully defended"—and that the Attorney General was "most anxious to avoid any situation in which it would not be possible to represent the

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[337] Memorandum from Edward J. Ennis to General Robert Richardson, "Habeas Corpus Proceedings" (copy on file in the Papers of General Robert C. Richardson, Jr., Hoover Institution Archives, Stanford, Cal.).

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

[339] *Id.*

[340] *Id.*

[341] All quotations that follow in this paragraph are from *id.*

military authorities whom the Department of Justice wishes to represent where any defense is available!"

With Ennis thus making it clear to Richardson that he was unwilling to endorse his extreme position, and with the Justice Department's hint that it could not defend his actions in appellate litigation now made explicit, a compromise was reached in informal meetings between Ennis and Judge Metzger. The terms were conveyed by Ennis to General Richardson, while the civilian officials in Washington were working out the details. This compromise called for Richardson to rescind the objectionable order; Judge Metzger—while not conceding that the contempt order had been unjustified—then consented to reduction of the fine to $100.[342] The judge informally agreed that meanwhile the prisoners could properly be transferred to the mainland (as Ennis had suggested), thus placing them outside the jurisdiction of the district court in Hawai'i for purposes of ruling on their habeas petitions.[343]

In deciding not to pursue the litigation further, the military was in the end much influenced by the advice of the Justice Department lawyers who—though they had faithfully represented the Hawai'i command in the courts—now were firmly convinced that the continuation of martial law for such a long period after the Pearl Harbor attack would very likely be found unconstitutional if carried to the Supreme Court for a final judgment.[344] This prediction as to the findings in constitutional law merely reinforced the argument that the weak or non-existent evidentiary case against the internees represented another source of potential embarrassment in any further court proceedings. Indeed, Ennis specifically reminded the War Department, Glockner had been fully cleared by the FBI, and the Army in Hawai'i had incarcerated him despite the FBI's finding: "There is almost nothing which would suggest that this man is

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[342] Letter from General Robert Richardson to General Julius Ochs Adler (Oct. 8, 1943) (on file in the Hawaii Military Government Records, Record Group 338, National Archives). Richardson had been adamant that the fine should be quashed altogether. "It is a personal, punitive fine, as far as I am concerned," he wrote, suggesting that the President himself ought to remit the $5,000, thus "showing that he was back of the military in this case . . . ." *Id.*

Edward Ennis agreed with Richardson that if the President paid the fine, he would consequently legitimize the Army's stand. For this reason, Ennis opposed such a move and wrote, "A pardon or a remission of fines is . . . undesirable because it is not normally used until the judicial remedy has been exhausted and it might appear to validate the military action and rebuke an independent court." "Summary of Ennis Report" (Oct. 1943) (on file in the Under Secretary's Files (Fortas Files), U.S. Department of the Interior Records, Record Group 48, National Archives) [hereinafter "Summary of Ennis Report"].

[343] *See* Letter from Edward Ennis to John J. McCloy (Aug. 7, 1943) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[344] *Id.* Ennis expected that it was likely that the courts would inquire into the facts where the petitioner had been held for a period longer than a year and a half. *Id.*

dangerous," Ennis reported, so that "a judicial review of the facts in that case might prove embarrassing."[345]

Although the case for continuing to hold Seifert was apparently considered somewhat more defensible, the Army lawyers in Honolulu quickly grasped the import of what Ennis was telling them—and apparently finally understood, too, that the War Department was leaving them little choice as to their course of action. Hence they moved to moot the cases by releasing both prisoners, even though in doing so their action contradicted many earlier public statements and also the Army's own arguments before the district court that Glockner and Seifert posed a serious danger to security. The prisoners were thus given their freedom—but, it is significant to note, not before the Army demanded that each of them sign a waiver that relieved the Army of any liability for false arrest or other wrongful deprivation of the internees' rights.[346] The release of the prisoners in this manner, a Judge Advocate General officer explained in a radiogram to McCloy, had "the advantage of . . . quick disposition of case without trial which might disclose sharp division in public opinion and in any event would focus nation-wide attention on Hawaii."[347] Both Richardson and Admiral Nimitz concurred with the view, he reported, that any further procedures in these two cases would involve "a substantial risk of the full-dress trial which all here [in Richardson's headquarters] consider highly undesirable."[348] It seems fair to speculate, too, that the Army may finally have come to recognize how serious the consequences might be if Richardson's General Orders No. 31 and its crude threat of coercion against a federal district judge should come into play in the course of appealing Judge Metzger's decisions.

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[345] *Id. See also infra* note 445.

[346] Wiener Report, *supra* note 123, at 10. *See also* Letter from Assistant Secretary John J. McCloy to General Robert Richardson (Aug. 15, 1943) (on file in the Hawaii Military Government Records, Record Group 338, National Archives).

[347] Radio from Colonel Hughes (Fort Shafter) to Assistant Secretary John J. McCloy (Oct. 14, 1943) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (Radio 102251Z).

[348] *Id.* That the effect of a full-dress trial would not necessarily be wholly damaging to the Army was indicated in correspondence between Delegate Farrington and Garner Anthony in September. Farrington noted that the confrontation between Richardson and the court had attracted a great deal of attention in Washington. "It will interest you to know," he reported further, "that the comment of Senator Reynolds, Chairman of the Senate Military Affairs Committee, was that any controversy of this nature should be resolved in favor of the military." Letter from Joseph R. Farrington to Garner Anthony (Sept. 10, 1943) (on file in the Papers of Delegate Joseph R. Farrington, M-473, Series 4, Miscellaneous Subject Correspondence, Folder 772, Hawai'i State Archives). Farrington also predicted that if the President should instruct Richardson to revoke his order against the court, it might inspire "a counter-proposal in Congress, emanating from War Department sources, to establish military government in the Islands by law." *Id.*

And so cool heads prevailed, while the Army's subordination to civilian control from Washington had been reasserted and the consequences of outrageously deficient legal counsel from the Army command's Judge Advocate officers in Honolulu had been overcome. In the federal district courtroom in Honolulu, however, the memory of this effort to intimidate Judge Metzger must have become a vital element of the context in future proceedings in that court involving challenges to the Army's regime.[349]

Intensifying the anger of the Army's critics—including, not least of all, the highest ranking officers of the Justice Department and the Department of the Interior—was the way in which General Richardson and his legal advisers were resisting any new concessions to the restoration of civilian government. Neither Governor Stainback nor Territorial Attorney General Anthony believed that the Army was ever going to yield its prerogatives so long as the war went on. Moreover, they had become much worried about the prospects for a return to full civilian control *after* the war. A special report prepared by Anthony in September (while the fiasco sparked by Richardson's confrontation with the federal court was still unresolved) set forth anew the legal arguments against the legitimacy of Army rule and also surveyed the factual situation in Hawai'i that bore on the issue of "military necessity" as a justification for suspension of civil liberties. Despite the President's instructions at the time the Restoration agreement went into effect formally sixth months earlier, on March 10th, there had been no progress whatsoever in accomplishing the "gradual and complete restoration of civil authority" that had been an explicit objective of the program.[350] Anthony reiterated the argument that in approving the declaration of martial law just after Pearl Harbor, the President had not approved "the transfer of the Government of the Territory to the Army and the appointment of a 'Military Governor,'"—neither of which could have been done legally by the President in any event, since to do so would have exceeded his authority under terms of the Hawai'i Organic Act.[351] With the legality of provost court decisions involving civilian defendants thus questionable, Anthony warned, some 123 prisoners, sentenced to terms from six months to life imprisonment and then being held in the Oahu Prison, might need to be freed altogether or at least re-tried. Moreover, the provost courts were continuing to operate under procedures and authority "[not] contemplated by the constitution or laws of the United States or the Territory," so that there was a continuing "needless invasion of the civil liberties of our people, and also the possibility of liability

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[349] *See, e.g., Ex parte* White, 66 F. Supp. 982, 985 (D. Haw. 1944) (includes a statement in the record that General Orders No. 31 was "the most disgraceful threat ever made anywhere against the judicial branch of our Government."); *see also supra* note 322 for Judge McLaughlin's repetition of that view, quoted in text.

[350] Anthony Report, *supra* note 26.

[351] *Id.* at 3. On the Organic Act and its terms, *see supra* note 4.

of our government officials in holding those incarcerated without a valid conviction."[352] Anthony cited chapter and verse as to the invalidity of the Army's claim that "military necessity" required continuance of Army rule: the courts were open and functioning with wide jurisdiction already ceded, grand juries and trial juries were restored, all the major agricultural and commercial enterprises of the Islands were in full operation, the territorial legislature and county boards of supervisors were meeting normally, air and steamer schedules had been regularized, and emergency measures such as those requiring troops to carry sidearms had long ago been terminated.[353] In sum, Anthony contended, the standard for return to civilian governance prescribed in the *Milligan* case had been fully met, *viz.*, "that the moment that order is restored the necessity for martial law (hence its justification) ceases to exist."[354]

Anthony believed that the decision in *Ex parte Quirin*[355]—reaffirming that "the constitutional safeguards of civil liberty" applied in wartime emergencies and assured access to justice in the federal courts—taken together with the *Milligan* precedent, absolutely required an end to Army rule. It should be done, he contended, by a joint order of Governor Stainback and the commanding general, and should include immediate abandonment of the self-assigned title "Military Governor." Any security concerns could easily be addressed, as they had been addressed on the mainland, by implementation of the President's Executive Order No. 9066, under which the Japanese-American population had been evacuated and interned on the mainland, and by the congressional legislation of March 1942 that had validated in statutory form this order's terms. In that way, any Army orders that might be challenged as violating civil liberties would be reviewed in an orderly way in the courts, in accord with constitutional procedures.[356] (This suggestion should not be taken as evidence that Anthony treated lightly the sanction of internment or removal. Indeed, in June 1943 Anthony had delivered a commencement address at the University of Hawai'i in which he forthrightly condemned the mass internment of Japanese-Americans as a policy "savor[ing] of fascism in one of its ugliest forms—the mass condemnation of people simply because of the accident of birth, their racial ancestry." He saw no place in a democratic society for "concentration camps" such as had been proposed for Hawai'i the previous year.)[357] Citizens found dangerous on loyalty or security grounds, Anthony contended in his report, could be excluded from military areas or sent to the

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[352] Anthony Report, *supra* note 26, at 7, 9.

[353] *Id.* at 12-13.

[354] *Id.* at 14.

[355] 317 U.S. 1 (1942); *see supra* note 252.

[356] Anthony Report, *supra* note 26, at 15-16.

[357] GARNER ANTHONY, THE UNIVERSITY IN A FREE SOCIETY 5 (Univ. of Hawai'i Occasional Paper No. 42, June 1943) [hereinafter ANTHONY, FREE SOCIETY].

mainland; aliens could be interned—again, with actions against them always subject to judicial oversight.[358] Moreover, if a genuine emergency should occur, "martial law . . . could be proclaimed in a moment."[359] In the longer run, Anthony predicted, the acquiescence in suspension of constitutional liberty would weaken the dedication to self-government under a regime of rights and of consent. This was the ultimate danger.[360]

In the months ahead, Anthony—who stepped down as territorial attorney general in December 1943, but would then serve as private counsel in the *Duncan* litigation and appeals to plead his case against the Army—had ample opportunity to argue his position in the courts. There is little doubt that the Army's behavior in threatening coercive action against Judge Metzger did much to confirm Anthony's dedication to his cause and the zeal with which he would pursue his campaign against martial law both in the academic journals and before the federal judiciary.[361] Similarly, the imbroglio that pitted Richardson against virtually the whole civil establishment, not only Judge Metzger, reaffirmed for Ickes and his circle in Washington the view that "democratic government is jeopardized by military encroachments on civil authority."[362] It was a controlling premise for Ickes that, "if the dignity of our civilian government institutions is not upheld during times of stress, constitutional government as we conceive it will be in more danger from our own neglect than from the efforts of our enemies."[363] Based on that canonical

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[358] Anthony Report, *supra* note 26, at 16-21.

[359] *Id.* at 22.

[360] *Id.* at 22. This report was also used by Anthony as the principal basis for his second *California Law Review* article, Anthony, *Martial Law*, *supra* note 5.

[361] Authors' interview of Mrs. Garner Anthony, Honolulu, Haw. (Apr. 1994); Interview of J. Garner Anthony, Honolulu, Haw. (Nov. 12, 1971) (transcript on file in the Oral History Project of the Waiumull Foundation, Honolulu) [hereinafter Anthony Oral History Interview].

[362] Letter From Harold Ickes to Francis Biddle (Dec. 18, 1943) (on file in the Deputy Secretary Files (Fortas Files), U.S. Department of the Interior Records, National Archives).

[363] *Id.* Similarly, Anthony's reassertion of the arguments against continued Army controls of purely civilian matters led Delegate Farrington to urge that he come to Washington to pursue the issues personally. "You are performing an immensely valuable service to the people of the Territory," wrote Farrington, "and trust that you will stay with your job, even though it involves heavy sacrifices, until free American local self government is assured for Hawaii in the future." Letter from Joseph R. Farrington to Garner Anthony (Nov. 29, 1943) (on file in the Papers of Delegate Joseph R. Farrington, M-473, Series 4, Miscellaneous Subject Correspondence, Folder 772, Hawai'i State Archives). When Anthony resigned the next month, in the face of appeals from Joseph R. Farrington and others that he remain as attorney general, he expressed confidence that his successor, Nils Tavares, would continue to work effectively in that office, including presumably work in the cause of restoration of civilian government. Letter from Garner Anthony to Joseph R. Farrington (Dec. 24, 1943) (on file in the Papers of Delegate Joseph R. Farrington, M-473, Series 4, Miscellaneous Subject Correspondence, Folder 772, Hawai'i State Archives).

belief, the efforts of the Department of the Interior to end martial law and restore civilian supremacy were unremitting. This, too, formed part of the essential background to the drama that was going forward in the courts.

B. The Japanese-American Internments

It is significant to the history of Army rule in Hawai'i that none of the hundreds of Japanese-American internees who were incarcerated by the Army in the Islands sought legal redress by way of habeas corpus petitions at any time during the war. No hard evidence has been found to date that will explain precisely why this was so; but it is a surprising aspect of the story—especially given that Judge Metzger had proven so receptive to habeas petitions in 1943 and 1944. Under the circumstances, one might expect that at least one or two of the many Japanese-Americans taken into custody would have had resource to the courts. The most likely explanation, we think, is that there was strong pressure from the families of internees to take a stoical view of their fate, whatever the measure of individual injustice; for a lawsuit in federal courts might jeopardize the freedom of the vast majority who had been protected by Army policy in Hawai'i from the fate of Japanese-Americans in the west coast states.[364]

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[364] LIND, THE JAPANESE IN HAWAII, *supra* note 69. It seems likely that a general understanding existed among Americans of Japanese ancestry, that to rock the boat through habeas petitions might increase the risk of mass internments and consequently the loss of freedom for their entire community in the Islands. In a 1942 study of Hawai'i's Japanese-American population at war by Professor Lind, a faculty sociologist at the University of Hawai'i, the author stressed the importance of the threat of mass evacuation as a crucial element in the Hawaiian situation:

> The . . . total exclusion of all persons of Japanese ancestry from the coastal portions of the Western Defense Area [California, Oregon, and Washington] had a strikingly depressant effect upon the Japanese of Hawaii. This was conceived as a threat not only to their relatives and friends situated within the designated areas but also to themselves. "We will be next," many of them said, and the efforts of local morale agencies to allay these fears have not been wholly availing.

Id. *See also* a later work, LIND, HAWAII'S JAPANESE, *supra* note 34, at 38-199, *passim.*

An Army censorship report, summarizing the content of more than 150,000 letters processed during June 1-15, 1943, referred to "low Japanese morale expressed in the form of resentment, anxiety and futility as the result of rumors of mass discrimination against the Japanese-American soldiers [stationed] in Mississippi and Louisiana"—an indication that the apprehensive attitudes of the earlier period of the war continued to be manifest in the Japanese-American community. General Information Summary, Vol. II, #11: General Civilian Morale 9 (June 1-15, 1943) (copy on file in the Japanese Internment Papers, Hamilton Library, University of Hawai'i). Individual letters quoted in the censorship summary indicate the level of fear that persisted, e.g., one by a Japanese-American citizen that stated, "Only yesterday someone told my father . . . that in case of an attack they are going to kill all the Japanese on this island—women and children . . . . It has created such a fear in our home we don't dare go out in the dark alone." Another wrote:

It could not have been far from their consciousness, moreover, that even prior to the Pearl Harbor disaster, the commanding general in Hawai'i had issued a public declaration explicitly warning Japanese-Americans in the following harsh terms of how the burden of proof was regarded, and of the possibilities of mass punishment. General Short stated:

> Anyone who gives any thought to the matter must realize that if acts of sabotage or attempts to injure our national defense in any way, are committed by any member of a particular group, all members of that group will be under suspicion until the guilty party is apprehended, and proof is given that his acts were not supported or condoned by others of the group.
>
> Further, while this suspicion exists, many innocent members of the group may, through error, be accused falsely of disloyal acts, and may suffer unjustly before their innocence can be established.[365]

The Army command in Hawai'i found it disconcerting that no Japanese-American internee stepped forward to petition for a writ of habeas corpus during the war, for the military lawyers were confident that the federal courts would be strongly inclined to uphold the military's powers under martial law if the petitioner were of Japanese ancestry.[366] Accordingly, after accepting the

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"There are always people who everlastingly make things miserable for us. Sometimes we get so frightened we don't even feel like going out . . . . We are not responsible for this fear; yet to some we are." *Id.* at 10-11. *See also* SLACKMAN, *supra* note 77, at 251-55.

It should be noted that even Governor Stainback contributed to the muting of Japanese political voices, intervening in the Kauai local primaries in October 1942 to persuade Japanese-American candidates to withdraw from the election. He did so in response to criticism from mainland newspapers and feared that "this would probably be used as [an] argument for continuing and possibly extending military government in the Islands." Letter from Ingram Stainback to Harold Ickes (Oct. 30, 1942) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (attached to a Nov. 7, 1942 note from Harold Ickes to John J. McCloy).

It is also possible that Japanese-American internees who might have taken a militant view and sought legal redress had lost faith in the civilian judicial process—understandable enough after the Japanese-American cases were decided by the Supreme Court, but certainly not before then, indeed especially as the Hawai'i federal district court judges had proven hospitable to habeas petitions. *See, e.g.*, LIND, HAWAII'S JAPANESE, *supra* note 34, at 184-86, reporting on an interview of a Kibei internee from Hawai'i.

[365] LIND, HAWAII'S JAPANESE, *supra* note 34, at 68 (quoting a July 14, 1941 proclamation). General Emmons's proclamations with respect to the Japanese, after Pearl Harbor, were by contrast more positive and geared to persuading the general public of the loyalty of the Japanese-American population. *See* LIND, HAWAII'S JAPANESE, *supra* note 34, at 70-71; *but cf.* OKIHIRO, *supra* note 18, at 256-74 for an interpretation skeptical of Emmons' good will and intentions with respect to Americans of Japanese ancestry and control of their community under martial law.

[366] Radio from Colonel Hughes (Fort Shafter) to Assistant Secretary John J. McCloy (Oct. 14, 1943) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (Radio No. 102251Z) ("[A] Japanese American case

decision to release Glockner and Seifert on the mainland, General Richardson ordered the two remaining foreign-born internees of European ancestry to be transferred there as well, outside the jurisdiction of Judge Metzger's court. This action would assure absolutely, Richardson explained to his superiors, that "in the event of another [internee] case arising in the courts it will have to be that of a Japanese."[367] Richardson and his legal aides were, in this respect, to be disappointed.

C. The Duncan and White Cases

The next phase of the legal challenge to Army rule was initiated by two prisoners who—unlike the earlier petitioners for habeas, all naturalized citizens—were American-born, and both of whom had been convicted by the provost courts for ordinary crimes rather than having been taken into custody and interned as alleged loyalty or security risks.[368]

The first round of the new litigation came in March 1944 in the case of Lloyd Duncan, a civilian shipyard worker who had been convicted by a provost court the previous month for assault on two military sentries and was given a six-

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would clearly be [the] best test case of internment power which could probably be won on [the] basis of [the] *Hirabayashi* case which the Judge [Metzger] here agrees with").

[367] Radio from General Robert Richardson to Assistant Secretary John J. McCloy (Oct. 13, 1943) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (Radio No. 102251Z).

[368] *See* Duncan v. Kahanamoku, 327 U.S. 304 (1946); *see also* White v. Steer, 327 U.S. 304 (1946) (The court merged the *Duncan* case on appeal with *White*. These two cases were eventually decided in 1946 by the Supreme Court.) There was a third petition for habeas filed as well, *Ex parte* Spurlock that was mooted before reaching the Supreme Court. 66 F. Supp. 997 (D. Haw.), *rev'd*, 146 F.2d 652 (9th Cir. 1944), *cert. denied*, 324 U.S. 868 (1945). The Army provost court's treatment of the prisoner Spurlock, an African-American civilian defense worker, was manifestly arbitrary and the case would have been an embarrassment if taken further on appeal beyond the Ninth Circuit. The government lawyers probably recognized its threat to their chances with the *Duncan* and *White* appeals. In the *Spurlock* case, in district court, Judge McLaughlin outraged the Army by ordering "pauper's counsel" to be provided to the petitioner. Declaring that this was an "extraordinary action," General Richardson, advised by William R. C. Morrison (General Green's successor as Executive for the Military Government), told the War Department that it would probably "cause a deluge of applications for writs of habeas corpus from all the prisoners convicted in provost courts and military commission now incarcerated . . . and will probably stimulate similar action on the part of internees." He strongly urged that the Army seek "some type of assistance" from either the Ninth Circuit or the Supreme Court, suggesting a writ of prohibition or other directive that would require the district judges in Honolulu to stop hearing habeas petitions until such time as the *White* and *Duncan* cases were finally disposed of on appeal. Radio from Col. William R. C. Morrison (for Richardson) to General Myron Cramer and Assistant Secretary John J. McCloy (May 2, 1944) (on file in the Papers of General Robert C. Richardson, Jr., Box 22, Hoover Institution Archives, Stanford, Cal.) (Radio No. RJ 17077).

Pictured from left to right are: Edward J. Ennis, special assistant to the U.S. attorney general; Anthony Garner, attorney for Lloyd Duncan; Nils Tavares, territorial attorney general (standing), and Governor Ingram Stainback at Duncan's habeas corpus proceeding challenging martial law in Hawai'i (*Honolulu Star Bulletin*, Apr. 8, 1944).

month prison sentence.[369] In a petition for a writ of habeas corpus, presented to Judge Metzger's court for Duncan by his counsel, Garner Anthony, the petitioner argued that because "military necessity" no longer could justify it, the provost court's claim of authority over him, as a civilian worker, was unconstitutional.[370]

This time General Richardson agreed to appear in court, and a full-dress trial that received wide publicity in the press ensued. Both Richardson and Admiral Chester Nimitz, renowned commander of the Pacific Fleet, testified under oath that Hawai'i remained in danger of "imminent invasion," by air attack if not otherwise, and that the determination of military necessity was the Army's prerogative and no one else's, certainly not a federal judge's.[371] Governor Stainback—who had never made a secret of his determined opposition to Army rule, and who was regarded by General Richardson as a man bent on "harassing" him and undermining the military's prestige—testified that under Hawai'i's own statutes covering war emergencies, he and the territory's ordinary civilian courts had ample power to deal effectively with any security threats that might arise.[372]

In a moment of high drama during the hearing, General Richardson glared at Garner Anthony from the witness stand and accused Anthony of "trying to weaken my authority" in trying to take away the measures that ensured the security of the Islands. Anthony quietly responded: "All I am trying to do, General, is to give this boy . . . a fair trial under the Constitution of the United States."[373] This exchange might well have caused Anthony endless trouble in the civilian community, as it bordered on openly questioning his loyalty. Indeed, Richardson's top legal officer, General Morrison (Green's successor) had already been secretly urging some of Anthony's most important business clients to drop his firm as their counsel because of the criticism Anthony was

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[369] *See Duncan* Transcript, *supra* note 112.

[370] *Id.* Although Duncan's sentence was for imprisonment only, in fact he was put at hard labor by the military after being sent to prison. *Id.*

[371] *See Duncan* Transcript, *supra* note 112. Contemporary newspaper accounts in the *Honolulu Star-Bulletin* and in the *Honolulu Advertiser* were also quite complete, day by day, as the testimony was presented. General Richardson's testimony is extensively quoted in Dorothy Benyas, *Richardson Says Martial Law Is Valid*, HONOLULU ADVERTISER, Apr. 12, 1944, at 1; *Habeas Case Verdict To Be Issued Today*, HONOLULU ADVERTISER, Apr. 13, 1944, at 1; *see also Testimony of General Richardson, Admiral Nimitz in Habeas Corpus Case*, HONOLULU STAR-BULLETIN, Apr. 15, 1944, at 8.

[372] For a detailed account of Stainback's testimony, *see* Dorothy Benyas, *Governor Speaks For Civilian Rule*, HONOLULU ADVERTISER, Apr. 8, 1944, at 1; *Text of Governor Stainback's Testimony in Habeas Corpus Case*, HONOLULU STAR-BULLETIN, Apr. 18, 1944, at 7.

[373] *Richardson and Anthony in a Spirited Exchange*, HONOLULU STAR-BULLETIN, Apr. 11, 1944, at 6.

leveling at the military.[374] Such potential adverse public effect on Anthony was promptly headed off, however, by the intervention of Edward Ennis, the Justice Department litigator assigned to represent the Army in the hearing. Ennis stood now to assert in open court that,

> so far as the Department of Justice is concerned—and I want to speak for the Department of Justice and the Attorney General in this respect—that we, of course, do not feel that the bringing of an action of this kind is in any way an attempt to take an antagonistic or unpatriotic or improper attitude towards the Government. I would like to state for myself, and I know for the attorney general of the department, that we consider it a helpful thing for an attorney to have the courage of his convictions to present to the court the issues as he sees them. And we feel that the interest of a member of the bar, and of the bar generally, in pursuing these questions . . . is commendable and furthers the interest of all of us in living under a regime of law.[375]

Anthony's vigorous representation of Duncan was thus praised by Ennis, in the face of General Richardson's angry blast, as not only the proper function but indeed the ethical obligation of an attorney seeking to clarify an important constitutional question in wartime.

After extended testimony, Judge Metzger ruled against the Army and issued the writ, ordering Duncan to be released from military custody. In an opinion that misread the terms of the Interior-Justice-War Department "restoration" agreement of 1943, Metzger declared that from Restoration Day forward and possibly from an earlier date, the entire regime of martial law had been illegal.[376] The Army had no authority either under the restoration agreement or

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[374] Wiener Report, *supra* note 123, at 11-12. "[P]ersons prominent in the office of the military governor called up clients of the lawyers who were bringing habeas corpus suits to ask them to boycott their lawyer and to transfer their law business to other lawyers who wouldn't bring habeas corpus suits." *Id.* General William R. C. Morrison, Green's successor as Executive for the Military Governor, self-styled, "is the one who went around trying to get Garner Anthony's clients to boycott their lawyer." *Id.* at 15. These findings corroborate Mr. Anthony's own statement in correspondence with Farrington, "I would like you to know that Colonel William R. C. Morrison, the executive of the 'military governor,' has attempted to intimidate me by getting at some of the leading clients of [my] firm." Letter from Garner Anthony to Joseph R. Farrington (Mar. 23, 1944) (on file in the Papers of Delegate Joseph R. Farrington, M-473, Series 4, Miscellaneous Subject Correspondence, Folder 772, Hawai'i State Archives).

[375] *A Comment From Mr. Ennis*, HONOLULU STAR-BULLETIN, Apr. 17, 1944, at 4 (editorial); *see also* McLaughlin Speech, *supra* note 322.

[376] *See Duncan* Transcript, *supra* note 112. Metzger read the language in the restoration proclamations that stated that martial law and suspension of habeas corpus were "in effect" as being merely a statement of fact describing the legal situation prior to the time the proclamations would become operative. Farrington, who had been involved in the Washington negotiations of the agreement, wrote: "Certainly [Metzger] has not interpreted correctly the understanding prevailing at the time the [restoration] agreement was reached." Letter from Joseph R.

under the prevailing statutes, the court ruled, for continuing to try civilians in the provost courts for ordinary crimes.[377]

Compounding the Army's problems was another case that came up immediately afterward before Metzger's colleague on the district court in Hawai'i, Judge J. Frank McLaughlin. The petitioner in this instance was Harry White, a Honolulu stockbroker who had been convicted by a provost court of embezzling $3,240 from clients' funds. Serving a five-year term for this civil offense, he, too, claimed that his conviction by a military tribunal was a violation of his basic constitutional rights.[378] Judge McLaughlin ruled against the government, ordering White freed, but on much broader legal grounds than those stated by Metzger in the *Duncan* case. McLaughlin declared that the civilian governor's transfer to the Army of all power over civilian justice,

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Farrington to Garner Anthony (Aug. 27, 1943) (on file in the Papers of Delegate Joseph R. Farrington, M-473, Series 4, Miscellaneous Subject Correspondence, Folder 772, Hawai'i State Archives). On the judge's misreading of the restoration agreement of 1943, *see also* Anthony, *Martial Law*, *supra* note 5, at 478, 494.

Farrington's view of the matter is confirmed in a letter from Harold Ickes to John J. McCloy in which Ickes accepted McCloy's view that martial law had not been terminated by the 1943 agreement: "We agree with you that it was our intention that martial law should be continued. We might disagree as to whether or not an end could be put now, or at least in the future, to martial law, but I have no disposition to set my judgment in that matter against that of the War Department." Letter from Harold Ickes to John J. McCloy (Aug. 30, 1943) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives). *See supra* note 264.

Assistant Secretary Fortas similarly recognized that the preamble to the proclamation had expressly referred to continuation of the suspension of the writ of habeas corpus, at the same time restoring regular civilian governmental functions, and indicated that Metzger had misunderstood the terms when he adopted Governor Stainback's view of the document and its terms. Telephone conversation between Abe Fortas and Capt. Hall (Aug. 18, 1943) (transcript available in the Assistant Secretary of War Files (McCloy Files), War Department Records, National Archives) ("I don't see any way out of this thing except to litigate it. I don't think we can very well get into a situation where the C[ommanding] G[eneral] is openly in defiance of a court order, even though the court order may be unsound").

[377] *See Duncan* Transcript, *supra* note 112. In fact, the 1943 agreement restoring many powers to civilian government did not specify that the privilege of the writ of habeas corpus was restored in all instances. It was Edward Ennis's interpretation that under the 1943 restoration agreement martial law remained in effect and the writ was suspended, "but civilian agencies resumed specified functions. In addition, judicial proceedings, with the exception of criminal actions against members of the armed forces and criminal prosecutions for violations of military orders, were returned to the courts." "Summary of Ennis Report," *supra* note 342. Unlike the War Department and Army command, however, Ennis at this time apparently regarded it as remaining within the authority of the civilian territorial governor to determine whether and when the privilege of the writ of habeas corpus might be restored—rather than regarding the December 1941 proclamation of martial law as having surrendered this question to the entire discretion of the commanding general. *Id.*

[378] *Ex parte* White, 66 F. Supp. 982, 984 (D. Haw. 1944).

dating from Pearl Harbor Day, had been "absolutely and wholly invalid" from the start. Nothing in American law, he declared, gave a governor such authority. Judge McLaughlin also denied wholesale the Army's claim that military necessity was a matter for the military's judgment exclusively; to proclaim a military emergency "does not make it so," McLaughlin wrote, and the Army must submit to the review and final judgment of the civilian courts.[379]

The Army immediately appealed both rulings to the Ninth Circuit, hoping, however, that the appellate court could be bypassed and that the Supreme Court would agree to take the case directly. There was a far better chance, the Army lawyers believed, that the Supreme Court would uphold the validity of martial law while American troops were still in the field, than if the case came up after victory had been won. Thus one of General Richardson's legal officers explained in a November 1944 memorandum:

> The military will have its strongest position politically before the Court while the war is on. After the war it is possible that the military may be relegated in our social system to the place where it was for many years following the last war and prior to the present war. Once the war is over the Courts will find it much easier to be critical of the actions of the military.[380]

Interestingly, this memorandum went on to consider a more clearly self-serving argument on behalf of the individual Army officers who had administered martial law, *viz.*, that failure to prosecute the appeals vigorously "would act as an inducement for further actions or suits," and that such suits could result in civil damage judgments in favor of persons wronged by military courts or administration.[381] Previously (as we have noted) the Army had made a practice of demanding waivers of civil liability from internees whom it released, as it sought to do also with the small number of prisoners serving provost court prison sentences who filed habeas corpus suits when they were freed in the Army's effort to moot their cases on appeal.[382] Now, as the appeals of *Duncan*

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[379] *Id.* at 988.

[380] Memorandum from Colonel E. V. Slattery to Colonel William R. C. Morrison (Feb. 17, 1944) (on file in the Hawaii Military Government Records, Record Group 338, National Archives).

[381] *Id.*

[382] *See, e.g.*, WEGLYN, *supra* note 18, at 294 n.30 (quoting Jerome Community Analysis Report). Japanese-American deportees from Hawaiian internment camps "first had to sign a paper waiving any claims of damages or indemnity against the FBI, Army, and Navy." *Id.* The same practice was pursued with other internees, some of whom apparently refused to sign the waivers. *Id.* Earlier, we have seen that Zimmerman, Glockner and Seifert were asked to sign damage waivers; Zimmerman refused, but the other two did agree to the procedure in order to gain their freedom, upon agreeing also to withdraw from litigation of the appeals. *See supra* note 346.

In testimony in a civil damages trial after the war, General Emmons stated that signatures on such waivers of liability were "a matter of routine" for the government's protection. *General*

and *White* went forward, the Judge Advocate General's office in Washington became explicitly concerned about the possibility that an adverse judgment in the Supreme Court in these cases might spark a rash of "civil damage suits against any and all, the General [Richardson], the Admiral [Nimitz], and everybody else."[383] It was partly out of this concern that the Army had requested of the War Department permission to participate actively in the preparation of briefs in the appeals.[384] Indeed, General Richardson specifically asserted in his confidential official correspondence that the threat of civil suits or even criminal actions against him and his subordinates "has been paramount in our minds throughout the entire litigation of the *Duncan* and *White* cases"![385]

D. Context of the Duncan and White Appeals

A particularly intriguing feature of the litigation at this juncture was the role of Edward Ennis, the Justice Department lawyer assigned by the Solicitor General to represent the Army both in the district court and in the Ninth Circuit. From as early as October 1942, when the Army was defending the appeal in the Ninth Circuit,[386] Ennis had expressed in private correspondence with Army officials his doubts about the constitutionality of martial law in Hawai'i.[387] A year later, a Honolulu newspaper quoted Ennis as saying that denial of the right of the writ of habeas corpus was inappropriate for cases "involving . . . matters of no interest to the military authorities."[388] While the military's legitimate range of interests might well include a case like Duncan's, since he assaulted a sentry, Ennis's statement certainly cast serious doubt on the propriety of the Army's stand in the *White* case, which involved merely embezzlement—a civil offense that had no palpable connection to security or defense of the Islands.

Green's Deposition Is Read at Trial (unidentified newspaper clipping) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

[383] Letter from Colonel W. J. Hughes to General William R. C. Morrison (Feb. 13, 1945) (copy on file in the Hawaii Military Government Records, Box 44, Record Group 338, National Archives).

[384] *Id.*

[385] Radio from Robert Richardson to the Judge Advocate General T. H. Green (Oct. 15, 1945) (on file in the Papers of Robert C. Richardson, Jr., Hoover Institution Archives, Stanford, Cal.) (Radio No. R-71951).

[386] Zimmerman v. Walker, 132 F.2d 442 (9th Cir. 1942), *cert. denied*, 319 U.S. 744 (1943).

[387] Letter from Edward Ennis to Angus Taylor (Oct. 13, 1942) (on file in Criminal Files, Zimmerman Case File, Record Group 18, National Archives, Sierra and Pacific Regional Branch, San Bruno, Cal.). "I intend to restrict the argument of this [*Zimmerman*] appeal very closely to the limited point involved and to avoid the more controversial aspects of martial law." *Id.*

[388] *Writ Privilege Denied Only in Military Cases*, HONOLULU ADVERTISER, Oct. 23, 1943, at 1.

At the time the *Duncan* case was under appeal, two years later, Ennis advised the Solicitor General that he regarded as "probably unconstitutional" the suspension of habeas corpus in Hawai'i.[389] In April 1943, Ennis had explained to Attorney General Biddle that he regarded it as his role to represent the Army as a matter of the Department's "legal duty in a doubtful legal situation," but his arguments in court were not to be taken as "a complete policy approval of those [i.e., the Army's] views."[390] Many years later, in an interview concerning his wartime litigation activity, Ennis recalled that he thought martial law "was entirely wrong in Hawaii after the first year," and that he had made clear to the Army command his personal reservations about their legal case.[391] It was not only Ennis in the Justice Department who raised doubts about the possibility of success for the government in defending its positions on *Duncan* and *White* when the cases reached the Supreme Court: for even within the General Staff Corps, the view was gaining strength that "the War Department position on martial law in Hawaii is becoming indefensible" so far as arguments of "military necessity" were concerned.[392] Indeed, at the very time General Richardson and Admiral Nimitz were testifying in Judge Metzger's courtroom that the Hawaiian Islands remained in imminent danger of enemy attack, the War Department was preparing to reorganize its Central Pacific command, downgrading the Islands to a "communications zone."[393]

Still another unusual aspect of the litigation was the division within the Cabinet departments as to the desirable outcome of the appeals in *Duncan* and *White*, and the consequent involvement of government lawyers in quietly aiding

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[389] Memorandum from Edward Ennis to the Solicitor General (Jan. 21, 1944) (on file in the Papers of Charles Fahy, Franklin Delano Roosevelt Library, Hyde Park, N.Y.). The purpose of the memorandum was to persuade the Justice Department not to moot the *Endo* case, which was going up on appeal, and Ennis referred to the mooting strategy as one that might also be applied in the *Duncan* and *White* cases (as had happened with the *Zimmerman*, *Seifert*, and *Glockner* cases) with the unfortunate result of preventing the high court from ruling on the "probably unconstitutional" Army regime in Hawai'i. *Id.*

[390] Letter from Edward Ennis to Attorney General Francis Biddle (Apr. 10, 1943) (copy on file in the Justice Department Records, National Archives, Sierra and Pacific Regional Branch, San Bruno, Cal.).

[391] Interview with Edward Ennis, U.S. Attorney (Dec. 20, 1972) (transcript available in the Japanese-American Resettlement and Relocation Collection, Bancroft Library, University of California, Berkeley) [hereinafter Ennis Interview].

[392] Memorandum from Lt. Colonel Harrison to Captain Colclough (June 6, 1944) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, National Archives).

[393] *Id.* Urging that the military authorities take a different approach in Hawai'i, Colonel Harrison also wrote that "the major arguments used under martial law have not dealt with the question of the military necessity for such martial law but have tended to become arguments for the maintenance of control of the labor forces in Hawai'i. In this problem both the Army and Navy are seriously concerned." *Id.*

the case for Duncan against the Army. The Department of the Interior lawyers had long regarded the military's regime in Hawai'i as of doubtful constitutionality (or worse); and now, anticipating a hearing before the Supreme Court, attorneys in the Interior's solicitor's office quietly cooperated with Garner Anthony, who was representing Duncan, and probably also with the American Civil Liberties Union lawyers in providing material for the appellate briefs.[394]

In summary, then, in late 1944 the Army itself was prepared to abandon its tactic of repeatedly mooting habeas cases rather than permit the Supreme Court to make a definitive ruling on martial law; instead, it now had become anxious to have the Court come to a decision while the war was still being fought. And in the background was the anxiety about civil indemnification suits, should martial law be found invalid. Meanwhile, the principal counsel for the Army himself harbored serious doubts as to the cause for which he was arguing, and the Interior department staff was working behind the scenes in providing material for use against the government's own lawyers in the appeals.

E. Political Storm Clouds

Not without significance, either, was the political context in 1944, especially because the mainland press—including both liberal commentators and conservative Republicans eager to find soft spots in the armor of the wartime White House—had begun to run articles and editorials critical of the Army's policies in Hawai'i.[395] There were also stirrings of damaging criticism from

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[394] Authors' telephone interview with John P. Frank, Esq. (Aug. 1990) [hereinafter Frank Interview]. There is correspondence between Frank and Fortas as to the most effective arguments that might be advanced in briefs for the appellants in the *White* and *Duncan* appeals to the Supreme Court. There is also some evidence suggesting that the Department of the Interior considered, at least briefly, seeking permission to file an amicus brief in the *Duncan* litigation, on the side of the appellants and against the Army. *See, e.g.*, Memorandum from John P. Frank to Under Secretary Fortas (June 12, 1944) (copy on file in the Under Secretary Files (Fortas Files), U.S. Department of the Interior Records, Record Group 48, National Archives).

[395] One example is the column by the liberal commentator Merlo Pusey, *War vs. Civil Rights: Military Government In Hawaii*, WASHINGTON POST, May 9, 1944, at 9. *See infra* note 397; *see also infra* text accompanying notes 430-36.

Criticism had emerged even before the 1944 election year. As early as August 1943, the conservative Republican *Chicago Daily Tribune* had run a Honolulu dispatch that gave publicity to Hawai'i lawyers' concerns about the suspension of civilian courts' jurisdiction; it also reported the sentiment in the Hawai'i bar that "It's bayonet rule!" regarding General Richardson's extraordinary executive order threatening Judge Metzger with imprisonment, and quoted Dean Emeritus Roscoe Pound of the Harvard Law School as saying that Judge Metzger's actions were consistent not only with what was permissible but what "was his duty" in regard to habeas corpus. This Aug. 28, 1943 clipping is on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va. *See* ANTHONY, ARMY

some quarters in Congress, with one House member from Michigan, for example, charging that military rule in Hawai'i embodied "hateful ideals and the political methods of our enemies."[396] Of particular importance was a signed article in the *Washington Post* by Merlo Pusey in May 1944 that stated:

> When the victory is won and the excitement of war subsides we are going to be very much ashamed of two policies now in effect. They are the mistreatment of loyal American citizens of Japanese origin and the prolongation of military government in Hawaii. In both instances the constitutional rights of citizens have been flagrantly violated, and even if we assume that those encroachments were necessary in the first place, they have been extended much longer than any military necessity seems to justify.[397]

In Hawai'i, the territorial bar association was taking an increasingly assertive stance in favor of restoration of full normal jurisdiction for civil courts and reinstitution of jury trials. At a special meeting of the association in April 1944, a resolution calling for restoration of the civilian justice system obtained nearly unanimous consent; and one prominent member of the bar told the press that "everything which has been accomplished under martial law could also be accomplished under promulgation of defense regulations as provided under [the] act of congress adopted in 1942 permitting the president and secretary of war and military commanders to prescribe military areas."[398] There was a tendency for the War Department and the Army command in Hawai'i to brush off bar association complaints as self-serving, because the lawyers had an economic interest in restoration of jury trials and the full operation of civilian justice.[399] Thus in a report in mid-1942 to the Judge Advocate General, Green

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RULE, *supra* note 3, at 70; *see also infra* text accompanying notes 436-38.

[396] *Congress Hears Speech on Civil Rights in Hawaii in Wartime*, HONOLULU STAR-BULLETIN, June 1, 1944 (quotation of Representative Roy O. Woodruff). On concern in Congress regarding conditions under martial law in Hawai'i, *see, e.g.*, *"Don't Rock the Boat" with Hawaii Quiz Now, Says Solon*, HONOLULU ADVERTISER, Mar. 29, 1944, at 6. In April 1944, an Interior official testified to a House of Representatives Appropriations Committee subcommittee, when it considered support levels for civilian government in the territories, that he regarded continuance of martial law in Hawai'i as "unnecessary under conditions as they exist now" and recommended complete restoration of normal civilian government. *Martial Law Here Now Is Unwarranted, Thoron Says*, HONOLULU STAR-BULLETIN, Apr. 26, 1944, at 1. The subcommittee chairman, Representative Jed Johnson of Oklahoma, expressed astonishment: "I am amazed at the statement here . . . that we still have martial law in the Hawaiian islands." *Id.*

[397] Merlo Pusey, *War vs. Civil Rights*, WASHINGTON POST, May 9, 1944, at 9.

[398] *Provost Courts Opposed*, HONOLULU STAR-BULLETIN, Apr. 7, 1944, at 6 (quoting J. Russell Cades); *see also id.* at 1. Reference to the statute was to the Act of March 21, 1942, ch. 191, 56 Stat. 173 (18 U.S.C. § 97a), augmenting Executive Order 9066, issued earlier. Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942).

[399] Assistant Secretary of War McCloy, for example, referred to the "considerable agitation among the lawyers" as the exception to the general public approval of martial law that he observed in a visit to Hawai'i. Letter from John J. McCloy to Harry Hopkins (Oct. 19, 1942)

had contended that the only significant exception to positive public reception of Army rule was "some local sniping at the theory of Military government, principally, I am ashamed to say, by brothers of the legal profession."[400] Some civilian supporters of the Army's regime shared the view voiced by one apologist for martial law, that "Hawaiian tin-pot attorneys, abetted by Ickes, Thoron, and such," along with Governor Stainback, were responsible for making martial law an issue of controversy.[401] Similarly, after the war, General Richardson would record his personal version of how the public received martial law in the Islands: "It is very strange," he wrote in 1946, "that during the entire period of martial law it was rare that there was ever a complaint over its administration except from a few lawyers in the community."[402]

The organized bar's position, drawing fire not only from the Army but from civilian leaders who condemned it as a hindrance to prosecution of the war, might easily have led to bitter public recriminations or damaging accusations of disloyalty against individuals. Again, however, Edward Ennis played a vital moderating role, as he had done earlier during the proceedings in Judge Metzger's court.[403] Speaking before the bar association meeting that supported the resolution calling for an end to martial law, Ennis declared that such discussion of civilian rights and military policy was entirely appropriate—indeed "a healthy sign in a democracy," no less in wartime than in normal times. Ennis continued, according to the reports of his speech, by cautioning: "In every war there has been considerable difficulty in demarking the limits of civilian and military authority," and that it was unlikely that the justices of the Supreme Court of the United States would be unanimous on the issues in *Duncan*.[404]

(on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[400] Letter from Thomas H. Green to E. C. McNeil (July 9, 1942) (on file in the Papers of Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

[401] Letter from Harry Hassock to Thomas H. Green (Aug. 14, 1942) (on file in the Papers of Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

[402] Letter from General Robert Richardson to John A. Matthewman (Jan. 25, 1946) (on file in the Papers of General Robert C. Richardson, Jr., Hoover Institution Archives, Stanford, Cal.). Disingenuously or otherwise, Richardson did not admit to recognizing what is patently obvious, *viz.*, that written complaints to a military commander in a martial law regime that was rounding up persons for internment without public hearings might have been completely intimidating to potential dissenters.

[403] *See supra* note 375 and accompanying text.

[404] *Lawyers Hit at Provost Courts*, HONOLULU STAR-BULLETIN, Apr. 7, 1944, at 1. Doubtless Ennis had in mind that fact that in the *Hirabayashi* case, for example, there had been concurring opinions by Justices Murphy and Rutledge that expressed serious doctrinal differences with the majority on the legitimacy of the Army's claims to authority to suspend the constitutional rights of civilians on the mainland. *See* Hirabayashi v. United States, 320 U.S. 81, 88, 99, 112-14 (1943).

It was not only the bar association, however, that mounted an open campaign critical of Army rule. The territory's Democratic Party convention in 1944 declared that military rule was "illegal" as well as "contrary to every tradition of America from its beginning," and that therefore it should be terminated.[405] There were also rumors in mid-1944 that the labor unions in Hawai'i were considering lawsuits against the Army challenging the constitutionality of the Military Governor's control over labor relations and wages.[406]

Governor Stainback meanwhile continued to exert every possible pressure through the Interior Department and directly with the White House in the cause of restoring the privilege of the writ of habeas corpus and terminating martial law. In a private conference with Samuel Rosenman, one of President Roosevelt's closest advisers, the governor reiterated that the defense and security emergency arguments of 1941-42 no longer pertained in 1944; and besides, he was reported as counseling, right-wing Republican critics of the administration would continue to "use the situation here as an example of the dangers to liberty with the continuation of the President in office."[407]

The intensity of Stainback's campaign is also explained by his belief—not entirely without factual foundation[408]—that the Army and Navy, as well as a few elements of the business elite in Hawai'i itself, would welcome a perpetuation of military rule even beyond the end of the war: "Plans for future control of Hawaii by certain fascist-minded individuals must be considered," he was reported as advising: "This contemplates Army and Navy control; some high ups [sic] in both civil and military life are making plans along this line."[409]

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[405] *Bourbon Platform Urges Earliest Termination of Martial Law Here*, HONOLULU STAR-BULLETIN, May 1, 1944, at 7.

[406] "Extract from Report of the Attorney General, Territory of Hawaii to the Governor . . ." (July 26, 1944) (on file in the Papers of Samuel Rosenman, Franklin D. Roosevelt Library, Hyde Park, N.Y.).

[407] "Memorandum: Desirability of Terminating Martial Law and the Suspension of the Privilege of the Writ of Habeas Corpus by Executive Proclamation" (not dated, but July 1944 as determined by internal evidence) (on file in the Papers of Samuel Rosenman, Franklin D. Roosevelt Library, Hyde Park, N.Y.) (reporting Stainback's comments) (author not given) [hereinafter Memorandum: Desirability of Terminating Martial Law].

[408] *See infra* text accompanying note 418.

[409] Memorandum: Desirability of Terminating Martial Law, *supra* note 407 (reporting Stainback's comments). Similarly Farrington saw Garner Anthony's campaign to restore civilian control of civilian affairs as part of the larger cause of "perpetuation of a sound system of local self-government in the Islands." Letter from Joseph R. Farrington to Garner Anthony (Dec. 30, 1943) (on file in the Papers of Delegate Joseph R. Farrington, M-473, Series 4, Miscellaneous Subject Correspondence, Folder 772, Hawai'i State Archives). Farrington was worried, in fact, that if the President himself moved definitively to curb the Army's wartime authority in Hawai'i, such an order "will be followed by a counter-proposal in Congress, emanating from War Department sources, to establish military government in the Islands by law." *Id.*

This concern was not idiosyncratic with Governor Stainback, as is suggested by an Army intelligence report in 1942 that spoke of

> deep-rooted suspicion of many Island people, particularly some business and professional and political leaders, . . . that the Federal Government is using martial law as an excuse to foist a commission form of government on Hawaii after the war is over. Whatever statements . . . territorial leaders make about home rule and statehood are made deliberately to avert such action—that is: the installation of a [non-elective or military] commission government.[410]

When Attorney General Anthony pondered the problem in late 1943, against the background of General Richardson's recent threat to incarcerate Judge Metzger, he worried that a loss of self-government could too easily occur even without necessarily "imputing any sinister design" to the Army brass.[411] Once accustomed to martial rule, especially when material comforts were abundant (as they were in the Islands then), "the authoritarian principle" would no longer seem alien. With apathy, Anthony concluded, would come acceptance of the military government's bureaucracy—"which naturally enough, like any other bureaucracy, will resist change or inroads upon its jurisdiction, and finally Congress may conclude that a military government is more suitable to Hawaii than our present government under the Organic Act."[412]

One can surmise that Anthony's concern about the integrity of self-government in Hawai'i, whether as a territory or eventually as a state, had another dimension; for in one of his most notable public addresses, he linked the ideals of a prejudice-free, multi-racial community with the issue of whether Hawai'i was threatened with becoming "simply a military garrison."[413] Asking the question, "Can we demonstrate that here the races of man can live in decency and dignity with equal opportunity for all?" Anthony asserted that the territory had a special mission to perform. It was "a miniature of the nation," and the survival and vigor of democratic self-government required that it not become a vassal state of the military.[414]

In fact, some of Hawai'i's political elite suspected in 1944 that a "sinister design" to curb their political rights was being actively pursued. Thus a Honolulu attorney admonished Delegate Farrington that "we must all work very hard to prevent any possible attempt of the Army and the Navy, backed by [certain civilians in Hawai'i], to put the island of Oahu permanently under

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[410] [Staff] Memorandum to Kendall J. Fielder, "Political Report: The Governorship of Hawaii" (July 31, 1942) (on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.).

[411] Anthony Report, *supra* note 26.

[412] *Id.* at 22.

[413] ANTHONY, FREE SOCIETY, *supra* note 357, at 3.

[414] *Id.* at 2-3.

military control."[415] Indeed, Hawai'i's political leaders, especially those who had espoused statehood in the immediate prewar years, were much concerned through the period of Army rule to "preserve as much as possible," as Samuel Wilder King had written early in the war, "the integrity of the territory as a political and economic unit of the United States."[416] Their concern about sinister doings would have been even more urgent had it become known in Hawai'i that in February 1944 General Richardson (at the prompting of his legal officers) actually had proposed formally that the war government should transfer administrative responsibility for Hawai'i from the Interior to the War Department, thus putting to an end with one stroke "the consistent complaining of the Territorial officials by making them responsible to the Secretary of War for the duration"![417] (Apparently McCloy spared his government colleagues outside the War Department any information of this proposal; and, mercifully for Richardson, it was considered in strict secrecy by McCloy and the Army's legal staff in Washington until it resurfaced a few months later—this time with the War Department's partial endorsement.)[418]

Meanwhile, practical matters relating to the day-to-day administration of criminal justice were also coming to play a role in the debate over martial law and in the tactics that the Army and its challengers were pursuing in the courts. Thus the territorial attorney general, Nils Tavares, who had succeeded Garner Anthony in 1944, anticipated that—because Judges Metzger and McLaughlin were overturning provost convictions—they might be expected to release prisoners who had been convicted of serious crimes. He therefore advised the Army that it had become important, as a simple matter of effective law

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[415] Letter from Bill Castle to Joseph R. Farrington (Mar. 13, 1944) (on file in the Papers of Joseph R. Farrington, M-473, Series 4, Miscellaneous Subject Correspondence, Folder 772, Hawai'i State Archives) (Castle was a law partner of Garner Anthony).

[416] Letter from Delegate Samuel W. King to Secretary Harold Ickes (June 17, 1942) (copy on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[417] Letter from General Robert Richardson to Assistant Secretary John J. McCloy (Feb. 10, 1944) (on file in the Hawaii Military Government Records, Record Group 338, National Archives). The official Army historical account of military government and civil affairs gave notice to this episode, explaining as follows Richardson's initiative to displace the Interior's authority:

> It was . . . anticipated [by Richardson's command] that the Interior Department and the Governor would attack martial law at any time, and it was therefore felt that the Commanding General should be prepared not only with a good defense, but might also launch an offensive by suggesting a few plans which might give those who were then opposed to martial law cause for thought.

Office of the Chief of Military History, Civil Affairs, *supra* note 26, at 3341 n.87.

[418] Letter from Assistant Secretary John J. McCloy to General Robert C. Richardson, Jr. (May 17, 1944) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

enforcement, to return full civil and criminal jurisdiction to the civilian courts, rather than awaiting the result of the Ninth Circuit appeals. The Army's response was hardly calculated to allay concerns about the military's motives in holding fast to power in the Islands: the Military Governor's office told Tavares that this would be considered as an admission of weakness by the military and hence was out of the question."[419] Consequently, Tavares advised Governor Stainback to continue pressing upon the government in Washington his view that martial law was being perpetuated without justification. It was far preferable, Tavares pointed out, for military government to be terminated by action of the President and the civilian governor, as opposed to being "kicked to death by court action" while the legality of provost court proceedings remained in doubt and the validity of their criminal sentences was left open to certain challenge.[420]

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High-level policy developments were also exerting a major influence in the political and legal milieu in which the appeal from the Ninth Circuit went forward. By December 1944, Secretary of War Henry L. Stimson had certified that arguments of "military necessity" were no longer plausible with respect to mainland internments of Japanese-Americans.[421] And in the last months of 1944 the government had set into motion a release program justified by the War Department on the dual grounds, as Assistant Secretary McCloy asserted, that "it can no longer be said that the West Coast is in danger of large-scale invasion" and that Japanese-Americans in the Armed Forces had made a record

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[419] "Extract from Report of the Attorney General, Territory of Hawaii to the Governor on the Crime Situation" 8 (not dated but July 1944) (copy on file in the Papers of Samuel Rosenman, Franklin D. Roosevelt Library, Hyde Park, N.Y.) [hereinafter Attorney General Report].

[420] *Id.* The Army lawyers attempted to refute Tavares' assertions, in correspondence with the Interior Department (which endorsed the Hawai'i officials' views). Thus the Provost Courts Commissioner declared, in a Sept. 23, 1944 memorandum, that the principal continuing business of the provost courts had to do with curfew violations (which in fact were the source of the most widespread civilian complaints of unnecessary controls at that time), falsification of information by residents of Japanese descent, absenteeism from jobs, failure of persons (including some juveniles) to accept employment, smoking in restricted areas, and "censorship violations" (surely a broad category). Memorandum from Provost Courts Commissioner John F. Wickham to Brig. General William R. C. Morrison (Sept. 23, 1944) (copy on file in the Hawaii Military Government Records, Record Group 338, National Archives) (it was quoted in a memorandum from Fowler Harper dated Aug. 17, 1944).

It seems unlikely that Attorney General Tavares and Governor Stainback would have regarded this rejoinder as voiding their point about the intrusiveness of the provost courts in areas of law over which civilian courts might as effectively have been given back jurisdiction.

[421] Draft Memorandum from Secretary Henry L. Stimson to President Franklin D. Roosevelt (Dec. 13, 1944) (copy on file in the Japanese-American Resettlement and Relocation Collection, Bancroft Library, University of California, Berkeley); *see also* IRONS, JUSTICE AT WAR, *supra* note 9.

of "courage and devotion to this country."[422] Probably the controlling factor in McCloy's announcement, considering the War Department's previous unremitting resistance to release of the mainland internees, was the Supreme Court's impending decision in the *Endo* case.[423] The *Endo* decision, which came down in November 1944, went against the government and required the immediate release from internment of a petitioner who had been cleared of any suspicion of disloyalty. It was the first case during World War II that successfully challenged the arguments of military necessity in relation to suspension of civil liberties of American citizens.[424] Apparently acting on information obtained covertly from a Supreme Court justice or staff member as to the timing of the decision's release, the Secretary of War issued a Sunday morning press release—just a day before the Court's Monday announcement of decisions—to seize the initiative for the Army and announce the commencement of the internee release program.[425]

Meanwhile, the Army command in Hawai'i steadfastly maintained, at least in its public pronouncements, that continuation of martial law was essential to the Islands' security and to the efficient conduct of the war. Privately, however, the Army lawyers and generals—who in fact were now admittedly concerned that if martial law must be terminated "the Army should receive credit" for it—were weighing alternatives to the legal foundations of their military rule in Hawai'i.[426] The specific alternative that General Richardson presented to the War Department was a proposal for an Executive Order nominally ending martial law but with an emergency recapture clause giving him virtually unlimited authority in the event that military necessity required it in the future.[427] But General Green, who was now posted in the Judge Advocate General's office in Washington, and the Army lawyers on Richardson's staff

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[422] Letter from Assistant Secretary John J. McCloy to Representative Clarence F. Lea (Dec. 6, 1944) (on file in the Japanese-American Resettlement and Relocation Collection, Bancroft Library, University of California, Berkeley).

[423] *Ex parte* Endo, 323 U.S. 283 (1944). For a full discussion of the litigative tactics on appeal in *Endo*, *see* IRONS, JUSTICE AT WAR, *supra* note 9.

[424] The significance of the Court's deliberations in the *Endo* proceeding for the prospective outcome of the *Duncan* appeal is discussed *infra* notes 529-41 and accompanying text.

[425] IRONS, JUSTICE AT WAR, *supra* note 9, at 345.

[426] Letter from General Robert Richardson to Assistant Secretary John J. McCloy (Aug. 13, 1944) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[427] *Id.* Richardson and his legal staff gave such intensive attention to taking the initiative, the official army historians concluded after interviews with the principals (Richardson, Morrison, and Slattery), "on the theory that if . . . any changes in the present status [of martial law] became necessary, such proposals should originate with the military and naval authorities in the Islands, who had . . . the responsibility of defense, rather than in Washington in an atmosphere of unfamiliarity and legal calisthenics." Office of the Chief of Military History, Civil Affairs, *supra* note 26, at 3341 n.87.

in Honolulu weighed in strongly against yielding on the issue even to that degree. Their reasoning, based on their litigative goals and tactics, is significant to our story: They had now become deeply concerned that "the termination of martial law prior to the decisions in the cases in the Circuit Court of Appeals . . . might prejudice the decisions in these cases," and, not least important, they feared also that "the Army might lose face in the community by such action."[428]

It is instructive that General Richardson and his legal advisers were not even willing to accept the application in Hawai'i of Executive Order 9066—under which Japanese-Americans had been interned on the mainland—as an adequate basis for Army control of civilian life in the Islands. To rely upon this executive order for his authority, Richardson stated, would leave him without adequate discretion in dealing with the Japanese-Americans deemed security or loyalty risks, in imposing censorship on the press, in controlling travel, or in the discipline of the labor force. Richardson was also explicitly concerned that reliance on Executive Order 9066 would place him at the mercy of the federal courts, both with regard to the interpretation of terms of his jurisdiction and with regard to the privilege of habeas corpus.[429] It was better, clearly, in his view to continue the process of appeals and mooting of cases—what a federal judge in Hawai'i later deplored as the Army's tactics of "bluffing, stalling, threatening, dodging and evading"[430]—so long as he was required by his superiors in Washington to continue to share power with Governor Stainback's civilian government. To Secretary Ickes and the Justice Department lawyers, nothing seemed so ominous in its constitutional implications as the view continually expressed by Richardson, and regularly seconded by McCloy's office, that if "the civil court's decision would determine a military situation"[431] the Army could not provide adequate security in Hawai'i.

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As the internal debate went forward within the Army and the War Department, press criticism continued to mount regarding the continued restrictions on civilian life in Hawai'i despite the manifest absence of a direct threat of attack. The *Duncan* appeal in particular received wide attention in the

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[428] Letter from Colonel Eugene V. Slattery to General William R. C. Morrison (July 25, 1944) (on file in Hawaii Military Government Records, Record Group 338, National Archives).

[429] Letter from General Robert Richardson to Assistant Secretary John J. McCloy (June 19, 1944) (copy on file in the Papers of Samuel Rosenman, Franklin D. Roosevelt Library, Hyde Park, N.Y.).

[430] McLaughlin Speech, *supra* note 322.

[431] Letter from Harold Ickes to Henry Stimson (citing the Army view) (undated but Oct. 1943) (on file in the Under Secretary's Files (Fortas Files), Department of the Interior Records, National Archives) (copy provided by Prof. Laura Kalman, University of California, Santa Barbara) (quoting from a Richardson memorandum).

mainland press, with many influential newspapers asserting the importance of civil liberties. Thus the *Louisville Courier-Journal* declared that Hawai'i was "obviously not" a case warranting martial law, which could only be justified in the face of "urgent danger from hostile forces" and when civilian government was unable to handle its ordinary functions properly.[432] The *San Francisco Daily News* applauded the district judges in Hawai'i for proving "so zealous in their tendency to protect the right of habeas corpus [which is] . . . the principal legal barrier that stands between civil authority and military dictatorship."[433] The *San Francisco Chronicle* also supported the rulings by Judge Metzger and Judge McLaughlin, insisting that their decisions would "keep the principle of civil rights intact for after-war purposes," with "[m]aintenance of civil rights for the long view" an issue that (in the editorial's view) transcended immediate military expediency.[434] Similar approval of the district courts' vindication of civil liberties came in a *Boston Herald* editorial declaring that if *Duncan* failed in his appeal it would amount to "a literal perversion of the Constitution."[435]

The crowning blow amidst this mounting press criticism came when the highly conservative Republic organ, the *Chicago Daily Tribune*, published an editorial in July blasting the Roosevelt administration for tolerating a lawless regime of naked military power in Hawai'i.[436] Its publication came at a time when the Department of the Interior was stepping up its efforts to achieve further restoration of civilian powers in the Islands—and meeting with the usual, unyielding resistance from the Army and from the War Department.[437]

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[432] *What Need For Martial Law in Hawaii?*, LOUISVILLE COURIER-JOURNAL, Apr. 15, 1944, *reprinted in Press Comment on Habeas Corpus Case: Mainland Newspapers Discuss Decision*, HONOLULU STAR-BULLETIN, May 18, 1944, at 4. *See also supra* note 396 and accompanying text (citations of congressional concern in early and mid 1944).

[433] *Civil Rights in Hawaii Upheld: Mainland Newspaper Views of Martial Law*, HONOLULU STAR-BULLETIN, May 13, 1944, at 4 (reprinting a *San Francisco Daily News* editorial).

[434] *Civil Rights in Hawaii Upheld: Mainland Newspaper Views of Martial Law*, HONOLULU STAR-BULLETIN, May 13, 1944, at 4 (reprinting a *San Francisco Chronicle* editorial).

[435] *Press Comment on Habeas Corpus Case: Mainland Newspapers Discuss Decision*, HONOLULU STAR-BULLETIN, May 18, 1944, at 4 (reprinting *"Invasion" in Hawaii* from the *Boston Herald*).

[436] *See* Letter from Abe Fortas to J. V. Forrestal (July 12, 1944) (on file in the Under Secretary Files (Fortas Files), Department of the Interior Records, National Archives) (the *Chicago Daily Tribune* editorial was attached to the letter).

[437] The lack of progress in the talks, which centered heavily on control of labor, is reported in Memorandum from Abe Fortas (July 19, 1944) (on file in the Under Secretary Files (Fortas Files), Department of the Interior Records, Record Group 48, National Archives) (reporting that after numerous conferences on the subject, McCloy now had indicated "that it was not contemplated that we 'civilian officials' should have any functions under the civilian labor control plan"). On July 12, 1944, Solicitor Fowler Harper reported that the negotiations had "apparently broken down." Letter from Fowler Harper to Abe Fortas (July 12, 1944) (on file

Hence Abe Fortas leapt upon the opportunity, sending a copy of the *Tribune* editorial to John McCloy and commenting on the complete lack of progress in talks about the procedures for terminating martial law. "Certainly, neither you nor I," he wrote, "should tolerate the continuation of a situation which permits that great liberal journal, the *Chicago Tribune*, to attack us as violating a fundamental principle of our constitutional government"![438]

Doubtless responding in some measure to mounting criticism from the press, the Army moved, while the habeas cases were on appeal, to make on-the-ground concessions by turning back to civilian agencies some of the less important regulatory powers over economic matters and industrial relations that the military regime had controlled since Pearl Harbor.[439] Despite these initiatives, General Richardson clung steadfastly to the title of "Military Governor," which had been made up out of the whole cloth by the Army when martial law was first declared, and which since early in 1942 had been a source of irritation (and then of serious outrage) to Governor Stainback and to the Interior Department. The Army held to this nomenclature despite the acknowledged fact that traditionally the term "military government" had been applied only in situations—such as Cuba and the Philippines after the Spanish American War—in which the military ruled over a conquered populace.[440]

In the view, however, of the commanding generals in Hawai'i—a view that was formulated with the constant advice and counsel of their legal staff officers—the abolition of the title "Military Governor" "would create confusion and destroy the uniformity of authority which now exists between civilians and

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in the Bureau Data Files, Box 9, Department of the Interior Records, Record Group 48, National Archives).

[438] Letter from Abe Fortas to John J. McCloy (July 12, 1944) (on file in the Under Secretary Files (Fortas Files), Department of the Interior Records, Record Group 48, National Archives). *See also* LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 79-80 (1990).

[439] Ernest May, *Hawaii's Work in Wartime, Part II: Our Government of Today*, HONOLULU STAR-BULLETIN, May 16, 1944, at 8; Ernest May, *Hawaii's Work in Wartime, Part XXIII: War Labor Board*, HONOLULU STAR-BULLETIN, June 12, 1944, at 9; Letter from General Robert Richardson to Assistant Secretary John J. McCloy (Apr. 14, 1944) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (proposing in general terms a way of turning manpower allocation issues back to civilian agencies).

[440] Letter from Assistant Secretary John J. McCloy to General Robert Richardson (Feb. 2, 1944) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives). In an address to an academic audience in 1946, Judge McLaughlin contended that a comprehensive military government (as opposed to one of martial law, which would be subject to constitutional limitations under the doctrine of necessity, and whose actions would be subject to final determination by civilian courts) like the one the Army established in Hawai'i was a regime "which even their own Army rules and regulations clearly recognized was lawful only in conquered territory—territory taken from the enemy." McLaughlin Speech, *supra* note 322.

the military."[441] It may be noted that in making this argument, the Army never made even a pretense of justifying systematically on constitutional grounds such "uniformity"; instead the military relied upon the rather extraordinary expediential argument that abolition of the title "would seriously impair the vital power to regulate and obviously invite the growth of some competing power [sic] based on the will of local politics or rival business interests."[442]

Early in the war period, the War Department backed the commanding generals on this issue, declaring that abolition of the "Military Governor" title would tend "to produce some speculation and conjecture as to the extent of the [Army's] authority."[443] As early as July 1943, however, Assistant Secretary of War McCloy began to shift ground, advising the Hawai'i command that he believed there was considerable validity in the Interior Department's objection that the title, "in the eyes of civilians," as Fortas wrote, "is an important symbol of military usurpation of civil government."[444] McCloy told Ickes that he would "press for the elimination of the title," conceding that in actuality it contributed little to the commanding general's authority in Hawai'i, and even admitting

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[441] Radio from General Delos Emmons to Assistant Secretary John J. McCloy (July 2, 1942) (copy on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (copy also on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.) (Radio No. 1224).

[442] *Id.* This example of poor lawyering was not uncharacteristic of the documents advancing legal arguments that came out of the Honolulu command. Indeed, the special Justice Department review in 1946 of martial law and military government in Hawai'i included some scathing comments upon the deficiencies as a lawyer of Colonel William R. C. Morrison, Green's successor as Executive, Office of the Military Governor. Wiener Report, *supra* note 123. In a statement issued by him in court but not published until 1949, Judge Metzger stated that "it appears quite certain that he [General Richardson] was not competently advised locally" in the Army's role in the *Glockner* case and the imbroglio surrounding the general order that threatened a federal judge with imprisonment and fine. Memorandum from Delbert Metzger, quoted at length in Claude McColloch, *Now It Can Be Told: Judge Metzger and the Military*, 35 A.B.A. J. 365, 368 (1949) (stating, in addition, that the legal counsel given Richardson placed him in the position of "what appeared at the time to be flagrant willful defiance of and disrespect to the Court").

[443] Memorandum, "Suggestions of the Department of the Interior for Modification of Martial Rule in the Department of Hawaii" (July 13, 1942) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, National Archives).

[444] Letter from Abe Fortas to John J. McCloy (Apr. 6, 1944) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives). Evidence of McCloy's recommendation to the Hawai'i command is in Letter from John J. McCloy to Harold Ickes (Aug. 27, 1943) (on file in the Papers of Harold Ickes, Library of Congress, Washington D.C.). Signs of McCloy's softening of views on this issue were earlier reported in Memorandum from Harold Ickes to Benjamin Thoron (June 2, 1943) (on file in the Papers of Harold Ickes, Library of Congress, Washington D.C.) (reporting, in addition, that Richardson, just appointed to succeed Emmons, had agreed to reconsider the need for the Military Governor title).

"that there is a good argument to the effect that it should not be used in connection with any of our own territory."[445] Meanwhile, Governor Stainback was incensed that the Army was proliferating the number of provost courts and officers in various newly created districts throughout the Islands. He forwarded to Ickes an editorial in the *Honolulu Star-Bulletin* that complained, "[i]t would seem the Army could form at least a company, if not a regiment, out of the men that they have exercising legal authority throughout the Territory"—a situation that irritated the governor and other critics of the military regime not only because of the constitutional issue, but also because the provost courts' activities served every day to remind the Islands' population of the displacement of civilian authority.[446]

Nonetheless, the Army remained adamant on these questions of its authority to rule over civilian life and institutions in the Islands; and despite McCloy's verbal concessions, the War Department in the end supported its commanders in Honolulu, insisting that generals knew best what was important to successful

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[445] Letter from John J. McCloy to Harold Ickes (Aug. 27, 1943) (on file in the Papers of Harold Ickes, Library of Congress, Washington, D.C.). A few months later, after conferring on the martial law situation with General Richardson, apparently on instructions from General George C. Marshall, Chief of Staff, General Julius Ochs Adler spoke about the situation with both Marshall and McCloy; he then advised Richardson confidentially to "quietly drop the title, 'Military Governor,' and create a bureau for civilian affairs." Letter from General Julius Ochs Adler to General Robert C. Richardson (marked "Secret") (Oct. 1, 1943) (on file in Hawaii Military Government Records, Box 57, Record Group 338, National Archives). This was written at a time when Richardson was still engaged in the impasse with Judge Metzger concerning the contempt citation and Richardson's general orders that threatened Metzger; Adler also advised Richardson then to withdraw the offending General Orders No. 31 and proceed to a resolution of the controversy over habeas corpus on a less confrontational basis. *Id.*

General Richardson also took advantage of the influence on the press enjoyed by General Adler, while Adler was acting as an intermediary between Richardson and the War Department, to send Adler a long memorandum condemning the actions by Judge Metzger in the *Glockner* habeas proceeding and asserting the absolute necessity of military rule in the Islands; he suggested that Adler might place his memorandum in the hands of "the right editors." Letter from General Robert C. Richardson to General Julius Ochs Adler (Sept. 8, 1943) (on file in the Papers of General Robert C. Richardson, Hoover Institution Archives, Stanford, Cal.).

Adler was a member of the family that owned the *New York Times*. Hence it is not difficult to explain why ten days later Secretary Ickes found it necessary to complain to the War Department that the *Times* of September 18 had published a long article on the confrontation in the federal court in Honolulu that hewed so close in its content to the position that General Richardson had been articulating that he believed it obvious that "the article was prepared . . . if not in collaboration with the military authorities, at least with their active cooperation." Letter from Harold Ickes to John J. McCloy (on file in the Assistant Secretary of War Files (McCloy Files), Box 57, War Department Records, Record Group 107, National Archives).

[446] Letter from Ingram Stainback to Harold Ickes (Jan. 26, 1944) (on file in the Papers of Harold Ickes, Library of Congress, Washington, D.C.) (enclosing clipping from the *Honolulu Star-Bulletin*, Jan. 24, 1944).

prosecution of the war in such matters, whether the policies be merely symbolic or otherwise.[447] Not until July 1944—a full year after McCloy's first request—did General Richardson finally relinquish the title of Military Governor. Even then, he announced that the Army's apparatus for residual control of civilian affairs would continue to operate—while functions in the labor field and other areas of governance were being gradually returned to civilian authority—as the "Office of Internal Security," an agency (and its personnel, headed by General Morrison) that was indistinguishable organizationally from the Office of the Military Governor.[448] In later months, moreover, as the Army's new security office did transfer to civilian agencies various powers that had been exercised by the military since Pearl Harbor, it was done grudgingly and with many precautions to assure "recapture" of those powers whenever the Army might deem it necessary in the face of emergency conditions.[449]

A remarkable feature of the Army's wartime regime was the success with which General Richardson managed to resist so long and so effectively, in the foregoing matters of policy, the explicit instructions of the President in early 1943, at the time of the partial restoration of civilian government—instructions

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[447] Letter from John J. McCloy to Harold Ickes (Feb. 2, 1944) (on file in the Papers of Harold Ickes, Library of Congress, Washington D.C.) (stating that Richardson had never actually agreed to discontinue use of the title, and that Richardson "has felt, I believe on the advice of his lawyers, that as long as martial law existed that term [Military Governor] was necessary").

[448] Radio from General Robert Richardson to Assistant Secretary John J. McCloy (July 21, 1944) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives). Meanwhile General Richardson's legal officers, in control of continuing rule over the civilian population, were encountering disappointment in their quest to have the War Department endorse their proposal to have the powers of the Interior Department transferred to the military commander. Probably they were most surprised of all to find that General Green, now in the office of the Judge Advocate General in Washington, was among those who expressed skepticism about the idea. Letter from Eugene V. Slattery to William R. C. Morrison (July 25, 1944) (copy on file in the Hawaii Military Government Records, Record Group 338, National Archives). *But cf. infra* note 465 and accompanying text.

As to origins of the idea for a bureau of internal security, as noted *supra* note 445, Brig. General Julius Ochs Adler had suggested to General Richardson in October 1943 that Interior Department criticism of the Army might be muted if Richardson created a bureau under a different title from that of Military Government; Adler's approach was essentially adopted in the plan made effective in late 1944.

[449] *See, e.g.*, Letter from Harold Ickes to President Franklin D. Roosevelt (Aug. 5, 1944) (copy in the Assistant Secretary of War Files (McCloy Files), War Department Records, National Archives); Letter from Henry L. Stimson to Harold Smith (not dated but marked Aug. 17, 1944) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (indicating, in addition, that the Army was particularly reluctant to cede a meaningful measure of control over labor exclusively to civilian agencies, as it feared the effect of absenteeism on logistic operations).

that required further transfers of authority from the military to the civilian government as conditions permitted.[450] The key, of course, is that it was largely left to the Army itself to decide when conditions permitted transfers of power. How intransigent Richardson's command could become, even in the face of explicit decisions by civilian superiors, was illustrated vividly in the specific matter of Army control over labor in Hawai'i—an area of policy which, in Richardson's view, was of vital importance for the effectiveness of his logistic operations. Although McCloy conveyed to the Hawai'i headquarters in June 1944 news that Secretary of War Stimson had come to a decision that military authority over labor was no longer necessary, and should be transferred to civilian agencies, it was not until more than four months later that Richardson complied.[451]

Attorney General Biddle recalled in his memoirs (in connection with his criticism of the mass internments on the mainland) that Roosevelt "was never theoretical about things" and acted pragmatically on matters affecting conduct of the war: "What must be done to defend the country must be done. The decision was for his Secretary of War . . . . The military might be wrong. But they were fighting the war."[452] Not troubled by civil liberties questions, Roosevelt thought, "if anything . . . that rights should yield to the necessities of war. Rights came after victory, not before."[453] The attitude of the President himself is also relevant to an explanation of why it was a long and torturous road for the critics of martial law—including so many at the highest level in the Roosevelt administration—to get the Army to relinquish its authority over civilian affairs in Hawai'i. It will be recalled that Roosevelt at the start of the war had personally directed an evacuation of the Japanese-American population of Oahu; and in early 1943, he had instructed the War Department to transfer General Green out of Hawai'i and to conclude the agreement that resulted in the Restoration of March 1943.[454] Otherwise, Roosevelt seems to have remained aloof from the controversies that raged within his Cabinet—at least until press criticism and evidence of rising concern in Congress caught his attention.[455] Besides, Cabinet members (including even Ickes, whose ire over

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[450] *See supra* notes 246-47 and accompanying text. The complete lack of progress on any further transfer of authority to the civilian government is documented in Anthony Report, *supra* note 26.

[451] Radio from Assistant Secretary John J. McCloy to General Robert Richardson (June 27, 1944) (copy on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (Radio No. 56672).

[452] BIDDLE, IN BRIEF AUTHORITY, *supra* note 244, at 219.

[453] *Id.*

[454] *See supra* notes 42 and 246-47 and accompanying text.

[455] At one point, Roosevelt's closest adviser in the White House, Harry Hopkins, sent to the War Department what seems on reflection to have been a clear signal that the President was not deeply concerned about the civil liberties issues in the Islands. Letter from Harry Hopkins to

the Army's operation in Hawai'i was hardly diminished in 1944) were increasingly sensitive about the need to protect the President from unnecessary aggravation and concern with administrative policies at a time when the wartime summit conferences, large issues of strategy, and domestic politics were preoccupying him and (as many feared) taking a toll on his health.[456] FDR's personal attitude consistently seemed to be one of relative indifference, so long as there were no high political costs to be paid—and, above all, so long as the naval and military operations supplying the Pacific war out of the Hawai'i port operations continued to operate smoothly.

The President showed a renewed interest, however, in giving firmer personal direction to the Hawai'i situation when he traveled to Oahu in July 1944 on a mission to confer with his top Army and Navy commanders in the Pacific theater in order to plan the final campaign against Japan. The President took this occasion to discuss briefly the question of Army rule in Hawai'i with General Richardson, who told the President that he and his staff were hard at work on drafting a new executive order—one that would embody an approach to termination of martial law for which Richardson disingenuously took full credit, and which, in Richardson's words, "would give me as military commander all the necessary powers to ensure security."[457] Remarking upon the prospect of getting the President to sign this "decree which I would like to have as a substitute for martial law," an obviously ebullient Richardson reported to the War Department that the President had "agreed that *a rose by any other name smells as sweet.*"[458]

John J. McCloy (Oct. 20, 1942) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) ("I don't want you to think that I am proposing any change in military control.").

[456] Ickes, as was noted earlier, did introduce the issue repeatedly in Cabinet meetings, but even he explained that a prime motive in yielding on some important points in the December 1942-January 1943 negotiations was to protect the President's time and energy. Letter from Harold Ickes to Henry Stimson (Jan. 27, 1943) (copy on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives). *See also supra* note 175 and accompanying text. By early August, however, Ickes had lost faith in the Army's willingness ever to surrender its labor control authority or to restore the right to a writ of habeas corpus, and so once again he appealed to the President directly to terminate the military regime and restore the writ. Letter from Harold Ickes to Franklin D. Roosevelt (Aug. 5, 1944) (copy in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[457] Letter from General Robert Richardson to Assistant Secretary John J. McCloy (Aug. 1, 1944) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[458] Letter from General Robert Richardson to Assistant Secretary John J. McCloy (Aug. 8, 1944) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (emphasis added).

One can easily picture Roosevelt thus reassuring his commander and waving off the problem with his trademark smile, while, however, at the same time deciding that the issue needed further investigation. This speculative version of what happened is given considerable support from the events that immediately followed: Before departing Hawai'i, the President instructed one of his most trusted advisers, Judge Samuel Rosenman, to stay on and obtain a first-hand reading on the conflicts that had surrounded the restoration issue and the prospective termination of martial law.[459]

Rosenman met first with Stainback, who predictably presented at length the argument for immediate termination of military rule. The governor also turned over a copy of a report recently prepared by Territorial Attorney General Tavares that deplored "the needless invasion of the civil liberties of our people"[460] and that also catalogued additional reasons for urgency: a general malaise and decline in civilian morale, a constitutional suit being planned by the labor unions to seek a judicial judgment against continued Army labor control, and, not least important, the tenuous legal position in which law enforcement was left by the series of five U.S. District Court decisions in Honolulu that had held judgments of the provost courts and/or martial law itself invalid.[461] Stainback also gave Rosenman a copy of a letter he had just written to Secretary Ickes declaring that the widely-circulated *Chicago Tribune* attack on martial law "is only the opening gun," in a presidential election year, of what might become a devastating Republican attack on the White House using Hawai'i "as an example of the dangers to liberty with the continuation of the President in office."[462]

Subsequently, Rosenman conferred privately with General Richardson, who gave him a very different account of both the objective situation and the prescribed solutions. The General had the advantage over Stainback, or probably thought so, since he had been able to speak privately with President Roosevelt whereas Stainback had not. Richardson had told FDR, and presumably now told Rosenman, "that it was the name 'martial law,' rather than any power exercised under it, that was annoying to a certain group of civilians"—thus implying that no substantive policies were really at issue; any

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[459] The mission assigned to Rosenman is evident from the conferences reported and the correspondence in the Hawaii file, Samuel Rosenman Papers, Franklin D. Roosevelt Library, Hyde Park, N.Y.

[460] Attorney General Report, *supra* note 419 (quoting Garner Anthony's earlier report).

[461] *Id.*

[462] Memorandum from Governor Ingram Stainback, "Desirability of Terminating Martial Law and the Suspension of the Privilege of the Writ of Habeas Corpus by Executive Proclamation" (not dated but July 1944 as determined by internal evidence) (on file in the Papers of Samuel Rosenman, Franklin D. Roosevelt Library, Hyde Park, N.Y.). On the *Chicago Daily Tribune* editorial, *see supra* notes 436-38 and accompanying text.

controversies stemmed not from a deprivation of civil liberties or a flawed and arbitrary justice system, but rather mere annoyance on the part of Stainback and his circle.[463] Uneasy that Rosenman had received a document from Stainback that he himself had not seen, Richardson said he "felt it necessary to fortify" Rosenman with a clear statement of his position on the hierarchy of authority: "I am absolutely and irrevocably opposed," the General declared, "to being placed in a position where the successful execution of my mission is dependent upon Governor Stainback or any of his subordinates."[464]

As he had done with the President, Richardson also sought to convey to Rosenman that the impetus for termination of martial law and return of significant power to the civilian government was originating from himself and his command's legal advisers.[465] This was an account of the facts entirely inconsistent with all the surviving evidence that the present authors have found—including evidence that as recently as a week earlier, the War Department and Judge Advocate General lawyers were still seriously considering Richardson's earlier proposal that the President issue an emergency order transferring all of the Interior's authority in Hawai'i to the War Department for the duration of the war![466] It must have been gratifying indeed to Richardson that the President, as he reported to his superiors in Washington, "praised *our initiative*."[467]

Even in dealing with the War Department itself, Richardson pursued further his campaign to establish that the ideas for terminating martial law came from him and his staff, expressing, for example, his gratification that "the integrated labor program which was initiated in my office meets with your approval and

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[463] Letter from General Robert Richardson to Assistant Secretary John J. McCloy (Aug. 1, 1944) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[464] *Id.*

[465] *Id.* See the account of the negotiations in Letter from Harold Ickes to President Franklin D. Roosevelt (Aug. 5, 1944) (copy on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[466] Letter from Eugene V. Slattery to William R. C. Morrison (July 25, 1944) (on file in the Hawaii Military Government Records, Record Group 338, National Archives). Morrison was Green's successor in Hawai'i as the Executive for military government, and Slattery was his top aide, then back in Washington attending talks with the War Department officials and Judge Advocate General lawyers. Slattery's letter reported that as the proposed draft executive order then stood, the provision for transfer of Hawai'i from Interior to War still remained though General Green and Colonel Hughes (both in the office of the Judge Advocate General) had not yet committed themselves to it entirely. Slattery stated further: "Colonel Hughes feels that maybe at a later date [in negotiations with Interior and Justice] we might again insert it in the [draft] order for the sake of bargaining and to excite the Department of Interior a little." *Id.*

[467] Letter from General Robert Richardson to Assistant Secretary John J. McCloy (Aug. 8, 1944) (copy on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (emphasis added).

that of the Navy."[468] He also tried to persuade McCloy to press for possible agreement on the proposed order so that it could be sent to the White House for approval and a proclamation: "Immediate action is urged," Richardson said, "as the Army should receive credit for initiating steps to abolish martial law and for proposing the security executive order regardless of the outcome of the Habeas Corpus cases," i.e., the *Duncan* and *White* appeals.[469] And indeed when termination did come in late October 1944, *Hawaii*, a news magazine that associated itself consistently with the Army line on every major policy issue, declared the end of martial law to be "the fruit of nearly two years constant effort and negotiation, instigated by the military."[470]

That the termination of martial law (on whatever terms were finally decided) was by this time a highly salient element in War Department thinking about the habeas cases and their appeal became evident in the internal discussions of McCloy and his legal staff as well. Thus, the top Judge Advocate General staff officers, including General Green, were said to be worried that "termination of martial law prior to the decisions in these cases . . . [in] the Ninth Circuit . . . might prejudice the decisions in these cases and that the Army might lose face in the community by such action."[471]

Clearly, any line that may have existed demarcating a concern with law from the politics of bureaucratic turf claims, the tactics of litigation in habeas corpus cases, and plain individual face-saving was, by now, almost indiscernible in the War Department correspondence and in the Army cables from Hawai'i.[472] So far had the Judge Advocate General officers became interested in micromanaging the situation after issue of the new executive order that one of

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[468] *Id.*

[469] Radio from General Robert Richardson to Assistant Secretary John J. McCloy (Aug. 13, 1944) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (Radio No. R25730). Of course, Richardson wanted the executive order to incorporate no language that cast doubt upon the hierarchy of authority during wartime conditions. Ironically, a month earlier Under Secretary Fortas had put McCloy on notice that he would advise Ickes to ask FDR for an immediate executive order (on terms favorable to full restoration of civilian powers on the same basis, and with the same emergency restrictions, as on the mainland, rather than on the War Department's terms) because the Army had shown no signs of accepting a real end to martial law. Memorandum from Abe Fortas to Harold Ickes (July 19, 1944) (on file in the Papers of Harold Ickes, Library of Congress, Washington, D.C.).

[470] *No Cause for Jubilation*, HAWAII: A MAGAZINE OF NEWS AND COMMENT, Oct. 17-31, 1944, at 7.

[471] Letter from Colonel Eugene V. Slattery to General William R. C. Morrison (July 25, 1944) (on file in the Hawaii Military Government Records, Box 54, Record Group 338, National Archives).

[472] *See, e.g.*, Memorandum from Colonel William J. Hughes to Colonel Harrison Gerhardt (Aug. 31, 1944) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

the senior Army lawyers, Colonel Hughes, proposed that if significant jurisdiction were to be returned to the civil courts, the President should be asked to send a confidential letter to the two district judges in Hawai'i. This letter, Hughes said:

> [should] in effect say to the civil courts, 'I will give you a chance to operate without martial law, but if you don't rise to the occasion, martial law will be re-instituted.' It is readily possible that upon receipt of such a letter the two judges would take on the new cases as a patriotic duty and might operate very efficiently.[473]

The implication was clear that "efficient" operation of the district courts, in Hughes' view, required Judges Metzger and McLaughlin to defer more reliably to the Army's judgment on security matters than they had been prone to do of late.

The Army lawyers had also begun to focus very intensely on the frightening prospect of civil liability suits in the event that all the legal loose ends were not tied up carefully in the formal actions that would be taken to terminate martial law. The Justice Department and the Interior lawyers had argued consistently for more than a year that the termination proclamation should be issued by Governor Stainback, since under the Organic Act only he had the authority to declare martial law in the first place; in response, as we have seen, the Army had maintained that all authority over martial law and its termination had passed to the military, leaving Stainback without jurisdiction in the matter.[474] Now, as it became clear that the President was soon going to take action, the Army lawyers began to argue the urgency of having Roosevelt himself proclaim the termination. If the President himself issued the proclamation, the Judge Advocate General's office advised,

> it inferentially makes the President legally responsible for martial law from Pearl Harbor day to date. As many of Governor Stainback's supporters are threatening enormous civil suits for false imprisonment against General Richardson and

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[473] *Id.*

[474] The disagreement remained unresolved even at the end of August. Thus Under Secretary of Interior Fortas contended that "termination should be handled in the same way as the original proclamation," which was issued by the then-governor, Poindexter: "What we were going to do was send it over to him [the President] for approval," but it would be "Stainback's proclamation." The conversation ended with discussion of the alternative of having Stainback and the President simultaneously issue orders for termination of martial law. Telephone Conversation between Colonel Harrison A. Gerhardt and Deputy Secretary of the Interior Abe Fortas (Aug. 31, 1944) (transcript available in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

> others, it might be of some value later on to be able to plead *respondeat superior* and to have the proof on record.[475]

The bureaucratic brew was stirred even more vigorously when the Department of the Navy weighed in to urge, for its own reasons, that the President, and not the Secretary of War, issue the termination order; this would assure that the Navy's prerogatives under the principle of "unity of command" would not be interpreted as abridged in the military area to be announced for Hawai'i. It was evident that the imperatives of bureaucratic turf claims still had ample energy behind them.[476]

Meanwhile, Secretary Ickes' outrage with regard to the continued violation of constitutional liberties in Hawai'i remained unabated. He now also had in hand, and very much in mind, the evidence of intensifying newspaper editorial criticism of the Hawai'i martial law policy around the nation—and especially the notorious *Chicago Tribune* blast. Ickes thus abandoned hope that the negotiations would come to anything, and instead decided to approach the White House directly for action. He no longer had the slightest confidence, he told the President, that the Army and the War Department negotiator were

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[475] Memorandum from Colonel William J. Hughes, Jr. to Assistant Secretary John J. McCloy (Aug. 1, 1944) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (document enclosed with Letter from Secretary Harold Ickes to President Franklin D. Roosevelt (Aug. 5, 1944)). Hughes' proposal was incorporated into an undated (ca. Aug. 15, 1944) proposed War Department draft for the Executive Order. Memorandum from General Myron Cramer to John J. McCloy (not dated but about Aug. 15, 1944) (copy on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives). Protecting Army officers from civil suits was explicitly presented, in language substantially drawn verbatim from Hughes' memorandum of Aug. 1, 1944, *supra*, in the penultimate draft of the termination order that was sent by then-Acting Secretary of War McCloy to Richardson for the latter's review. Radio from Assistant Secretary John J. McCloy to General Robert Richardson (Sept. 8, 1944) (on file in the Hawaii Military Government Records, Box 54, Record Group 338, National Archives) (Radio No. 27428).

After the war, General Green used precisely this respondeat superior defense in his public statements on martial law in Hawai'i. For example, in an address, "The Dilemma of a General," Green declared: "[Governor Poindexter] of his own accord and in the smoke of battle declared martial law. A certain radio commentator [Fulton Lewis Jr.] has recently attempted to convey the impression that the Governor signed the proclamation with an Army pistol at his head .... The Army had nothing [sic] to do with martial law in Hawaii except as the agency of the President, and, I might also add, the agency of the civil government of Hawaii." A transcript of this undated speech by General Green is on file in Box 16 of the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.

[476] Letter from General Myron C. Cramer to Assistant Secretary John J. McCloy (Aug. 25, 1944) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives); Telephone Conversation between Harrison Gerhardt and William Hughes (Aug. 25, 1944) (transcript, on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

interested in anything except cosmetic changes.[477] (The phrase "a rose by any other name"[478] comes to mind). So Ickes now called upon FDR to terminate immediately the military regime in the Islands, to order the writ of habeas corpus restored, and to announce to all departments involved that "there seems to be, from my personal inspection, complete law and order in Hawaii"—but also advising, in his announcement, that "civil officers there must lean over backward to carry out reasonable recommendations by the military and naval commanders."[479] A declaration that Hawai'i was a military area, under terms of the executive orders and congressional legislation that had been applied on the mainland, was more than enough, Ickes contended, to assure that security would be maintained properly in the Islands while restoring to citizens of the Territory their full rights.[480]

On October 24, 1944, the President finally did issue the executive order for termination of martial law, also returning nearly all criminal jurisdiction to the civilian courts; and on the same date, the Army and Governor Stainback also issued identical proclamations to the same effect.[481] Nevertheless, disputes continued to rage over implementation.[482] First, matters of nomenclature continued to bedevil the relations between the military and Stainback's administration. Thus the governor, seconded strongly by Under Secretary of the Interior Fortas, raised objections to the stratagem by which General Richardson was now issuing orders under the self-proclaimed title "Military Commander of the Territory"—a title that his critics found no less offensive than the former title of "Military Governor."[483] Even McCloy wondered why simply using his title of "Military Commander" did not lend ample dignity and authority to Richardson's pronouncements. Whatever the merits of the question, this little sideshow inflamed further the relations between the Governor's office and the Army command. "I have never known such a petty man nor one so insincere," Richardson complained of Stainback; he also derided "the continued sniping by the Department of the Interior at our sincere

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[477] Letter from Secretary Harold Ickes to President Franklin D. Roosevelt (Aug. 5, 1944) (on file in the Assistant Secretary of War Files (McCloy Files), War Department Records, National Archives).

[478] *See supra* text accompanying note 458.

[479] *Id.* (proposed language offered by Ickes).

[480] *Id.*

[481] Presidential Proclamation 2627 and proclamations by Governor Stainback and General Richardson, all dated Oct. 24, 1944. Copies of all three proclamations are in the Hawai'i War Records Depository, Hamilton Library, University of Hawai'i.

[482] *See* ANTHONY, ARMY RULE, *supra* note 3, at 103 (regarding the termination of martial law).

[483] Letter from Abe Fortas to John J. McCloy (Nov. 16, 1944) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

efforts to do a good job."[484] Hoping to put the matter to rest, McCloy finally informed the Interior Department that the designation "Office of Internal Security" would be used thenceforth—a terminology that "tends to disavow any warlike intent or jurisdictionitis"—and that he had complete faith that Richardson would keep guard against any actions by his staff that exceeded their newly circumscribed authority.[485]

Of more substantial importance was rising civilian criticism of the continued curfew in the Islands, which, as Garner Anthony and other critics had long maintained, no longer served a valid security function.[486] Not until July 1945 did General Richardson yield to such criticism, telling a press conference that he had himself personally "felt that way for months" but he had decided to consult the Honolulu Chamber of Commerce, and then was convinced that the curfew policy should not be lifted despite his personal views.[487] This is the only important instance in any archival or public record, at least that we have examined, in which General Richardson deferred to civilian opinion from any source on the type of security matter which the Army, in court and before the public, insisted was exclusively within its own competency and jurisdiction. One can presume that he consulted the Chamber of Commerce because its leadership had been undeviatingly supportive of the Army's wishes in all matters relating to martial law; and so Richardson could be quite certain of obtaining the answer he wanted when he asked for their advice.[488]

Turmoil within the Roosevelt administration's highest circles broke out again when one of Richardson's first special security orders after the termination banned the possession of firearms by citizens of German or Italian descent, and by naturalized citizens who were once German or Italian nationals, as well as

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[484] Letter from General Robert Richardson to John J. McCloy (Dec. 2, 1944) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[485] Letter from John J. McCloy to Abe Fortas (Dec. 11, 1944) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives). The term "jurisdictionitis" had been used in Fortas's letter of Nov. 16, in which Fortas warned: "Just as soon as the commanding General assumes another title which has civil connotations, and just a soon as he sets up a separate staff to perform the civil functions vested in him, his aides begin to get jurisdictionitis and conflicts begin to appear between the military and the civilian authorities." Letter from Abe Fortas to John J. McCloy (Nov. 16, 1944) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[486] *See* ANTHONY, ARMY RULE, *supra* note 3, at 103-04, *passim*; *see also* ALLEN, WAR YEARS, *supra* note 13.

[487] *Curfew Not Needed*, HONOLULU STAR-BULLETIN, July 2, 1945, at 1.

[488] Anthony Oral History Interview, *supra* note 361; ANTHONY, ARMY RULE, *supra* note 3, at 28-30, 103.

by all Japanese-Americans.[489] After the Attorney General had raised the issue with him, Fortas urged Secretary Ickes to protest the order by writing to Stimson, and he suggested the following language: "Discrimination based solely upon nationality was bad enough in the case of persons of Japanese ancestry," but to extend discrimination still further in this way was "intolerable" and in no way justified by security concerns.[490] Fortas's draft letter continued (in language that Ickes approved and apparently adopted in writing to Stimson) with a denunciation of racism as evidenced in the Army's record throughout the war, not sparing from the indictment the military's internment policy imposed on the West Coast:

> In fact, [the order] indicates clearly that the virus of racial discrimination cannot be confined to the victimization of one class or group. Your officers in Hawaii and on the West coast started with the Japanese. Your officers in Hawaii have now expanded their prejudices to embrace American citizens whose sole distinction is that they are of German or Italian descent.
>
> I cannot believe that this regulation, which is founded on a theory indistinguishable from the Nazi philosophy of contamination by race and ancestry, was adopted with your approval or that of Assistant Secretary McCloy. I hope that you will carefully consider this matter and that you will not only cause this regulation to be rescinded but that you will make an effort to ascertain whether the officers who are responsible for it are not so imbued with undemocratic prejudices that they should be transferred to duties in which their prejudices will have less opportunity to inflict injury upon American principles.[491]

There were yet other serious, persisting problems. General Green's successor as Executive, Colonel William Morrison, and his assistant, Major E. V. Slatterly, ran the Army's administrative and provost court operations affecting civilian affairs from the time of Green's departure in mid-1943 until the war's end. Protégés of Green, they were promoted to the rank of general officers and then kept in their posts even after the war at Richardson's request and with Green's intervention. Both men became prominent targets of criticism for their personal and official styles in conducting their duties. An investigation conducted confidentially by a Justice Department expert on martial law, at the War Department's behest, came down hard on the record these two officers had made. Morrison in particular was the subject of a blistering critique: He was faulted for arbitrariness and arrogance; he was "discourteous to civilians, and

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[489] Reference is to Security Order No. 4 in December 1944, quoted in letter drafted by Abe Fortas for Harold Ickes to Henry Stimson (undated, but attached to note dated Dec. 15, 1944) (copy on file in Under Secretary Files (Fortas Files), U.S Department of the Interior Records, Record Group 48, National Archives).

[490] *Id.*

[491] *Id.*

discourteous to military men"; he attempted to keep the Army's own historians out of his files, in what the investigator termed an outright "cover-up of his activities"; he gave the commanding general incompetent legal advice, in particular with regard to the confrontation with Judge Metzger and General Orders No. 31; and deficiencies of personal character were revealed in such incidents as when he "went around trying to get Garner Anthony's clients to boycott their lawyer."[492] If Congress ever undertook a full-scale public investigation of these activities as well as those of the Executive and the provost courts during General Green's regime in Hawai'i, the Justice Department report warned, "it will be a twenty-five year setback for the Army."[493]

In fact, the extension of their commissions and Hawai'i assignment were arranged for Slatterly and Morrison specifically, and apparently solely, so that they could assist in preparing a legal defense against the rash of civil liability suits that the Army anticipated it would face in the event it lost the *Duncan* and *White* appeals.[494] At the time, the behavior of the Army lawyer-administrators, consistently supported and promoted by General Richardson, simply gave further reason for concern to those who were carrying responsibility for defending the Army in the appeals going forward in the habeas corpus cases.

F. The Ninth Circuit Decision

It was thus in a highly unstable political and legal context that the Supreme Court, to the Army's dismay, declined to accept direct review of the *Duncan* and *White* cases. The appeals were heard in the Ninth Circuit, which in November 1944 reversed the district court.[495] The Ninth Circuit majority opinion not only upheld in sweeping terms the military's authority to punish a criminal defendant who had attacked a sentry or military policeman,[496] but also approved the extension of military authority under martial law to embrace ordinary civil cases such as the case of White, the stockbroker who had embezzled.[497] The majority also endorsed explicitly the Army's argument that

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[492] Wiener Report, *supra* note 123. On General Orders No. 31 and the Metzger-Richardson confrontation, *see supra* notes 321-46 and accompanying text.

[493] Wiener Report, *supra* note 123.

[494] Wiener Report, *supra* note 123; Memorandum from General Richardson to Major General George F. Moore, "Re: Personnel in Office of Civil Affairs" (Mar. 14, 1946) and Memorandum from General Richardson to the Secretary of War (May 3, 1946) (both documents on file in Box 19, Papers of General Robert C. Richardson, Jr., Hoover Institution Archives, Stanford, Cal.).

[495] *Ex parte* Duncan, 146 F.2d 576 (9th Cir. 1944), *rev'd sub nom.*, Duncan v. Kahanamoku, 327 U.S. 304 (1946).

[496] *Id.* at 583-84.

[497] *Id.* at 581.

the continued presence in Hawai'i of Japanese-Americans "of doubtful loyalty" in alarming (if unspecified) numbers warranted the extraordinary and extended suspension of constitutional liberties for all civilians there.[498] That the civilian courts "were disabled from functioning," the majority stated, made military trials necessary in August 1942 and no less so in March 1944.[499] (That the courts were "disabled" only because the Army had decided to disable them—as counsel for White and Duncan had pleaded—was a point on which the court did not discourse!)

Two concurring opinions were filed. One addressed the narrower matter of whether the President had approved the abdication of civilian authority by Governor Poindexter in December 1941—a point that would be contended in the Supreme Court's majority opinion, on appeal—and also found that Roosevelt's letter of February 1, 1943, authorizing the War Department to partially restore civilian rule, implicitly continued martial law in areas not conceded to the civilian authorities.[500] The concurring opinion declared:

> We hold that in view of the existence of a global war in which this nation is involved, and from the facts shown in evidence [by military and naval authorities] in the court below, the courts cannot say the decision of the military authorities or of the Governor of Hawaii to continue such suspension [of the habeas privilege] is so arbitrary, capricious or fraudulent as to justify the courts in ignoring the action of the military authorities . . . .[501]

In the original hearing on White's petition in the district court, Judge McLaughlin had declared that the legitimate reach of Army authority under martial law must be understood according to the *Milligan* doctrine, that is, that "the necessity is determined upon and in relation to the then existing facts."[502] In Judge McLaughlin's view, the evaluation of the "then existing facts" was in the last analysis, as *Milligan* required, always a matter for judicial determination. For the Army to say "it was necessary to give [White] a military trial does not make it so . . . . Necessity cannot be manufactured even by General Orders. It must be real, not artificial."[503] The Ninth Circuit took an entirely different view on this important point of law, ruling that the military itself had the authority to determine the extent of danger and the measures

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[498] *Id.* at 580.

[499] *Id.* at 581.

[500] *Id.* at 586 (Wilbur, J., concurring). Moreover, Governor Stainback's own proclamation announcing partial restoration was quoted in the concurring opinion, in which Stainback declared that "it was agreed that martial law should be continued" but with partial restoration of authority to the civilian government. *Id.*

[501] *Id.* at 589 (Wilbur, J., concurring).

[502] *Ex parte* White, 66 F. Supp. 982, 988 (D. Haw. 1944).

[503] *Id.*

required to protect the "fortress" and its population.[504] In this manner, then, the ground was marked out for the Supreme Court to rule on a question of central importance to the cases.

A dissenting opinion by Judge Stephens, who stated that the military had exceeded its authority, was distributed to the court; but at Stephens' request the opinion was withheld from publication until 1946. One may speculate that Stephens held back from releasing his dissent because of ill feeling on the Ninth Circuit bench that had been directed against one of his fellow judges, William Denman, when the latter had written a heated protest against what he regarded as the offhand way in which the court had treated a Japanese-American appellant seeking release from an internment camp.[505] In any event, when Judge Stephens did finally release his dissenting opinion in the *Duncan* appeal, he explained that he had suppressed the document because he had feared in 1944 that open dissent "had more possibility of harm than of good" with the war still waging.[506]

V. APPEAL TO THE SUPREME COURT

> I thought martial law was entirely wrong in Hawaii after the first year. I went out there and defended General Richardson and Admiral Nimitz, and took those cases up to the United States Supreme Court and argued them, and lost them, I am glad to say. I thought they were wrong at the time.
>
> —Edward Ennis[507]

Although the Justice Department's trial attorneys continued to believe that the provost courts and internments were unconstitutional, and that the Army deserved to lose on any further appeal, they and the Army lawyers decided to take the cases to the U.S. Supreme Court.[508] Unlike in earlier years, when the Army had mooted cases and freed internees and convicted prisoners rather than risk an adverse decision on appeal to the Supreme Court, the military lawyers

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[504] *Duncan*, 146 F.2d at 580.

[505] This was in the *Endo* case on appeal. *See infra* notes 529-41. Peter Irons discusses this incident and the Ninth Circuit majority's decision to block publication of the dissent, in IRONS, JUSTICE AT WAR, *supra* note 9, at 182-85.

[506] *Duncan*, 153 F.2d at 943 (Stephens, J., dissenting). *See* Anthony, *Hawaiian Martial Law*, *supra* note 21, at 53 (criticizing the course that Stephens took in withholding publication).

[507] Ennis Interview, *supra* note 391.

[508] The following summaries and analysis of the arguments before the Court by counsel for Duncan, *amici*, and the government follow closely from our discussion, in Scheiber and Scheiber, *supra* note 6, at 374-76; Anthony, *Hawaiian Martial Law*, *supra* note 21, at 36-52. Some of the analysis here is, however, based on materials that reveal some of the Court's internal deliberations prior to decision, a topic not touched in our earlier study nor by any other author to date.

now sought an early ruling from the high court while fighting in the Pacific was still going on. For after the war was over, the Army command officers still were convinced, the Justices would have a much more critical view than in a wartime setting of so comprehensive a suspension of civil liberties.[509] The Justice Department lawyers ascertained that the civilian officials—Governor Stainback, the territorial attorney general, and the two federal district judges in Honolulu—all remained consistent in their eagerness, for reasons different from the Army's, to have the case go up for final judgment as soon as feasible.[510] Meanwhile the Army legal staff sought unsuccessfully to obtain an extraordinary procedural measure from the Supreme Court—either a "writ of prohibition" by which the federal trial judges in Honolulu would be restrained temporarily from freeing any Army prisoners (then including a few Japanese internees who had allegedly expressed openly disloyal sentiments before prison interviewers), or else an informal directive that would accomplish the same purpose.[511]

Edward Ennis, who believed that "martial law was entirely wrong in Hawaii after the first year,"[512] and who revealed that view fully to the Army,[513] played a key role in preparing the briefs in both the *Duncan* and the *White* appeals. This was consistent with the role that Ennis had played in the *Endo* Japanese-American case in 1944, when he had opposed mooting the appeal by releasing Ms. Endo from the relocation center where she was being held. To moot the case, he had then contended, would deprive the Justice Department of the opportunity to obtain a definitive ruling on a crucial civil liberties issue—but he also had in mind the relationship to "the present [January 1944] *probably unconstitutional suspension of habeas corpus in Hawaii.*"[514] Were the case to be mooted, he feared, the Justice Department could do nothing to see the interests of the law advanced: "The only way left to this Department to deal with the Japanese [internees] problem effectively," he reminded the Solicitor General, "is on its own ground, in the courts."[515] In a case such as this—in

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[509] *See supra* note 380 and accompanying text.

[510] Letter from Edward Ennis to Charles Fahy (Apr. 13, 1944) (on file in the Attorney Records, Criminal Files, Record Group 118, National Archives, Sierra and Pacific Regional Branch, San Bruno, Cal.). *See also Justice Departments Seek Martial Law Tests*, HONOLULU STAR-BULLETIN, May 2, 1944.

[511] Radio from General R. C. Morrison (for General Richardson) to General Myron Cramer and Assistant Secretary John J. McCloy (Apr. 24, 1944) (on file in the Papers of General Robert C. Richardson, Jr., Box 22, Hoover Institution Archives, Stanford, Cal.) (Radio No. RJ 17077).

[512] Ennis Interview, *supra* note 391.

[513] *Id.*

[514] Memorandum from Edward Ennis to the Solicitor General (Jan. 21, 1944) (on file in the Papers of Charles Fahy, Box 37, Franklin D. Roosevelt Library, Hyde Park, N.Y.) (emphasis added).

[515] *Id.*

which the Army and the internment camp administrators had plainly violated a citizen's rights—the Justice Department could "merely . . . present the relevant considerations" to the Court and not make an unqualified argument for constitutionality.[516] For Ennis, then, the *Duncan* and *White* cases—and the entire pattern of the Army's policies in Hawai'i—presented much the same kind of opportunity: the appeal gave the Supreme Court an opportunity to establish correct precedent and strike a blow for constitutional liberties.[517]

The timing of the *Duncan* and *White* appeals worked against the Army, as it turned out, since the Supreme Court did not hear argument until December 7, 1945—four months after Japan's surrender, and, of course, the fourth anniversary, to the day, of the Pearl Harbor attack. This was also more than a year after the President had formally terminated martial law and restored the privilege of the writ of habeas corpus in Hawai'i. At issue in the arguments before the Court were the key questions that had been debated before Judges Metzger and McLaughlin in Honolulu: (1) whether the federal statutes in any way authorized trials of civilians by military courts when civilian courts could be opened and functioning; (2) whether the federal courts retained any authority to review a determination by the commander that "necessity" required suspension of civil liberties; and, finally, (3) whether, if such extraordinary military authority was ever proper, it could be continued until 1944 in a territory far removed from the actual combat zones. Because such extensive testimony had been given by Richardson, Admiral Nimitz and Governor Stainback in the district courts, the Justices had the full argument spread before them on the record with respect to the vexed issue of "military necessity" and the relevant facts—the degree to which the Japanese-American population was potentially dangerous, the likelihood of invasion (however defined), the relevance of the operation of civilian government as it actually functioned under various phases of martial law, and, withal, the degree to which progress of the American military and naval forces against Japan affected the legitimacy of continued Army rule. All four opinions that finally came down—those of Justice Black for the majority, the Chief Justice and Justice Murphy in concurring opinions, and Justice Burton for himself and Justice Frankfurter in a vigorous dissent—would refer explicitly to that record of testimony in the district court.

Duncan's counsel, Garner Anthony, argued that even if martial law itself were sustainable on constitutional grounds, it could not be extended to include the arbitrary closing of civilian courts or the extension of the military tribunals' jurisdiction over civilians for such crimes as embezzlement or simple assault.

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[516] *Id.*

[517] Ennis Interview, *supra* note 391 (saying he hoped the cases would lose in the Supreme Court).

Anthony contended that one must come back to the *Milligan* criteria for validation of martial law; and he quoted that decision to the effect that even if habeas corpus were properly denied, the Constitution does not permit the Army to order a citizen so denied to be tried "otherwise than by the course of common law."[518] In any event, nothing in the statute authorizing suspension of the writ, he contended, could be construed as authorizing the Army "to prescribe new crimes or offenses, or to create 'courts' or 'tribunals' to try offenses."[519] Imploring the Court to overturn the Ninth Circuit ruling, Anthony characterized the Ninth Circuit as having held "in effect . . . that the will of the commander, not the Constitution and laws of the United States, is the supreme law of the land."[520] He asked the Court at a minimum to uphold the civilian citizen's right to judicial review or to issuance of a writ after being convicted by a provost court "for an offense of the class constitutionally triable only by jury."[521]

In preparing his brief, it is interesting to note, Anthony was given office space in the Department of Interior and worked closely with John P. Frank and others in that department's legal staff. He was also given access to much of the Interior's internal archives, including its correspondence with the War Department. Hence Anthony's appearance for oral argument was the culmination of an unusual scenario in which the legal talents of one department of government were mobilized to help a party pursue his case against another department.[522]

In an amicus brief filed on behalf of the petitioners, the Bar Association of Hawaii and Nils Tavares, territorial attorney general, similarly called upon the Court to rule that the existence of martial law could not itself be cited as ample reason for closing the courts and subjecting civilian justice "to the will of the military commander."[523] Another amicus brief, by the American Civil Liberties Union, signed by seven of the nation's most distinguished constitutional lawyers, emphasized the fact that more than two years had elapsed, prior to the arrest and conviction of Duncan, "during which no attempt had been made to get Congress to authorize military trials of any kind." This, the argument

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[518] Brief for Petitioner at 39-40, Duncan v. Kahanamoku, 327 U.S. 304 (1946) (Nos. 14, 15).

[519] *Id.*

[520] *Id.* The remaining paragraphs of this section follow closely from Scheiber and Scheiber, *supra* note 6, at 376-78.

[521] Brief for Petitioner at 45, Duncan v. Kahanamoku, 327 U.S. 304 (1946) (Nos. 14, 15).

[522] Frank Interview, *supra* note 394. *See also* Interview with Warner W. Gardner (interviewed by Prof. Laura Kalman) (excerpts from interview provided to authors by Prof. Kalman) (Gardner recalls that Anthony was given full access to the Interior files).

[523] Brief for the Bar Association of Hawaii at 11, Duncan v. Kahanamoku, 327 U.S. 304 (1946) (Nos. 14, 15).

concluded, "show[ed] the absence of any real necessity for such trials" so long after the true emergency following the Pearl Harbor attack.[524]

The government's brief, led by the Solicitor General and by Ennis, contended that an ample legislative basis for imposition of martial law had been provided by the Organic Act, Section 67. Going beyond the terms of the statute, the argument went on to invoke "the inherent power of self-defense and self-preservation possessed by this nation."[525] Having made this broad claim, however, the government then effectively invited the Court to give judicial scrutiny to the Army's action: If a civilian court were to subject the military's judgment to a test in such an instance of martial law, the brief stated, it should be only that of "determining whether all the circumstances afforded a reasonable basis for the action."[526] This opening was one that the Army lawyers had been resisting since the 1942 *Zimmerman* appeal;[527] they had never wanted to admit that any kind of judicial review of their discretion in instituting or extending martial law was valid. Indeed, the Ninth Circuit had declared that such judicial review would risk "idle or captious" Hawai'i policy.[528]

Counsels' strategy of underlining the arbitrariness of the Army's claim to authority, together with the emphasis upon the lack of explicit statutory authority for the operation of provost courts in ordinary criminal and civil matters, proved to be highly effective. In the first place, it distinguished at a general level the facts of the two Hawai'i cases from those of the Japanese-American cases (*Hirabayashi* and *Korematsu*), for the latter involved actions by the Army explicitly authorized by Executive Order and then under terms of a statute and appropriations bills that reinforced the executive's action.[529] This distinction brought the *Duncan* and *White* cases more within the ambit of the

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[524] Brief for the American Civil Liberties Union at 29, Duncan v. Kahanamoku, 327 U.S. 304 (1946) (Nos. 14, 15).

[525] Brief for the United States at 58, Duncan v. Kahanamoku, 327 U.S. 304 (1946) (Nos. 14, 15).

[526] *Id.* at 55-59.

[527] *See* Zimmerman v. Walker, 132 F.2d 442 (9th Cir. 1942), *cert. denied*, 319 U.S. 744 (1943).

[528] *Id.* The Army's absolutist position has been termed the "blanket view" of the martial law power—as opposed to the "qualified view," which admits that the military's judgment can be reviewed on the facts by the civilian courts. *See* ANTHONY, ARMY RULE, *supra* note 3, at 64; *cf.* Frank, *supra* note 2, at 650 (proposing a distinction between "*qualitative*" and "*punitive* or *absolute*" martial law; the former regarding temporary emergency takeovers of authority by the military in emergency conditions, the latter denoting the kind of complete displacement of civil authority such as the Army instituted in the Islands). *See also* George M. Dennison, *Martial Law: The Development of a Theory of Emergency Powers, 1776-1861*, 18 AM. J. OF LEGAL HIST. 52 (1974) (discussing early constitutional history).

[529] Moreover, the opinion in *Hirabayashi* and the majority in *Korematsu* technically had been concerned only with the initial actions of the Army for evacuation, amidst the emergency conditions in the weeks following Pearl Harbor.

Endo case—for *Endo* was the one major decision of the war period in which the high court released an internee, giving as its reason that the government lacked explicit statutory authority for keeping the petitioner in an internment camp and denying her constitutional due process once her loyalty had been affirmed by the government itself.[530]

Second, by pointing out so tellingly the lack of clear statutory authority for the extraordinary wartime discretionary power seized for itself by the Army, Anthony's brief and the amici arguments in the *Duncan* appeal highlighted the threat *to civilian judicial power itself* that inhered in the government's view of "necessity" and its alleged legitimization of so sweeping a seizure of governmental authority. None of the Japanese-American cases had involved the specific question of martial law and Army discretion to suspend civil liberties and close the courts; instead, they had come to the high court under terms of the executive order and an act of Congress, enforceable against citizens by the civilian courts. By contrast, General Richardson's position, revealed in the trial record of *Duncan* in district court, was that the Army's authority was superior to that of the entire civilian establishment, reducing the courts themselves to the status of its "agents" (a term specifically employed in the general orders issued by the commanding general/Military Governor).[531]

Still another cluster of facts in the *Duncan* and *White* appeals worked against the government's chances to win the case for the Army in the high court. In both *Hirabayashi* in 1943, and *Korematsu* in 1944, the Justices had given heavy weight to the explicit rationale in the President's Executive Order No. 9066 (authorizing creation of military areas and exclusion of residents from that area by order of the Army) that invoked the need to guard against "espionage and . . . sabotage."[532] When the Court was called upon in 1944 to validate the

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[530] *Ex parte* Endo, 323 U.S. 283 (1944). For an illuminating discussion of *Endo* in the context of the exclusion cases, *see* Howard Ball, *Judicial Parsimony and Military Necessity Disinterred: A Reexamination of the Japanese Exclusion Cases, 1943-44, in* THE JAPANESE AMERICANS: FROM RELOCATION TO REDRESS (Roger Daniels et. al. eds., 1986). *See also* Joel B. Grossman, *The Japanese-American Cases and the Vagaries of Constitutional Adjudication in Wartime*, 19 U. HAW. L. REV. 649 (1997).

[531] General Orders No. 57 (Jan. 27, 1942), *reprinted in* ANTHONY, ARMY RULE, *supra* note 3, at 148-49. *See* Charles Fairman, *The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case*, 59 HARV. L. REV. 833, 855-56 (1946) [hereinafter Fairman, *Military Jurisdiction*].

[532] Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942) (stating "the successful prosecution of the war requires every possible protection against espionage and against sabotage . . . ."); Proclamation No. 17, Fed. Reg. 2320 (1942) (setting the evacuation process in motion, and declaring the entire Pacific Coast to be "subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations[.]").

These two statements of the rationale for evacuation and internment were quoted in Douglas' draft, dated Nov. 1, 1944, of the *Endo* majority decision. A copy of the draft opinion is on file

government's continued incarceration of Ms. Endo, however, the irrelevance of that rationale became controlling for most of the Justices; in internal Court memoranda, and also in Justice Douglas's majority opinion, members of the *Endo* majority therefore held that there could be no rational concern about espionage or sabotage in connection with Ms. Endo. Her loyalty, after all, had been attested to by the government's own review board and was admitted by the government in the briefs. Thus Justice Reed reminded Douglas, who was preparing the majority opinion in *Endo*, that "the entire program [of detention] is based on espionage"; and if that rationale for detention became irrelevant, Endo's appeal for a writ of habeas corpus must be honored.[533] The Justices' increasing skepticism of claims to sweeping discretion by the military was further revealed in Reed's observation that "even where we have espionage and sabotage, . . . it is not permissible to restrain the loyal citizen . . . for a longer time than is necessary to determine loyalty."[534]

When a majority had finally formed in favor of Endo, Chief Justice Stone (anticipating that the Army would shortly announce an entire end to the internment program) delayed the conclusion of deliberations and publication of the decision. Justice Douglas objected to this delay in extremely assertive terms: Endo was a loyal citizen posing no security risk, Douglas reminded the Chief Justice, and so she had an unquestioned constitutional right to her freedom immediately.[535] "The matter is at a standstill," Douglas stated, "[only] because officers of the government have indicated that some change in detention plans are under consideration"; but such administrative or policy developments could not be permitted, in his view, to trump Endo's absolute right to be released: "I feel strongly that we should act promptly and not lend our aid in compounding the wrong by keeping her in unlawful confinement through our inaction a day longer than necessary to reach a decision."[536]

This move by Justice Douglas was a signal that once the Court moved away from consideration of the wholesale evacuation and internment of an ethnic group at a time of extreme emergency—measures pursued soon after Pearl

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in the Papers of William O. Douglas, Library of Congress, Washington D.C.. In the final published version the statements were also central to Douglas' argument that espionage and sabotage were not relevant to the *Endo* release.

[533] Letter from Justice Reed to Justice Douglas (Nov. 9, 1944) (on file in the Papers of Justice William O. Douglas, Library of Congress, Washington D.C.) (regarding irrelevance of espionage and sabotage); *see* Ball, *supra* note 530; IRONS, JUSTICE AT WAR, *supra* note 9, at 344 (discussing *Endo* case). *See also* Grossman, *supra* note 530.

[534] Letter from Justice Reed to Justice Douglas (Nov. 9, 1944) (on file in the Papers of Justice William O. Douglas, Library of Congress, Washington D.C.).

[535] Memorandum from Justice Douglas to Chief Justice Stone (Nov. 28, 1944) (on file in the Papers of Justice William O. Douglas, Library of Congress, Washington D.C.) (regarding *Endo*).

[536] *Id.*

Harbor, with explicit executive and congressional authorization—and dealt instead with deprivation of the civil liberties of an individual citizen in a discrete situation clearly not an emergency, the Justices would not be so solicitous of the Army's prerogatives or the Executive's war powers. Thus, in language strikingly absent from the other Japanese-American cases, the majority in *Endo* asserted that a balance must be struck between, on the one side, a need for the kind of extraordinary powers "sufficient to deal with the exigencies of war time problems" as had been affirmed in the earlier Japanese-American cases, and, on the other, the Constitution's safeguards of individual liberty against arbitrary power.[537] The latter included "procedural safeguards surrounding the arrest, detention and conviction of individuals, compliance with which is essential if convictions are to be sustained."[538] The strictures of Article I, Sec. 9, which provided that the writ of habeas corpus might be suspended only in "cases of rebellion or invasion when the public safety may require it," was specifically cited, in connection with a dictum on a rule of interpretation, *viz.* that executive orders and acts of Congress (even war measures) should be narrowly construed "so as to avoid any possible conflict with specific guarantees of the Constitution" when basic individual liberties were at stake.[539] It seems difficult to imagine that with the Court in *Endo* taking such a position on the war powers, so different from its posture when espionage and sabotage were directly at issue in an extreme emergency, the prospects for the Army in the *Duncan* case appeal could have looked very promising to the government lawyers in November 1944.

The Army's prospects for victory in the *Duncan* appeal were cast in doubt even further by Justice Roberts's insistence, in a concurring opinion in *Endo*, that the Court should forthrightly face the constitutional issue instead of worrying (as the majority did in its opinion) whether or not the statute's language authorized the petitioner's detention after a formal finding of her loyalty. Guarantees of the Bill of Rights were at stake, Roberts declared; and "there can be but one answer" to the question of her right to be freed from detention immediately.[540] And Justice Murphy too had placed himself on record as forcefully denouncing the entire policy of detention as "an unconstitutional resort to racism."[541]

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[537] Justice Douglas' draft majority opinion in *Ex parte* Endo (Oct. 27, 1944) is on file in the Papers of Justice William O. Douglas, Library of Congress. It is annotated in handwriting and marked "OK for Printer, 11/1"; the published opinion contained nearly identical language.

[538] *Id.*

[539] *See supra* note 537.

[540] *Ex parte* Endo, 323 U.S. 283, 310 (1944) (Roberts, J., concurring).

[541] Korematsu v. United States, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting). Peter Irons points out that Black's majority opinion in *Korematsu*, probably in response to Murphy's attack, insisted that there was "a factual foundation of record" that supported the detention

As one considers the portents that could be read from these cases that preceded the *Duncan* appeal, it is obvious that any arguments (such as those made by the government before the Supreme Court in *Duncan*) contending that using the provost courts for ordinary civil and criminal justice matters was necessary to assure the security of the Islands, had lost their logical force simply by the passage of time. For during the entire period from the Pearl Harbor attack to the habeas petitions in 1944, no acts of either sabotage or espionage by Japanese-Americans had occurred in Hawai'i. To be sure, the Army ascribed the successful record, in this respect, to the stringency and coercive potential of its martial law regime;[542] but by the last months of the war, let alone in a retrospective view in early 1946, the Justices might as easily conclude that espionage and sabotage were no longer a serious threat so long after the time of the Pearl Harbor emergency, and certainly not with reference to the prospect of an "imminent invasion."

All these considerations came into play in the drama that played out in the Justices' chambers prior to the announcement of the Court's decision in the Hawai'i cases. After the initial conference, with a majority lining up in favor of Duncan and White, Chief Justice Stone assigned the opinion to Justice Black, author of the majority opinion in 1944 upholding the government's internment program in the *Korematsu* case. The issue now focused, however, on two Anglo-American petitioners; they were not members of the suspect, stigmatized ethnic group that Justice Black had been willing to subject to exceptional deprivations of civil liberties because of the alleged security threat on the West Coast. Moreover, Black responded sympathetically to the arguments of counsel regarding the need for the Court to assert its authority to review the Army's determination of "necessity." Chief Justice Stone hoped that the majority opinion would be narrowly based, with the Court resting its decision upon the specific facts relating to the situation in Hawai'i—and finding that its analysis of these facts did not support the Army's claim that "necessity" justified the military regime's use of the provost courts. Stone had no doubt that the Army had acted wrongly in Hawai'i. But he sought to avoid a constitutional decision, and above all to avoid adoption of a comprehensive rule that would cripple the government in a future emergency with conditions that could not be known in advance. "I do not think we have to state what the constitutional limits of martial law are," Stone wrote, continuing:

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program: "We conclude that the government's action was predicated not on racial prejudice, but upon the compelling urgencies of national defense." IRONS, JUSTICE AT WAR, *supra* note 9, at 339. It was late in the day, however, for the Court's majority to be backing off from its very explicit endorsement of the idea that all residents, including citizens, of Japanese ancestry could be regarded as potentially dangerous in the context of possible espionage and sabotage.

[542] *Duncan* Transcript, *supra* note 112 (Richardson testimony discussing the Army's ascribing lack of espionage to martial law).

> I should not be prepared to say that under no circumstances, when the public safety and order require it, the military, having authority to apply martial law, could not set up courts and try offenses. But it is enough for present purposes, even assuming danger of invasion, that there is no public necessity of creating military courts when the civil courts are open and able to function.[543]

Justice Black was of a very different mind; indeed, the entire thrust of his effort, in seeking to bring his colleagues into the majority opinion, was initially based on the notion that the *Milligan* doctrine must be reaffirmed, and that the *Duncan* decision must be placed on solid constitutional and not merely statutory grounds. Thus Black responded to the Chief Justice privately with a reaffirmation of the *Milligan* principle that denied the Executive exclusive discretionary authority in taking over civilian governmental functions. Three underlying principles buttressed Black's understanding of *Milligan*. First, an emergency did not authorize an arbitrary departure from the principle of separation of powers. The Executive could not claim the power "to obliterate the Congress and the Courts," any more than one or both of the other branches could destroy the Executive.[544]

Second, no military regime that went so far in its claims of authority as the one in Hawai'i could be justified under the Constitution. Even in an emergency that warranted extraordinary measures under martial law, and the detention of individuals on a temporary basis, there was no "necessity" that could justify how the Army in Hawai'i "wiped out all previously enacted legislation, substituted military edicts, and set up military tribunals over the courts throughout the islands"—in sum, a "totalitarian program."[545] Black was unwilling to accept the Chief Justice's suggestion that the majority opinion should stop with a statement that the circumstances in the Hawai'i situation—that is, the facts on which the claim of "necessity" was founded—did not justify what the Army had done. To do so, Black feared, would imply that a more severe emergency might justify such a totalitarian approach in other times: "Judicial invalidation of the program on the limited ground that the circumstances did not justify it in this loyal territory could be accepted as a declaration that other circumstances could."[546] This he was

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[543] Letter from Chief Justice Stone to Justice Black (Jan. 17, 1946) (on file in the Papers of Justice Hugo Black, Library of Congress, Washington, D.C.). Stone wanted Black to frame his argument so as to leave the door open, for example, for the executive to authorize the use of military courts for ordinary justice in a situation in which "the [civil] courts were unable to function for a long period of time, say two or three years . . . ." *Id.* Mr. Justice Black's Papers have been consulted and cited with the generous permission of Hugo Black, Jr., Esq., of Miami.

[544] Letter from Justice Black to Chief Justice Stone (Jan. 18, 1946) (on file in the Papers of Justice Hugo Black, Library of Congress, Washington, D.C.).

[545] *Id.*

[546] *Id.*

unwilling to propose, either explicitly or (as Stone suggested) by silence. Nor did Black, at least initially, wish to rest the opinion solely on a narrow reading of the Hawai'i Organic Act's provisions regarding martial law; if that was what others in the majority decided, he told Stone, "my present idea would be to rest my own vote squarely on the *Milligan* case."[547]

Third, Black denied that a nexus could rationally be established between the military's policies and the effective performance of "military tasks," in the course of which there might be a temporary closing of buildings that housed even courts or the legislature. The Army can, "of course, remove the obstructions which block its military progress," and even in "loyal territory" (as he spoke of Hawai'i) "civilian obstructionists of its imperative military functions" might be punished—but under "the laws of war," in an exercise of martial law powers rather than total control and displacement of governmental authority.[548] Here in Hawai'i was no slippery slope, no theoretical parade of horrors: here, for Black, was the ultimate outrage in a democratic society, the assertion by the Army of such power that, say, in a dire emergency in the District of Columbia itself, it might act to "set up military tribunals to carry on the duties of this and other courts."[549] His reference to "*this* and other courts" made his position unequivocally clear; the Army's declarations that the civilian courts in Hawai'i were mere agents of the military government was a threat, ultimately, to the authority of the Supreme Court itself, no less than to trial courts on the ground.[550] The courts were a sacred palladium, in Black's constitutional theology; and so the Army had claimed too much. The military's claim against the authority of the judiciary itself was in the end, we think, thus decisive with Black. And it probably was also of instrumental importance in the forming of a majority on the Court that reversed the Ninth Circuit finding, upholding the petitioners' appeals.

In crafting the compromise draft that became the majority opinion, Black did in fact adopt the tactic, presumably to gain the votes he required, of focusing upon the statute and its interpretation, stating that the Organic Act could not be construed as giving sweeping authority to the Army to supplant the civil government. In a narrow legal sense, then, his opinion did not reach the constitutional issue of whether Congress could ever properly authorize such a regime over a long war period with a receding threat of invasion.[551]

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[547] *Id.*

[548] *Id.*

[549] *Id.*

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

[551] Duncan v. Kahanamoku, 327 U.S. 304, 316-17 (1946). *See* Anthony, *Hawaiian Martial Law*, *supra* note 21, at 37-53 (providing a perceptive discussion of Black's opinion). A highly critical view of the opinions is in EDWARD S. CORWIN, TOTAL WAR AND THE CONSTITUTION 100-05 (1947).

Nonetheless, Black included in the opinion a long discourse on the history of habeas corpus in Anglo-American law, thus clothing the opinion in a mantle of constitutional rhetoric. He left no doubt that the Army's rule in Hawai'i represented to him the very kind of tyranny that had made the writ historically so vital to liberty. Nor did Black find any room for doubt that Congress understood the danger of such tyranny when it passed the Organic Act: "The phrase 'martial law' as employed in that Act, therefore, while intended to authorize the military to act vigorously for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals."[552]

The Chief Justice remained convinced that Black's approach to the issue was dangerously constraining, and could leave the government powerless in some future emergency. Stone thus wrote a spare and eloquent concurring opinion that focused upon the concept of emergency powers.[553] Unlike the majority, who asserted that the term martial law was of indefinite meaning in the law, Stone asserted that it must be viewed in terms of the situation: "Its object, the preservation of the public safety and good order, defines its scope . . . ."[554] "A law of necessity," Stone declared, can justify important sacrifices of constitutional liberty in order to avoid undermining military security and defense.[555] He found, however, that the government's power to command sacrifice in this regard "may not extend beyond what is required by the exigency which calls it forth."[556] The civil courts, operating under constitutional rules, and not the military commander's fiat, must be relied upon to make the final judgment of what was so "required" by the emergency. In exercising this authority to make a judgment on the facts, Stone adverted to the testimony of the military authorities themselves in the district court, where they "advanced no reason which has any bearing on public safety or good order for closing the civil courts to the trial of these petitioners, or for trying them in military courts."[557] Bars and other places of public amusement were open when the petitioners were tried, and the civil courts were open for other purposes; from these facts and related evidence of how the society and economy of the Islands were functioning, Stone found nothing that could support the government's contentions concerning "necessity" for the prosecution of these cases before Army tribunals.

Justice Murphy was not content with Black's rehearsal of the history of habeas corpus in the jurisprudence of Anglo-American civil liberty, nor with

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[552] *Duncan*, 327 U.S. at 324.

[553] *Id.* at 335 (Stone, C. J., concurring).

[554] *Id.*

[555] *Id.*

[556] *Id.*

[557] *Id.* at 337.

the Chief Justice's terse references to the facts of everyday life in the Islands while the provost courts continued to operate despite normalization of civilian life in so many other respects. Instead, he went through the arguments of the government step by step, commenting on each contention with a sense of outrage that bespoke his concern to crush out any impression of doctrinal ambiguity or judicial timidity that might invite a repetition of such military action in future times. Murphy especially abhorred the contention, in trial court testimony of General Richardson, that the civilian courts could not be relied upon to maintain order because they were subject to "all sorts of influences, political and otherwise," and that to be effective military rule must be absolute and not subject to challenge. "The mere fact that it may be more expedient and convenient for the military to try violators of its own orders before its own tribunals," Murphy declared, "does not and should not afford a constitutional basis for the jurisdiction of such tribunals when civil courts are in fact functioning or are capable of functioning."[558] Even more offensive, he pointed out, was the view that Richardson had put forth that security could not be achieved merely by proclaiming the Islands to be a military area, and dealing with the emergency in the same way as the Army had done on the West Coast, with its orders enforceable by the federal courts as provided in executive orders and congressional statutes. "That the military refrained from using the statutory framework which Congress erected," Murphy rejoined, "affords no constitutional justification for the creation of military tribunals to try such violators."[559] Murphy saved his strongest criticism, however, for the government's argument that the presence of large numbers of Americans of Japanese ancestry in Hawai'i was in itself a sufficient justification for Army rule despite the complete absence of any documented sabotage or espionage. As he had done in previous dissents, Murphy characterized this classification of an entire ethnic or racial group, with resultant loss of liberty to them, as blatantly unconstitutional; and he denounced in forthright language the racism that was inherent in such an approach.[560]

Justice Burton's dissenting opinion, in which Frankfurter joined, endorsed wholesale the government's claims as to emergency powers and the need for the Army itself to determine the issue of "military necessity" without being subject to review by civilian courts. In the initial conference, Frankfurter apparently spoke of the horrors of the Holocaust in Europe and the need to support the discretion of the military in order to assure national survival in a global war.[561] In his *Korematsu* opinion in 1944, Frankfurter had espoused

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[558] *Id.* at 332 (Murphy, J., concurring).

[559] *Id.*

[560] *Id.* at 334.

[561] Notes of Justice Murphy on the *Duncan* and *White* cases conference (not dated) (on file in the Papers of Justice Frank Murphy, Michigan Historical Collections, Bentley Historical

what reads like a doctrine of total judicial self-restraint in the wartime emergency: Congress and the President alone should decide how the Japanese-Americans must be treated: "That is their business, not ours," Frankfurter had declared.[562] This spirit of extreme deference was evident now in Burton's *Duncan* dissent. The opinion shrewdly raised the issue of whether the Court's vote on the Hawai'i appeals might not probably have been quite different if war were still being waged; the Court now enjoyed the luxury of hindsight, in the wake of an overwhelming military victory. It was too easily forgotten, Burton declared, that the Islands during the war were "like a frontier stockade under savage attack."[563] The executive must retain the option of permitting the military to exercise absolute control in such a situation, and especially so, Burton went on—echoing the premises and contentions of the majorities in *Hirabayashi* and in *Korematsu*, now once again so forcefully refuted by Justice Murphy—when "the possible presence . . . of many Japanese collaborators" rendered the fortress exceptionally vulnerable.[564] Hence, Burton concluded, the Organic Act should have been interpreted in the broad terms that would authorize complete military rule, leaving to the Army itself the decision as to what powers were necessary for it to perform its functions.[565] The provost courts, and the complete takeover of Hawai'i's civil government as well, were for the dissenters thus well justified by the emergency and by a doctrine of government's need to defend the nation against possible destruction.

"The great lesson to be learned from the case," as the legal scholar and martial law expert Charles Fairman commented shortly after publication of the decision in *Duncan*,

> is that the Court has rejected the theory that, in a situation of threatened invasion or comparable emergency, it is proper for the commander to take upon himself the position of "military governor" of the entire community, bringing the whole field of government under his command and thereafter operating at will either through military subordinates or through civil functionaries acting as his 'agents.'

Library, University of Michigan, Ann Arbor) [hereinafter Justice Murphy's Notes] (noting Justice Frankfurter's views).

[562] IRONS, JUSTICE AT WAR, *supra* note 9, at 340-41.

[563] Duncan v. Kahanamoku, 327 U.S. 304, 341 (Burton, J., dissenting). Frankfurter had made this argument in conference, stating (as Justice Murphy recorded his views):

> Our job is that of historian. We sit here on Dec. 6th [sic] 1945. It is my duty to project myself into 1942 . . . . What would this court have done in '42 and [an] injunction was sought? This is [the] President of the U. S. and he had [the] responsibility of conducting war. If I can't say I wouldn't vote for not enjoining [the] military in '42 I can't do it now.

Justice Murphy's notes on Dec. 18 conference (on file in the Papers of Justice Frank Murphy, Michigan Historical Collections, Bentley Historical Library, University of Michigan, Ann Arbor).

[564] *Duncan*, 327 U.S. at 341 (Burton, J., dissenting).

[565] *Id.* at 344.

> This was the theory which General Richardson expounded, . . . and this is the theory which the Court definitively repelled.[566]

During the war, Fairman had been supportive of the Army's prerogatives in the Japanese-American exclusion and detention policies, and had been critical of Garner Anthony's initial challenge to the military in Hawai'i. Moreover, Fairman had been associated, as a legal officer in the Army, with the defense of the military's regime in Hawai'i.[567] Hence it was especially telling that even Fairman aligned himself against the absolutist view taken by the Army, and embodied in General Richardson's trial testimony: Fairman concluded that "the justification for trying Duncan and White by provost court really came to nothing more than the *ipse dixit* of the commander."[568] Unlike the evacuation and detention of the West Coast Japanese-Americans, which Fairman was still prepared to defend on the grounds that at least such measures, "though drastic, had a clear relation to a permissible end,"[569] the takeover of civilian justice and the use of the provost courts in Hawai'i had no such relationship. Fairman still remained in the camp of those who would give the commander exceptional powers in a true emergency: so long as the purpose be lawful, "then *pro tanto* the civil authority gives way."[570] But even for Fairman, the definition of what purposes were "lawful" could not be left to the commander alone. Although he was unhappy with the absolutist tone and implications of Black's opinion, with its sweeping and resonant appeal to the entire tradition of Anglo-American legal history, Fairman was not willing to endorse the imperatives that naturally flow from "military thinking," which, as he now conceded, "runs to absolute solutions." The proper principle in military emergencies, he now contended, was "that the commander's authority over civil affairs is limited to measures of demonstrable necessity."[571] This would, he admitted, require the Army and the civilian governors to live with and accept

> not an *absolute* but a *mixed* situation; not exclusive but concurrent authority. This is not congenial to the soldier's mind; but the alternative would obliterate

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[566] Fairman, *Military Jurisdiction*, *supra* note 531, at 855.

[567] General Green's office in Hawai'i had ordered a large number of reprints of Fairman's earlier *Harvard Law Review* article contesting Garner Anthony's criticism of the military regime, with the intent of giving them wide distribution in Hawai'i. Also, Fairman had been involved personally in some of the discussions of the Hawai'i policy—and specifically with the delineation issues—in the offices of the general staff and Judge Advocate General in Washington during the war. *See supra* notes 186-94 and accompanying text.

[568] Fairman, *Military Jurisdiction*, *supra* note 531, at 857.

[569] *Id.*

[570] *Id.* at 858. This view was, essentially, the burden of Chief Justice Stone's position in his *Duncan* concurring opinion. *See* Duncan v. Kahanamoku, 327 U.S. 304, 335 (Stone, C.J., concurring).

[571] Fairman, *Military Jurisdiction*, *supra* note 531, at 858-59.

> interests of civil liberty and democratic government too valuable to be sacrificed more than is actually necessary.[572]

And the Court had now made clear, Fairman recognized, that—contrary to the burden of his own arguments in his earlier writings—it was the federal judiciary, and not the Army itself, which would make the final judgment as to the appropriateness and necessity of extraordinary measures in a situation such as Hawai'i's in the war years.[573]

For some of the other actors in the constitutional drama set in motion by Army rule in Hawai'i, it was difficult to assume the posture of cool reassessment that Fairman had taken. Judge McLaughlin, for example, had presided in the federal district court in White's hearing, and he also had granted Spurlock's petition in a case (mooted by release of the prisoner before it was heard by the Supreme Court) in which the procedures of the provost court in convicting an African-American laborer were so brutal and indefensible that even General Richardson saw the dangers of pursuing the appeal.[574] Speaking before the Social Science Association of Honolulu, albeit asking that the presentation be regarded as private and not released to the press, Judge McLaughlin gave full vent to his personal views. What the Army had done in Hawai'i was dangerous above all, he declared, because "if what they did here was right, it could be done at any time in any other part of the United States"[575]—the same point as had been made by Justice Black and Justice Murphy in their *Duncan* opinions—and in this sense America had been brought perilously close to authorizing "military dictatorship."[576] McLaughlin found nothing in the record that would lead him to conclude, as, for example, Fairman had concluded, that the Army had acted in good faith.[577] Nor did he accept the contention in an editorial published days before, in the *Honolulu Advertiser* (whose editorial policies had hewed to the Army line consistently throughout the years when the Army controlled Hawai'i) which asserted that the *Duncan* case decision failed to understand civilian opinion in the Islands; the editorial had been headlined "They Did It!—And We Liked It!" (which captured perfectly the spirit of the text).[578] Against such views, Judge McLaughlin declared that the military's policies and the Army's manipulation of the law through mooting of cases and advancement of unconstitutional claims had been unconscionable. "They did it intentionally," he concluded: "They did it with

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[572] *Id.* at 859 (emphasis added).

[573] *Id.* at 858. *Cf.* Fairman, *The Law of Martial Rule*, *supra* note 3 (*contra* Anthony's views expressed in Anthony, *Martial Law in Hawaii*, *supra* note 25).

[574] McLaughlin Speech, *supra* note 322, at 33-35.

[575] *Id.* at 36.

[576] *Id.*

[577] *See* Fairman, *Military Jurisdiction*, *supra* note 531, at 857.

[578] *See They Did It—And We Liked It!*, HONOLULU ADVERTISER, Mar. 16, 1946, at 18.

design aforethought. They did it in knowing disregard of the Constitution. They did it because Hawaii is not a State. They did it because they did not have faith that Americanism transcends race, class and creed. So 'They Did It'—with a gun."[579]

Garner Anthony—persistently dedicated during the war years, and also in the *Duncan* appeal, to pursuit of what he viewed as the imperatives of rule of law against arbitrary military authority—reflected on the history of Army rule in Hawai'i in terms that are especially pertinent as we look back fifty years later on the meaning of this episode in American legal history: "It will probably be years," he wrote, "before the historian of the future can clearly appraise the motives and causes that led the Army to pursue the course it did in Hawaii."[580] The difficulty in finding an explanation, Anthony went on, lay partly in the fact that the challenge to established constitutional values was so blatant, and was so dangerous:

> It is inconceivable that those in high places in the War Department were not cognizant of the fact that the regime erected in Hawaii superseding the civil government was not only illegal but contrary to our most cherished traditions of the supremacy of the law. It is readily understandable that military personnel not familiar with the mixed peoples of Hawaii should have had misgivings concerning them. However, the conduct of the populace on December 7 and thereafter should have put these military doubts to rest. To be sure it took some time for the military authorities to assure themselves that the civil population was all that it seemed—a loyal American community. What is not understandable is why the military government was continued after several years had elapsed and the fears of the most suspicious had been allayed.[581]

Pondering the issues that historians must eventually try to resolve, Anthony offered his own speculative interpretation of why things had gone so far. His explanation, tentatively offered, was essentially that inertia had taken hold, once the Army established itself in authority; and that the natural tendency to hold on to power had become translated, in the hands of a military bureaucracy that aggrandized itself (in terms of individual officers' promotions through the ranks, as well as in terms of expanding their authority) into a regime that advanced claims against the inherited constitutional tradition.[582]

With the passage of the years, the increased availability of extensive archival materials, such as we have sought to mobilize here to reconstruct the history, has provided an opportunity to take up afresh the challenge that Garner Anthony lay down to historians. In the concluding section, therefore, we will

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[579] McLaughlin Speech, *supra* note 322.

[580] ANTHONY, ARMY RULE, *supra* note 3, at 98.

[581] *Id.*

[582] *Id.*

offer some reflections on how actions and policies of a wartime government and military establishment that were "not understandable" in 1946 may be viewed in the perspective of half a century's time.

VI. CONCLUSION

In assessing the record of Army rule in Hawai'i, it is useful to compare it with the much better-known history of the Japanese-American relocation and internments on the mainland—and to ask whether the explanations that have been advanced for why these measures were demanded so insistently by the Army, and acceded to by FDR's wartime government, may apply equally to the Hawai'i situation. Four decades after the relocation and internments, Congress authorized a Commission on Wartime Relocation and Internment of Civilians to assess the record. After an intensive investigation, the Commission reported that the history was one of "grave injustices," and it urged a policy of redress.[583] In the course of its hearings, the Commission had heard extensive testimony not only from victims of the internment policy but also from many of the wartime government officials—among them John McCloy and Edward Ennis—who had played an important role in the crisis of civil liberties in Hawai'i. In its 1983 final report, which persuaded Congress to extend reparations payments to those who had been interned, the Commission officially concluded that the decisions which had led to the misguided relocation policy had been impelled by three forces exerting a powerful influence on both the civilian officialdom in Washington and on the military: "race prejudice, war hysteria, and a failure of wartime leadership."[584]

There has never been any official effort comparable to the Commission to establish responsibility and consider redress with respect to the Army regime in Hawai'i during the war years. Of course, with the *Duncan* decision, the Supreme Court rendered a definitive judgment of legality soon after the war that served to establish whether wrongs had been committed; by contrast, the racist doctrines of *Hirabayashi* and *Korematsu* had never been repudiated by the Court itself, so that the 1983 Commission report was the first official action of the government that admitted wrong in the case of the mainland evacuation and internment.[585] Nonetheless, many of the same officials who had been

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[583] *See generally* REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS: PERSONAL JUSTICE DENIED (1983).

[584] *Id.*; PERSONAL JUSTICE DENIED, PART TWO: RECOMMENDATIONS 5 (1983); *see also* IRONS, JUSTICE AT WAR, *supra* note 9, at 362; *see also* VALERIE HATAMIYA, RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988 (1993).

[585] This is not to say that there had been no concern, after the war, for redress in Hawai'i. There was considerable public debate, sparked by radio as well as newspaper commentary

responsible for the internment policy were also responsible for the military's Hawai'i regime—especially the policy makers and administrators in the War Department, and the legal officers and litigators in the Justice Department. Therefore, many of the questions of responsibility raised by the Commission with respect to the mainland are confronted within a similar framework, and with many of the same cast of characters, when we examine the record of Army rule in Hawai'i. In the Islands, as on the mainland, there was a dramatic clash of expediential policies in the face of an emergency (reinforced by the Army's wish to exercise extraordinary control over citizens deemed potentially subversive) with the core constitutional values that a determined group of individuals such as Edward Ennis and Secretary Harold Ickes endeavored to protect.[586] Do the same factors that shaped the dynamics of the internment policy, in the Commission's analysis—race prejudice, hysteria, and failure of leadership—explain how the Army was able to impose an illegal regime, and, in the minds of many, an unconstitutional regime, so successfully in wartime Hawai'i?

First let us consider racial prejudice, both as an independent factor and in relation to the hysteria factor. The record of those who governed Hawai'i during the war was a mixed one. But Generals Emmons and Richardson did resist the directive of the President to order removal of the entire Japanese-American population from Oahu; they issued public statements urging fair treatment of all citizens; and they championed the formation of a *Nisei* fighting unit. Withal, the Army command in Hawai'i maintained a public posture that worked against the development of any virulent popular hysteria with respect to the Japanese-American residents. They did so, moreover, against the opposition of the Secretary of the Navy, Frank Knox, who continuously pressed

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focused on how the Army had behaved; there were bills in Congress over several years to award small sums to those who had been imprisoned by provost courts; and there were several lawsuits against General Richardson and other Army personnel, apparently all of them either quietly settled or dropped. This aftermath to the record of civil liberties will be treated by the authors at length in the book that we plan from our ongoing project.

[586] Most of the latter group were lawyers, playing varied roles: Ennis in the Justice Department, as working counsel, seeking to defend the prerogatives of the federal judiciary against the Army's extreme claims; Ickes and Fortas, in the Interior Department, and also Attorney General Biddle, advocating the civil rights of Hawai'i's civilians against the Army regime; Stainback, using his prestige as civilian governor to guard against erosion of the Territory's enjoyment of Bill of Rights protections, as well as its claims to political autonomy and statehood aspirations; and the uniquely important Garner Anthony, as private attorney and outspoken independent critic, as attorney general for the territory, and later as *pro bono* counsel for Duncan. Not lawyers, Samuel King and Farrington, in Congress, worked the corridors and used their access to the press to keep the question of Army rule and its legitimacy before the government and the public.

the White House in 1942 for removal and a crackdown on alleged (and never documented) espionage and sabotage.

The Army also resisted recurrent efforts from various sources, both in the public arena and behind closed doors in government offices, demanding harsher measures to restrict the freedoms of the Japanese-Americans in the Islands. The most prominent instance of public pressure was led by John A. Balch, a former president of the Mutual Telephone Company in Hawai'i. For more than six months in 1943, he issued public statements (carried by the press) and pressured government officials, demanding that at least 100,000 Japanese-Americans be evacuated to the mainland and their jobs turned over to laborers who would be brought in from California or elsewhere.[587] Balch argued that no nation could exist safely with so large a minority "consisting of a race as unassimilable as the Japanese," but his motives were openly economic as well as xenophobic: unless such a removal was effected, he contended, "these people [will] gain even greater political and economic control" than they already enjoyed.[588] They were taking up civil service jobs in great numbers, Balch wrote; they had come to dominate the University of Hawaii (now operated "for almost the exclusive use of the Japanese race"); and they were buying up real estate throughout the Islands at a time when the other citizens were investing surplus funds in bonds to support the war in which their sons "were being slaughtered by these sadistic people in the Solomons and elsewhere in the Pacific."[589] Others in the Islands, including the acting federal district attorney general Angus Taylor, similarly pressed within official government circles to have the Army crack down with tight security measures, even more than it had done, on the Japanese-American population.[590]

In Congress, a small faction of members, mainly segregationist fanatics like Congressman John Rankin of Mississippi (who had denounced the statehood idea in earlier years on grounds it would ratify the legitimacy of a multi-racial society), provided a sympathetic audience for such opinion.[591] And in Hawai'i,

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[587] *Removal of Isle Japanese Urged by J.A. Balch*, HAWAII TIMES, Jan. 18, 1943, at 1.

[588] *Id.*

[589] *Id.*; *see also Japanese Peril to Future of Hawaii, Balch Contends*, HONOLULU STAR-BULLETIN, June 24, 1943, at 1.

[590] *See supra* note 245 (regarding Angus Taylor's efforts with James Rowe in the Justice Department). Demands for stronger measures against Hawai'i's Japanese-American population were not restricted to individuals and media in the Islands. For example, the liberal journal *The Nation* carried an article in mid-1942 calling for the mass evacuation of both citizen and alien Japanese-Americans from Hawai'i to the mainland, contending that the possibility of disloyalty and subversion was great—and denying that serious labor shortages would ensue, damaging the war effort as the Army had claimed. Albert Horlings, *Hawaii's 150,000 Japanese*, THE NATION, July 25, 1942, at 69.

[591] Congressman Rankin's crude attacks on the loyalty of residents of Japanese descent in Hawai'i appear in his questioning of witnesses in a hearing on statehood in 1937. Transcript

one of the Islands' two leading newspapers prominently published a series of articles in 1943 giving weight to the charge that a "[s]inister influence has been at work in Hawaii for a generation and more . . . . Hawaii has been the focal point of Japanese propagandists, selfish Japanese commercial interests and spies."[592]

It is in the light of these powerful forces, which had the potential to spark hysterical popular hostility against the Japanese-American community in the Islands, that the Army's policies must be assessed. Moreover, even the most dedicated civil libertarian critics of the Army, for example Garner Anthony or the Justice Department official James Rowe, Jr., admitted that extreme caution must be exercised and the potential for "danger"[593] must be recognized in a

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of Proceedings . . . at the Statehood Hearing, Iolani Palace (Oct. 1937) (on file in the Papers of Delegate Samuel Wilder King, Hawai'i State Archives). Among the many Hawai'i citizens who testified was the young attorney Hiram Fong, later a U.S. Senator and federal judge, who as a Chinese-American offered "a few words on behalf of my American brothers of Japanese ancestry." *Id.* at 197.

In 1943, Rankin was reported as stating in a press interview, "Hawaii is part of America and I am for saving America for Americans . . . . Hawaii will never become [a] state if I can help it until Hawaii is exclusively in [the] hands [of] white men." United Press news service dispatch (June 3, 1943) (transcript on file in the Papers of Delegate Joseph R. Farrington, Hawai'i State Archives).

In April 1943, in response to reports that the Japanese government had authorized the brutal executions of several young American aviators who had been captured when shot down during the famous air raid on Tokyo led by General James Doolittle, there was a move in Congress to enact legislation ordering that all citizens of Japanese descent should be considered dual citizens of Japan and the United States, and as such taken immediately into custody—an action that was explicitly directed, in particular, at the Japanese-American population in Hawai'i. CONG. REC. 362 (April 2, 1943) (Senator Stewart's statement).

[592] Earl Albert Selle, *The Emperor Is the Enemy*, HONOLULU ADVERTISER, Mar. 19, 1943, at 12. The *Honolulu Advertiser* also ran a series of editorial columns by Earl Albert Selle in which the Japanese-Americans were stereotyped in a great variety of ways, all uncomplimentary to them and certainly raising questions about their reliability in wartime. Typical of Selle's observations was the comment: "They are aware that America is at war, but their minds do not seem capable of publicly admitting that Japan is an enemy." *The Floor Is All Theirs*, HONOLULU ADVERTISER, Mar. 8, 1943, at 10; *see also Begin on Japanism Now*, HONOLULU ADVERTISER, Mar. 5, 1943, at 10; *Thin-Skinned and Thick-Headed or Discrimination—A Basis for It*, HONOLULU ADVERTISER, Mar. 12, 1943, at 12. In an article on the recruitment of the *Nisei* fighting force in Hawai'i, it was noted that General Emmons "refused to be stampeded" by prejudiced anti-Japanese forces demanding mass internment and other measures. Cecil Coggins, *The Japanese-Americans in Hawaii*, HARPER'S MAGAZINE, June 19, 1943, at 75-76.

[593] Although refuting the unsubstantiated charges of disloyalty and potential for sabotage that had been advanced by Angus Taylor, James Rowe began with admitting that in any situation such as Hawai'i there was manifest "danger" associated with so large a population. Letter from James Rowe to the Attorney General (Apr. 13, 1943) (on file in the Papers of James Rowe, Jr., Franklin D. Roosevelt Library, Hyde Park, N.Y.). Anthony conceded that to fear such danger immediately after Pearl Harbor was perfectly understandable. ANTHONY, ARMY

geographic situation such as Hawai'i's, already attacked by the enemy, in the midst of a global war.

What also should be weighed in the balance in this regard, however, was the Army's consistent practice, whenever confronted with demands to trim back on military control in Hawai'i, of citing the dangers of Japanese-American disloyalty and potential sabotage or espionage. Arguments of the Army's critics that pointed to the complete absence of sabotage or espionage after Pearl Harbor were refuted by the military in a "Catch-22" logical maneuver: there were no such incidents, the Army maintained, precisely because martial law and harsh warnings against any disloyalty had kept the Japanese-Americans in line. Constant reiteration of the idea that there was potential subversion and disloyalty on the basis of racial identity, regardless of citizenship and despite the fact that there was no evidence of espionage or sabotage or even what could be termed subversion, was the equivalent of the racist justifications given by the Army and the government for the mainland internments policy. The military and the loyalty boards under their control did unquestionable injustices, moreover, to many individual Japanese-Americans, both citizens and alien residents.[594]

In what cause did the Army advance such arguments and make its demands for continuing a regime of virtually total control? In the private letters of the commanders, General Green, and some of the other top military figures, it becomes evident that they lived every moment with the specter of another Pearl Harbor disaster. They had the responsibility of defending islands that had already been the subject of the first successful foreign attack on an American population center since the War of 1812; and they asserted in private, no less than in official communications, the view that without total control they could

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RULE, *supra* note 3, at 98. Anthony's argument, as we have seen, was that after the passage of only a few months it was manifest to any rational observer that the danger was minimal—and, he continued, if evidence of a real threat did emerge, a resort immediately to full martial law would have been justified. *See* Anthony, *Martial Law in Hawaii*, *supra* note 25. McCloy's view on the need for continued military control, for example, remained firm in August 1944, when he wrote to Ickes that "with . . . the general progress of the war the whole activity there [in the Pacific] is going to be stepped up, and Hawaii is going to be the center of it all. Under these circumstances I do not believe that we could or should entirely relinquish the martial law status." Letter from John J. McCloy to Harold Ickes (Aug. 27, 1943) (on file in the Papers of Harold Ickes, Library of Congress, Washington, D.C.) (marked "personal").

[594] The Hawaiian command saw internment as a policy that "could never be more than a token internment, representing a continuing pressure upon the Japanese community as a very effective security measure." Selective internment had worked to assure security by "acting as a deterrent on the Japanese community," exerting pressure on allegedly disloyal or potentially dangerous Japanese-Americans. Memorandum for General Richardson (undated) (on file in the Assistant Secretary of War Files (McCloy Files), Record Group 107, National Archives) (filed with Aug. 19, 1944 letter from General Robert Richardson to Assistant Secretary John J. McCloy).

not fairly be held accountable for what happened on their watch. Perhaps equally vivid in their minds was the fresh memory of personal reputations destroyed, and the military and naval careers that crashed, as the result of the inquiries that followed the Pearl Harbor disaster. What remains as challenging to explain now, however, as it was when Garner Anthony pondered the issue fifty years ago, is the question: Why should the generals in command have carried this argument so far? Why should they have been so committed to the idea that military security would fail if even the embezzlement case of a stockbroker, or a simple assault that would have drawn a $25 fine in a civilian court in peacetime, were not tried in military courts, and if those convicted were not imprisoned for long periods of time?

The answer seems to lie in the personal conviction, first, of General Green and, later, the commanding general, Richardson, that civilian courts were unreliable. There was always the danger of delay, procedural maneuvering, and failure by judges or juries to appreciate the need for order. Thus, in his communications to the War Department and in his testimony in the habeas corpus cases, Richardson spoke of civil liberties concerns as mere "academic" issues, an ornament to the American system of law in peacetime but a dangerous threat to protection of a "fortress" like Hawai'i in wartime. If the civilian courts prevailed in ruling on Army actions, Richardson believed, "The military would be dependent upon . . . the discretion of the prosecutors and the usual political factors that pervade civil enforcement agencies."[595] As to trials, he contended, in a situation like that in Hawai'i "there must . . . be in the punishment a certain measure of retribution. The punishment must be swift; there is an element of time in it, and we cannot afford to let the trial linger and be protracted."[596] Richardson was candid in admitting that he even saw great danger to security in the simple risk of the commander's being "embarrassed" in any civilian court review of his decisions, as had happened in alien internment cases in a few federal trial courts in the East.[597]

In seeking to protect their prerogatives, however, the commanding generals and the Army's lawyers in Hawai'i were selective in conveying information and manipulative in interpreting it for their superiors in Washington. They consistently portrayed the civilian population as wholly supportive of Army rule—a position without substantial evidence other than the compliance with which the population responded to a tough military regime that included tight censorship of mails and information. Moreover, the Army leaders portrayed

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[595] Letter from General Robert Richardson to Assistant Secretary John J. McCloy (Feb. 10, 1944) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives).

[596] *Court Record of Richardson's Testimony*, HONOLULU STAR-BULLETIN, Apr. 14, 1944, at 8.

[597] *Id.*

any criticism, such as that voiced by Anthony, Stainback and other civilian officials, and a few journalists, as being either idiosyncratic or misguided—withal, lacking sufficient appreciation of the realities of war.[598] The command in the Islands, in its reports to Washington, was always quick to cite the advice and legal counsel of leading figures in Hawai'i who were supportive of Army

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[598] In what the Army's critics regarded as a preemptive and cooperative move to manipulate public opinion, General Emmons appointed a public relations section which, as Anthony asserted:

> feed the press with news designed to place military rule in a favorable light and suppress news reflecting any dissatisfaction with it. In addition to this set-up, Mr. Lorrin P. Thurston, the manager of the *Honolulu Advertiser*, one of the two daily papers printed in this city, has been appointed as 'Public Relations Advisor to the Military Governor' (General Orders No. 155). It is unfortunate that this newspaper has thus foreclosed itself from being of any public service in criticizing the existing military rule.

Report from Garner Anthony to Governor Ingram Stainback 4-5 (Dec. 1, 1942) (on file in the Papers of James Rowe, Jr., Franklin D. Roosevelt Library, Hyde Park, N.Y.) (reprinted in ANTHONY, ARMY RULE, *supra* note 3, at 191-99). Interestingly, Emmons' decision to appoint Thurston was not welcomed by Green, who did not think well of Thurston's talents and thought the Army would gain little by his being made an official adviser. Diary of Thomas H. Green (Nov. 2, 1942) (on file in the Papers of Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.). *See* ANTHONY, ARMY RULE, *supra* note 3, at 69-70 (discussing the pro-Army editorial policies of Thurston's newspaper).

The *Advertiser* editorial desk provided an especially valuable service to the Army with an editorial in its Sept. 12, 1943 issue, which stated: "Lifting of martial law in Hawaii . . . would be cataclysmic for the Islands and a decided threat to the safety of the nation." *How Martial Law Protects Hawaii*, HONOLULU ADVERTISER, Sept. 12, 1943, at 1, 2. The editorial was reprinted in handbill form and apparently circulated widely by the Army as part of its campaign of resistance to pressure for restoration of fuller civilian control. It is on file in the Hawai'i War Records Depository, Hamilton Library, University of Hawai'i, and also in Box 43, Hawaii Military Government Records, Record Group 338, National Archives.

Stainback complained to Ickes that articles in the *Advertiser* critical of his efforts to end martial law in early 1944 should be interpreted in light of Thurston's membership on General Richardson's staff. His view is summarized in a Letter from Assistant Secretary John J. McCloy to Harold Ickes (May 8, 1944) (on file in the Papers of Harold Ickes, Library of Congress, Washington, D.C.). Queried by McCloy as to the facts, Richardson rather heatedly replied that Thurston no longer held the position officially, but that he had been consistently "very helpful in liaison with [the] Chamber of Commerce and other civilian groups" and provided Richardson's command with valuable intelligence "as to community needs and the public reaction . . . [to] the military." Radio from General Robert Richardson to John J. McCloy (May 9, 1944) (copy on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (Radio No. 15652). "This information I hope will help you repulse the snipers," Richardson added. *Id.*

There continued to be serious tension between Thurston and Governor Stainback, who in correspondence with Interior officials attacked Thurston as "a stooge of Dillingham," one of the Big Five's major figures and a favorite ally of the Army within the civilian social and economic elite. Letter from Ingram Stainback to Abe Fortas (Dec. 29, 1944) (on file in the Files of Benjamin W. Thoron, Records of the Office of Territories, Department of the Interior Records, Record Group 126, National Archives).

rule; but it suppressed or sought to discredit the opinions that represented serious opposition from "respectable" critics.

General Green in particular appeared to his critics to be vindictive and confrontational, showing no capacity for compromise and scarcely hiding his lack of respect for his critics, whom he was quick to see as verging on disloyalty.[599] He provoked responses that tended to escalate differences and embitter protagonists, as happened with Ickes, Anthony, and Stainback; and then as happened in his encounters with Attorney General Biddle, who denounced Green to Roosevelt as a "martinet" and urged that he be relieved of his duties in Hawai'i.[600] A United Press reporter wrote in 1943 that Green "is supposed to be a pleasant individual but [is] about as pliant as a concrete wall."[601]

In his conduct of the military government's daily operations and oversight of the provost courts, as well as in his personal character, General Morrison, who succeeded Green in the post of Executive for the Military Governor, was deemed by the Justice Department special investigator in 1946 to have made one of the most indefensible records of any general officer in the entire Pacific theater, in large part because of his arrogant abuses of authority.[602] It is also relevant, we think, to ponder the charge levied by some of the Army's critics that once a military government was in power, "the individuals in this office

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[599] *See, e.g.,* Diary of Thomas H. Green (Mar. 9, 1942) (Green's view of Riley Allen, editor of the *Star-Bulletin*); Diary of Thomas H. Green (Apr. 6 and July 23, 1942) (Green accuses Stainback of being unprincipled and of lying); Diary of Thomas H. Green (Jan. 1943) (numerous negative comments regarding Interior officials, one of whom he characterized as "an incorrigible Pinko," and regarding other civilian officials in Washington) (all on file in the Papers of General Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.). In January 1943, Green wrote to his principal aide, Colonel William R. C. Morrison, warning that the Army's archives documenting control of civilian life should be guarded from any effort by civilian authorities to take them over, "because we would never be able to see them once they were turned over to someone who is controlled by the Governor. Apparently he has always despised us and particularly General Emmons and me. It is regrettable that we wasted courtesy on him but I am glad that we did as it makes my own conscience clear." Letter from Thomas H. Green to William R. C. Morrison (Jan. 2, 1943) (on file in the Hawaii Military Government Records, Box 65, Record Group 338, National Archives).

[600] *See supra* note 237 and accompanying text.

[601] Letter from "Bart" Bartholomew to Roy [Howard] (dated "January 00" [sic], 1943) (copy on file in the Papers of General Delos Emmons, Hoover Institution Archives, Stanford, Cal.).

[602] Wiener Report, *supra* note 123. In the context of the fiasco that was set in motion by General Richardson's effort to resist Judge Metzger's orders in the *Glockner* habeas corpus case, Edward Ennis reportedly wrote in December 1943 that Morrison and Slattery were the persons principally responsible for the continuing tensions between the Army and the Stainback administration, and accordingly he recommended that "the Army replace the Morrison-Slattery team with a new man." Letter from Walter Gellhorn to Benjamin Thoron (Dec. 29, 1943) (on file in Under Secretary Files (Fortas Files), Department of the Interior Records, Record Group 48, National Archives).

naturally enough resisted any change that would mean a liquidation of their jobs," together with the promotions in rank that came with time and with their extensive responsibilities.[603] In this same vein, Abe Fortas told McCloy in 1944 that the lack of movement to implement the termination of martial law was attributable to the resistance of many Army officers on his staff for government of civilian affairs "who have an interest and intellectual commitments in the functions which they exercised" and were loath to give them up—and whose defense of their authority was a symptom that they suffered from the common disorder "jurisdictionitis."[604]

The foregoing aspects of the Army's record in Hawai'i indicate that "failure of wartime leadership," one of the three factors that the Commission on Wartime Relocation identified in 1983 to explain the mainland evacuation and internment policy, was also an important factor influencing events in the Islands. The critical place where leadership would have its most effective impact was in the War Department. In Assistant Secretary John McCloy's office the reports from the Hawai'i command were read and evaluated, the legal opinions from the Judge Advocate General's office were assimilated, and the command decisions were approved. Not least important, it was McCloy who had the principal responsibility for dealing with the Justice Department and the Department of the Interior in defending the Army against criticism and in working out the reforms that were finally effected. On what assumptions about the Army, with what effectiveness, and with what degree of faithfulness to constitutional principles did McCloy and others in the civilian hierarchy of the War Department discharge these responsibilities?

Here again, there is a balance of considerations to be judged. On the one side, McCloy had many urgent policy responsibilities in addition to those concerning Japanese-Americans and Hawai'i. For example, in late 1943 and early 1944 he was sent on missions to the Middle East, the Italian battle areas, and London to evaluate military operations and to participate in planning for the Allied invasion of France. Such assignments were a significant drain on his time and energy, and they must have put on the back burner for some time the question of reforming the Army regime in Hawai'i.[605] McCloy's own stated view, however, put forward in all his negotiations with the Interior and Justice

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[603] Letter from Garner Anthony to Roger M. Baldwin (Feb. 28, 1944) (on file in the Papers of Delegate Joseph R. Farrington, Hawai'i State Archives).

[604] Letter from Under Secretary of Interior Abe Fortas to John J. McCloy (Nov. 16, 1944) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (marked "Personal and Confidential"). *See supra* note 485 and accompanying text, for McCloy's reply with reference to the "jurisdictionitis" syndrome.

[605] On McCloy's responsibilities for urgent military matters in 1943-44, *see* KAI BIRD, THE CHAIRMAN: JOHN J. MCCLOY AND THE MAKING OF THE AMERICAN ESTABLISHMENT 172-86 (1992).

officials, was firm and undeviating: for him, in Hawai'i "the man on the ground" must be given deference and a broad respect for his responsibilities. It was this view, we think, rather than any diffusion of energies or attention, that led McCloy to support his commanders even on issues (including highly important issues, such as use of the Military Governor title) on which he privately disagreed with them.[606]

Officials who had frequent contact with McCloy in the negotiation of Hawai'i martial law and mainland internment issues believed, both at the time and in later reflections, that the problem was that McCloy, Secretary Stimson, and others in the War Department "somehow conceived of their job to be lawyers for a client," as Edward Ennis would state retrospectively; "and they . . . did not exercise the independent authority they should have exercised."[607] If McCloy was an able and determined advocate for the Army, he was also the faithful servant of Secretary Stimson; and it is clear that nothing in McCloy's dogged defense of the Army in Hawai'i ran contrary to Stimson's preferences. Even in the imbroglio that brought General Richardson into confrontation with Judge Metzger, involving the notorious General Orders No. 31, placing the War Department in an untenable position and inducing McCloy at last to draw some firm lines with Richardson's command, the War Department sought to paper over the matter as best it could.[608] Also, McCloy was ardent in his pursuit of a presidential pardon for Richardson, after Judge Metzger found him guilty of contempt. Similarly, when the President forced him to remove General Green from his post in Hawai'i, McCloy found a safe berth for Green in Washington, where he was later appointed to the key post of Judge Advocate General of the Army—a position from which Green would orchestrate an active legal defense of his own record and that of other officers in the Hawai'i command against a bevy of damage suits that were sparked by the *Duncan* decision.[609] And when

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[606] *See supra* notes 444-46 and accompanying text.

[607] IRONS, JUSTICE AT WAR, *supra* note 9, at 350 (quoting Ennis from public testimony and from private interview). *See also* WALTER ISAACSON AND EVAN THOMAS, THE WISE MEN 199 (1986) (stating that "raising moral considerations was not necessarily McCloy's job, and certainly not his style," and quoting from an interview with James Rowe just before Rowe's death: "I think McCloy's main motives were to try to please the generals and make things easy for Stimson").

[608] According to a member of the Interior's legal staff, in later recollections, throughout the negotiations with McCloy over Army rule, "Abe [Fortas] was very discerning, very hard-nosed, and exceedingly useful. I believe for Christmas, he sent McCloy some lead soldiers, saying that he might have fun ordering them about." Gardner Interview, *supra* note 522. *See also* KALMAN, *supra* note 438, at 100.

[609] This topic, too, will be treated more fully in our forthcoming book. The extent to which Green employed his staff to gather materials relevant to the defense he needed to put together is evident from correspondence and a large volume of records that his staff photocopied for his use from War Department and other department archives. (These documents are filed in the

the Army in 1944 undertook a publicity campaign designed to portray the termination of martial law as its own policy—seeking to obscure the fact that the Hawai'i command had resisted termination efforts by every means at its disposal—McCloy and the War Department gave that effort (which may fairly be characterized as cynical and self-serving) their full cooperation. Similarly, McCloy sought to frame the formal order ending martial law in terms that would permit the officers who had presided over military government and the provost courts in Hawai'i to offer an effective respondeat superior defense if civil liability suits were inspired by the Supreme Court's decision in the *Duncan* case.[610]

A highly interesting, and heretofore largely unappreciated, role in the litigation of Hawai'i-related constitutional issues was played by the Justice Department lawyer Edward Ennis.[611] He took the role of counselor to the situation. Critical of Stimson and the War Department for "acting as attorneys for their clients, the military, and [getting] them what they asked for,"[612] Ennis sought to take the higher ground himself. Whereas Ennis believed that McCloy and others "did not do the job that constitutionally the civilian military authorities are supposed to do, namely to examine what the uniformed military authorities ask for, and [then] determine independently whether it should be given to them,"[613] Ennis took it upon himself to counsel the Army as to its constitutional responsibilities. Assigned to defend in litigation a position in the law with which he disagreed, Ennis took what he called a "middle of the road (or should I say 'Office of the Solicitor General') kind of legal representation"; he made it clear both to his superiors and to Richardson's command that he was

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Papers of General Thomas H. Green, Judge Advocate General's School Library in Charlottesville, Va.). *See also generally* ANTHONY, ARMY RULE, *supra* note 3.

[610] Radio from Assistant Secretary John J. McCloy to General Robert Richardson (Sept. 8, 1944) (on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives) (Radio No. 27428). And indeed General Richardson after the war used the argument in requesting the Army's support for legislation that he had proposed to immunize himself and other officers from suits that were instituted after the *Duncan* decision in the Supreme Court. "Martial law," Richardson averred, "was initiated by the then Governor of the Territory, Governor Poindexter, whose act was approved by the President of the United States. The Army commanders therefore were merely the executive agencies [sic] carrying out the orders of their superiors." Memorandum from General Robert Richardson to the Chief of Staff (May 29, 1946) (on file in the Papers of General Robert C. Richardson, Jr., Box 25, Hoover Institution Archives, Stanford, Cal.).

[611] Ennis' important role in resisting—though not to the point of resigning—the policies with respect to evacuation and internment, and his important influence in the litigation of *Endo*, which ended, to his satisfaction, in a defeat for the government in the Supreme Court (which also portended another defeat in the *Duncan* appeal) are treated fully (and sympathetically) in IRONS, JUSTICE AT WAR, *supra* note 9, *passim*.

[612] Ennis Interview, *supra* note 391.

[613] *Id.*

doing so as a matter of "legal duty in a doubtful situation," not because he approved the policies he was engaged to defend.[614]

Within the Justice Department, he worked to close off options, such as mooting of important cases on appeal, that he believed were designed to frustrate constitutional procedures and redress of legitimate causes in the habeas cases. He also pressed the Solicitor General and his other colleagues in litigation to bring justiciable questions to the courts and not let the Army control the course of litigation. "The only place this Department can be effective," Ennis wrote, "is in its own field in the courts, and we should not lightly abandon our advantage in being able to control litigation to promote the policies which we think are correct."[615] When *Duncan* finally was heard in the Supreme Court, it will be recalled, Ennis was successful in getting the government's brief to acknowledge the possible legitimacy of judicial review of a decision on "military necessity"—a disappointing concession, from the Army's standpoint, and a major opening for Justice Black and the Court's majority.

It was difficult for Ennis to walk the thin line between his duties as counsel to the Army and the pursuit of this higher cause that was his responsibility as an officer of the court. Less difficulty, in this regard, was confronted by Harold Ickes and his staff in the Interior, or by the Attorney General. They forthrightly kept civil liberties issues before their colleagues in government councils, and they effectively challenged the Army's claims to absolute control. If only they had managed to win the consistent support of the White House, they would have obtained concessions much earlier than March 1943, when the restoration agreement finally returned some significant authority to the civilian government, and they probably would have obtained the termination of martial law much earlier than October 1944. Although acting as administrators in political positions, Ickes, Biddle, Abe Fortas, and others in the Interior and Justice Departments also revealed their sense of obligation to the Constitution; as lawyers, they appraised independently, and with a view to getting at basic principles, the import of what was happening in Hawai'i under Army rule. They spoke in constitutional language, or it may be said "lawyerly" as well as political and administrative terms, in their dealings with the War Department

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[614] Letter from Edward Ennis to Attorney General Biddle (Apr. 10, 1944) (on file in *Duncan* file, U.S. Attorney Records, Record Group 118, Sierra and Pacific Branch, National Archives, San Bruno, Cal.).

[615] Edward Ennis, "Memorandum for the Solicitor General, Re: Endo v. Eisenhower" (Jan. 21, 1944) (copy on file in the Papers of Charles Fahy, Franklin D. Roosevelt Library, Hyde Park, N.Y.).

and the White House; and they kept matters of principle at the forefront of policy discussion as best they could.[616]

Garner Anthony's role was the classic one of an attorney pursuing the cause of constitutional principle. He left a thriving law practice to accept a $1,000 per annum job as territorial attorney general, and then gave extensive pro bono time to the *Duncan* case, suffering some slander from Army officials in Hawai'i along the way. His single-minded pursuit of the legal and constitutional issues was cast not in absolutist terms, opposed to any Army decisions that would curtail the citizenry's liberties, but rather in a conventional constitutionalist context, in which he was prepared to accept Army control under Executive Order 9066 since it provided for enforcement by the civilian courts.[617] The tenacity with which Anthony dedicated himself to the civil liberties issue was matched by the strength of the scholarship that he brought to the subject in his academic writings. In his law review articles, as in his major reports to Stainback on military government, he brilliantly illuminated the constitutional and legal issues involved. These reports and publications were carefully read

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[616] An example of such lawyerly thinking and professionally oriented behavior is documented in the report of a War Department-Army-Interior conference on martial law in August 1942:

> Mr. Fortas said that the Civil Liberties committee of the American Bar Association is very much interested in the Hawaiian situation; that it feels that the extent to which military rule is carried, and the manner in which it is exercised, will be very important as legal precedents. He suggested that it might be desirable to consider the appointment of a committee on which the War Department, the local military authorities and judiciary, the Department of the Interior, and the American Bar Association would be represented. Such a committee could work out, in cooperation with the Commanding General, the extent to which military necessity demanded martial law.

Memorandum from Benjamin W. Thoron (Aug. 12, 1942) (photostatic copy) (on file in the Papers of Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.) (referring to Conference of Aug. 10 in Regard to Military Rule in Hawaii: Present: Secretary of Interior, Under Secretary of the Interior, Assistant Secretary of War McCloy, General Thos. H. Green, and Mr. B. W. Thoron).

In the continuing correspondence between Ickes and Stimson (*see, e.g., supra* notes 151, 172, 205, 232, 237, 266, 286, 290, 332, 431 and accompanying text), Ickes, of course, constantly referred to constitutional values and imperatives. Once the district courts (Judges Metzger and McLaughlin) had found military rule unwarranted, Ickes immediately pressed the President directly to recognize the unconstitutionality of the military government and to order its termination. Letter from Harold Ickes to President Franklin D. Roosevelt (Aug. 5, 1944) (copy on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives). The most formal and elaborate legal-constitutional argument that was submitted in administration debates of Hawai'i policy was an elegant joint letter by Attorney General Biddle and Acting Secretary Fortas dated Dec. 19, 1942 and cited *supra* note 249.

[617] *See supra* notes 171, 179 and accompanying text; ANTHONY, ARMY RULE, *supra* note 3, at 102.

and exerted much influence during Interior and Justice deliberations; and they went far toward defining the agenda for litigation, and, it seems clear, ultimately toward influencing the outcome of the *Duncan* case in the Supreme Court.

President Roosevelt's role must also be accounted for. As happened with respect to the Japanese-American internment policy, Roosevelt approached the Hawai'i question in a pragmatic fashion, concerned almost exclusively with the military security issue except when he could not avoid dealing with the bureaucratic friction of interdepartmental confrontation—or when, as happened in 1944, the spotlight of criticism in the domestic arena threatened serious political damage. Roosevelt apparently wrote off the Japanese-American mainland evacuation as one of the unfortunate costs of war, once having been told by the Army—and having it confirmed by McCloy and Stimson—that the policy was of urgent importance for security. Little of the information he received about Hawai'i challenged his long-standing attitude of distrust toward Japanese-Americans, citizens and alien residents alike.[618] Had there not been high-level pressures from his Cabinet, as Ickes and Biddle pressed for modification and then termination of martial law, and had the press and radio commentators not begun to focus criticism on the Army regime in the Islands, it seems likely that Roosevelt would have left the Army free to maintain its control over government and the justice system in Hawai'i throughout the period of fighting in the Pacific. The reforms that Roosevelt finally embraced did not represent anything like a principled commitment to giving constitutional norms priority over what he was continually being told by the Army and War Department was "military necessity." Giving the Army the benefit of the doubt—with regard to Hawai'i no less than with respect to the internees—remained the touchstone of FDR's position on military government in the Islands until nearly the end of the war.

Withal, the evidence leads inexorably to the conclusion, we think, that (1) if the War Department had not hewed so intransigently to the line that military security in Hawai'i required an Army regime with absolute authority (and if the department's civilian leaders had been more skeptical of the claims of necessity that an overzealous commander was advancing), and (2) if the White House had undertaken an independent analysis of the military's intelligence about domestic security, then the fate of civil liberties in wartime Hawai'i would have been very much different. But the Pearl Harbor disaster had left the President unwilling to take any risks that the professional military people, their judgment validated by his War Department, believed to be too high. The Army commanders were convinced (as General Green declared) that "the loyalty of any large foreign group is dangerous in war," and residents of Japanese

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[618] *See* BIRD, *supra* note 605, at 152-54; IRONS, JUSTICE AT WAR, *supra* note 9, *passim*.

ancestry were especially to be feared because of both their collective and their personal characteristics.[619] The champions of traditional constitutional values did win some victories in Cabinet-level policy decisions, and, of course, they finally did prevail in the *Duncan* case once the war had ended. But they were constantly impeded in mustering political support for their views so long as American casualties were being taken in battle areas, however geographically remote from Hawai'i the combat area might be, and so long as the imperatives of pursuing total victory against Japan were controlling in all the government's highest policy councils.

Our retrospective view of the Hawai'i wartime regime suggests the wisdom of Garner Anthony's suggestion that the record of that period indicates how misguided it is to assume that "because one has excelled in the arts of war he therefore will excel in the arts of peace or in the arts of government."[620] Even when one recognizes, as surely one must, that the military authorities who took charge in the wake of the Pearl Harbor debacle "bore a very anxious and lonely trust"—and that the decision to take over civilian governance was "a clear-cut solution, calculated to give strength and comfort to an anxious commander"[621]—it seems clear that the Army went far beyond what the situation required, in a rational view, when it reduced civilian authority to a nullity and substituted military fiat for the rule of law.

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[619] Diary of General Thomas H. Green (Sept. 16, 1942) (copy on file in the Papers of Thomas H. Green, Judge Advocate General's School Library, Charlottesville, Va.) (handwritten notes added). It is noteworthy that even as the government moved toward termination of martial law, the Army insisted that the commanding general must retain power to detain any person whose presence was regarded as "dangerous to military security;" and the War Department therefore objected to the proposal by the Justice Department that arrest, detention, evacuation, or exclusion from the area should be permitted only when the commanding general specifically stipulated that such action was "necessary to prevent espionage or sabotage." Letter from A. S. Fisher to John J. McCloy (Sept. 29, 1944) (copy on file in Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives). In this instance, the Justice Department view prevailed. *See* Security Order No. 10, *quoted in* ANTHONY, ARMY RULE, *supra* note 3, at 102.

[620] ANTHONY, ARMY RULE, *supra* note 3, at 122.

[621] Fairman, *Military Jurisdiction*, *supra* note 531, at 857.

ACKNOWLEDGMENTS

This article is drawn from the authors' research for a book on wartime Army rule in Hawai'i. The authors are indebted to the Center for the Study of Law and Society of the University of California, Berkeley, and its director, Professor Robert Kagan, for support of the project; and the senior author wishes also to acknowledge research support from the Boalt Hall School of Law, UC Berkeley. Many librarians and archivists graciously provided the authors with expert assistance, among them the reference and archival staffs of the Hawai'i State Archives, the National Archives (both the central collections in Washington and Maryland, and the regional collection in San Bruno, California), the Judge Advocate General's School Library (Charlottesville, Virginia), the University of Hawai'i at Manoa Library, the Hawai'i State Library, the Library of Congress Manuscripts Division, the Franklin D. Roosevelt Library (Hyde Park, New York), the Bancroft Library at the University of California (Berkeley), the Hoover Institution Archives (Stanford, California), and the University of Michigan Library. Chris Carr and Deborah Dworski provided research assistance, which is gratefully acknowledged.

Segments of this research have been presented at annual meetings of the Law and Society Association and of the American Society for Legal History; at a Henry E. Huntington Library workshop on legal history; and in public lectures sponsored by the Hawai'i Committee for the Humanities in Honolulu, and by the Boalt Hall School of Law, University of California, Berkeley. The authors are grateful to commentators and participants for their suggestions. Special thanks are owed to Professor Laura Kalman of the University of California, Santa Barbara, for generously sharing materials from her research on the biography of Abe Fortas; to Mr. Daniel Lavering, Chief Librarian, for expediting our use of newly opened materials in the Judge Advocate General's School Library; to Ms. Susan Shaner and other reference staff and the administration of the Hawai'i State Archives, for helping us to identify and gain access to archival materials that were of central importance to this study; and to Mr. John Hauck, Librarian of the University of Hawai'i, for his supportive interest in the project and for making the library's splendid collections of World War II materials available to us. Mrs. Garner Anthony graciously granted us an extended interview in Honolulu, also sharing some important material from her personal papers. Invaluable criticism and suggestions have been provided by Professors Jon Van Dyke of the University of Hawai'i, Mari Matsuda of the Georgetown Law Center, the late Paul Murphy of the University of Minnesota, Jonathan Lurie of Rutgers University, Joel Grossman of Johns Hopkins University, and Rolf Nygren of the University of Uppsala, Sweden.

The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective

Joel B. Grossman*

I. INTRODUCTION

Notwithstanding the worldwide emergence of constitutions and constitutionalism, the proliferation of constitutional courts with powers of judicial review, and the spread of the rights revolution and concerns for international human rights, rights are always at risk in wartime and other national security crises. It has been said, perhaps with some exaggeration, that *"inter arma silent leges"* ("during war law is silent"). The proper question, however, is how effectively rights will be protected in times of crisis by this emerging constitutionalism and new institutional structures of rights adjudication. Answers to this question, remain elusive. Under what circumstances can and will nominally independent courts, and the law, stand up to the inevitable external and internal pressures for conformity and loyalty, and disregard of individual or group rights, that arise in times of crises? How confident can we be that constitutional promises are real rather than illusory?

Some constitutions contain explicit emergency provisions that, at least in theory, govern the behavior of governments during crisis. The U.S. Constitution, however, contains only limited emergency provisions.[1] But an "accordionlike" doctrine of emergency powers has been recognized in a series of Supreme Court decisions that formally deny the existence of such emergency powers but permit their existence and use in particular situations.[2]

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[1] U.S. CONST. art. I, §§ 8, 9 (giving Congress the power "to call forth the militia to execute the Laws of the Union, suppress insurrections and repel invasions" and to suspend the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it").

[2] *See, e.g.*, Reid v. Covert, 354 U.S. 1, 40 (1957) ("We should not break faith with this nation's tradition of keeping military authority subservient to civilian authority, a tradition

"[E]mergenc[ies] [do] not create power," Chief Justice Hughes once wrote, "[but] may furnish the occasion for the exercise of power."[3] The existence of a Bill of Rights and other constitutional amendments and protections of individual liberties, which make no overt concessions to emergencies, further complicates the task of determining the boundaries of legitimate government power.

This Article addresses some of these issues in the context of a case study of one of the most shameful episodes of constitutional failure in the United States, the internment of 120,000 Japanese Americans—a majority of whom were native born American citizens—in detention camps during World War II. This disregard for constitutional rights, justified at the time by claims of military necessity, and upheld by the Supreme Court, is now universally condemned. Two presidents and the Congress have apologized to the victims; and Congress has provided a modicum of reparations in an effort to redress the terrible wrongs that were committed. The Supreme Court has just recently repudiated the racist basis of these wartime decisions, in *Korematsu v. United States*[4] and *Hirabayashi v. United States*,[5] upholding the exclusion and curfew components of the (and by inference the entire) internment program, although it has not formally overruled those decisions.[6] While it is most unlikely that mass racist deprivations of this scope or kind will be repeated, the nagging question remains: Could a new national crisis of similar proportions, where national survival is (or is thought to be) at stake, precipitate a comparable compromise of individual rights by the political branches which would then be rationalized and accepted by the Supreme Court?

History cautions us to be wary of post hoc judicial apologies and condemnations of egregious rights deprivations in time of crisis. Realistically speaking, is the Court as an institution more likely in the future than in the past to be able to withstand the enormous pressures to support, or at least defer to, the

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which we believe is firmly embodied in the Constitution."); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 587-88 (1952) ("The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces." But, "[t]he power of Congress to adopt such public policies as those proclaimed by the order is beyond question."); Schenck v. United States, 249 U.S. 47, 52 (1919) ("When a nation is at war many things which might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right."); *Ex Parte* Milligan, 71 U.S. 295 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.").

[3] Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 426 (1934).

[4] Korematsu v. United States, 323 U.S. 214 (1944) (upholding the exclusion order).

[5] Hirabayashi v. United States, 320 U.S. 81 (1943) (upholding the curfew order).

[6] Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2106-07 (1995).

government, that inevitably accompany a wartime crisis? The Constitution's war powers have traditionally been employed to legitimate the most extreme uses of federal power. Today we condemn *Korematsu* and *Hirabayashi* as constitutional and judicial failures, but at the time they were regarded by many as a successful example of the Court joining the political branches in support of a united war effort (by conceding "ample" power to Congress and the President to deal with a perceived major threat to the survival of the nation).

Part II describes the Japanese American internment policy during World War II and its causes, the Supreme Court's endorsement of the policy, and subsequent efforts to undermine and/or overrule the offending decisions. Part III examines more closely the institutional factors that produced those decisions. Part IV briefly lays the groundwork for a more systematic analysis and prediction of how the Court might respond in the future to a crisis of similar magnitude. Finally, Part V concludes that the Court should require the government to meet the heavy burden of proving that deprivations necessary to meet a crisis are factually grounded, demonstrably compelling, narrowly tailored to meet actual crisis needs, and are in accord with norms of procedural due process.

II. THE INTERNMENT POLICY

A. Antecedents and Implementation

On February 19, 1942, following the Japanese attack on Pearl Harbor and after receiving the report of the Roberts Commission (which placed primary responsibility on the military commanders for their lack of preparation, but also reported undocumented rumors of the existence of a Japanese espionage network in Hawai'i that had sent information to the enemy), President Franklin D. Roosevelt signed Executive Order 9066, giving Secretary of War Henry Stimson and the military commanders under him the legal power to exclude all persons, citizens and aliens alike, from designated areas on the west coast.[7] The purpose of the order was to insure against sabotage, espionage, and fifth column activities. On March 21, 1942, Congress implicitly ratified the Executive Order and provided that violation of the order of a military commander was a misdemeanor punishable by fine or imprisonment.[8]

When the orders were implemented by the War Relocation Authority (WRA) and the military, all Japanese Americans living on the west coast were

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[7] Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942).

[8] Act of June 25, 1948, ch. 645, 62 Stat. 765 (codified at 18 U.S.C. § 1383 (1974) (repealed 1976)).

subjected to a curfew and then excluded from their homes by the Army. They were detained in assembly centers and then evacuated to "relocation centers" elsewhere in California, and also in Idaho, Utah, Arizona, Wyoming, Colorado, and Arkansas. About two-thirds of those relocated were native-born American citizens; the remainder were primarily legal aliens prevented by law from obtaining American citizenship. The government claimed that there were neither time nor resources to make individual loyalty determinations. "All this was done despite the fact that not a single documented act of espionage, sabotage or fifth column activity was committed by an American citizen of Japanese ancestry or by a resident Japanese alien on the west coast."[9]

There was, however, no comparable detention or internment of persons of German and Italian ancestry, even though the United States was also at war with Germany and Italy.[10] In 1940, according to census estimates, there were more than 1.2 million German born, and 1.6 million Italian born, persons living in the United States. The total population of German born and of German descent was 5.2 million; Italian born and Italian stock, 4.6 million. By contrast, the total Asian population (there were no separate figures for Japanese), including those born in Asia and native-born American citizens, was 340,000. There was strong evidence that German and Italian nationals presented a greater threat to American security than did the Japanese. The German American Bund was a large, cohesive, organization more openly sympathetic to the Axis cause than any Japanese group. Germans and Italians were more heavily concentrated around the strategic areas of the west coast than were the Japanese. Of the 56 persons arrested for espionage by the FBI in 1941 and 1942, none were Japanese. And there were two major German, but no Japanese, spy rings apprehended.[11] The Attorney General believed that Germans and Italians were indeed security risks, and proposed that at least 10,000 be required to leave the west coast. But General John DeWitt's

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[9] REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 3 (1983) [hereinafter CWRIC REPORT]. *See also* PETER IRONS, JUSTICE AT WAR (1983).

[10] *See* STEPHEN FOX, THE UNKNOWN INTERNMENT: AN ORAL HISTORY OF THE RELOCATION OF ITALIAN AMERICANS DURING WORLD WAR II (1990); Stephen Fox, *General John DeWitt and the Proposed Internment of German and Italian Aliens During World War II*, 57 PAC. HIST. REV. 407 (1988).

For an interesting comparison to World War II internment policies in Australia, *see* MARGARET BEVEGE, BEHIND BARBED WIRE: INTERNMENT IN AUSTRALIA DURING WORLD WAR II (1993). Bevege reports that the United States "urged that the rigorous internments and reprisals of World War I not be repeated," and that provisions should be made for speedy and automatic appeals by internees, which they were. Most internments in Australia were on an individual rather than a group basis. The contrast to American internment policies is obvious.

[11] *Girl, 18, Accuses Nazi Spy Suspects*, N.Y. TIMES, Feb. 4, 1942, at 12; *Spy Suspect Admits He Used Alias, and Biddle Reports 5th Column Curb*, N.Y. TIMES, Mar. 3, 1942, at 13; *6 Nazi Spies Guilty in First War Trial, All Face 20 Years*, N.Y. TIMES, Mar. 7, 1942, at 1.

regulations, which superseded those of the Justice Department on the west coast, exempted German and Italian nationals. Those Germans and Italians who had initially been excluded from the west coast by the Attorney General's regulations were permitted to return by late 1942; by that time most Japanese had been removed and incarcerated. And there were two federal court cases, in Pennsylvania and Massachusetts, that invalidated the exclusion of Germans and rejected the military's determination that they were excludable as security risks.[12]

Reviewing the disparate treatment of Japanese compared to German and Italian nationals, the Commission on Wartime Relocation and Internment of Civilians (CWRIC), established by Congress in 1980, concluded that the decision to evacuate and intern only the Japanese Americans on the west coast was due to the sheer numbers involved, the relatively high assimilation rate of the Germans and Italians, their lack of economic threat, and their considerable political influence.[13] There is, ironically, also evidence that in some respects the Japanese on the west coast were better assimilated: 45 percent owned their own farms; by contrast, 52 percent of the German and Italian populations were unemployed at the time.[14] More subjective measures of loyalty, however, predominated.

The racial and ethnic basis of the west coast internment policy also stood in contrast to security measures in Hawai'i, where less than one percent of the 158,000 persons of Japanese ancestry (more than 35% of the population) were interned despite the greater vulnerability of Hawai'i to enemy attack. The Japanese in Hawai'i however, were culturally and economically better integrated into the population, and there was arguably less racial bias against them.

Although President Roosevelt and several members of his Cabinet pushed for mass internment of the Japanese Americans in Hawai'i "well into 1942," Roosevelt's military advisors, including General Delos Emmons in Hawai'i, argued otherwise.[15] Protecting the rights of Japanese Americans in Hawai'i

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[12] Ebel v. Drum, 52 F. Supp. 189 (D. Mass. 1943); Schueller v. Drum, 51 F. Supp. 383 (E.D. Pa. 1943).

[13] CWRIC REPORT, *supra* note 9, at 283-93. *See also* Mary Dudziak, *The Supreme Court and Racial Equality During World War II*, 1 J. SUP. CT. HIST. 35, 44-45 (1996). "A curfew was established for German and Italian *nationals* and for *all persons* of Japanese heritage." *Id.* (emphasis added). "Justice Black did not see the exclusion of Japanese-Americans from the West Coast to be race discrimination." *Id.*

[14] Harrop Freeman, *Genesis, Exodus and Leviticus: Geneology, Evacuation, and Law*, 28 CORNELL L.Q. 414, 446 (1943).

[15] ROGER DANIELS, CONCENTRATION CAMPS USA: JAPANESE AMERICANS AND WORLD WAR II 73 (1971). By comparison to General DeWitt, General Emmons did not hold "dogmatic racial views" but "argued quietly but consistently for treating the ethnic Japanese as loyal to the United States, absent evidence to the contrary." CWRIC REPORT, *supra* note 9.

was not, however, their main concern. What concerned Emmons and the military in Hawai'i, and ultimately saved Hawai'i's Japanese American population from mass internment, was their key economic role.[16] Removing the Japanese population would have left a dangerous void in the labor pool. In addition, the military governor worked to refute allegations that the Japanese Americans, as a group, were disloyal.[17] While Hawai'i's Japanese Americans thus suffered less than their west coast counterparts, the islands' entire population was forced to live the duration of the war under strict military control over almost all aspects of life.[18] Overall, this evidence amply supports Roger Daniels' conclusion that "the legal atrocity committed against the Japanese Americans was the logical outgrowth of American racism, specifically anti-Japanese racism on the west coast which had begun in the 1880s when significant numbers of Japanese immigrants began arriving in Washington, Oregon and California. Alien land laws, controlled immigration, school segregation, and legislation limiting economic opportunities for orientals were part of the sixty year preamble that culminated in the mass evacuation and internment of Japanese Americans."[19]

The internment of the Japanese must be viewed within the context of the historical intolerance toward all Asians on the west coast. Chinese immigrants of the 19th century were early victims of prejudice; it was charged that they were unscrupulous, treacherous, subversive, and immoral.[20] The appearance of Japanese immigrants closely coincided with the decline of the Chinese as a major component of the west coast labor force. The Japanese became the legatees of this anti-Chinese sentiment. Soon after their arrival, the Japanese were regarded as worse than the Chinese they replaced. The U.S. Industrial Commission noted in 1901, for example, that "they have most of the vices of the Chinese, with none of the virtues."[21]

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[16] MORTON GRODZINS, AMERICANS BETRAYED: POLITICS AND THE JAPANESE EVACUATION 291-94 (1949).

[17] *Id.* at 298-99.

[18] *See* Harry N. Scheiber and Jane L. Scheiber, *Constitutional Liberty in World War II: Army Rule and Martial Law in Hawaii, 1941-1946*, 3 W. LEGAL HIST. (1990); *see also* Harry N. Scheiber and Jane L. Scheiber, *Bayonets in Paradise: A Half-Century Retrospect on Martial Law in Hawaii, 1941-1946*, 19 U. HAW. L. REV. 477 (1997). Under the aegis of military control it was thus possible to keep a tighter watch on the Japanese American population in Hawai'i than would have been possible on the west coast absent internment. Complete military control of the entire west coast population would have been politically risky and logistically impossible.

[19] ROGER DANIELS, CONCENTRATION CAMPS: NORTH AMERICA, JAPANESE IN THE UNITED STATES AND CANADA DURING WORLD WAR II 27-90 (1981).

[20] JACOBUS TENBROEK ET AL., PREJUDICE, WAR AND THE CONSTITUTION 15-22 (1958).

[21] *Id.* at 24 n.63 (citing REPORTS ON IMMIGRATION, UNITED STATES INDUSTRIAL COMMISSION, (Washington Printing Office, 1901), Vol. XV 754).

The Russo-Japanese war of 1905 heightened mistrust of the Japanese in the United States. Japan's sweeping victories over the Russians were attributed to the treacherous and aggressive nature of the Japanese people; and there were rumors that the United States was Japan's next target. It was alleged that Japanese immigrants were engaged in sabotage and espionage to lay the foundation for such an attack. A labor periodical captured the sentiment well: "A characteristic among Japanese . . . is their propensity for spying . . . . Put a huge roof over the Japanese Empire and you have a national detective agency . . . ."[22]

This antagonism came to a head in 1905 with calls to exclude the Japanese from the west coast. The American Federation of Labor (AFL) urged that Asian immigration be checked lest "American people must surrender the right to occupy American soil . . . ."[23] The Japanese and Korean Exclusion League was founded in that year; one year later it already had 78,000 members. The first official act of discrimination was San Francisco's segregation of Asian pupils in 1906. Opposition to Japanese land ownership culminated in passage of the California Alien Land Law in 1913, which barred aliens ineligible for citizenship, as most Japanese immigrants were, from owning land. The Native Sons of the Golden West led the fight to preserve California, "as it has always been and God himself intended it shall always be—the White Man's Paradise."[24] Along with the Joint Immigration Committee, which would later play a significant role in the World War II events, it was instrumental in passage of the Japanese Exclusion amendment to the Immigration Act of 1925.

That act temporarily mollified anti-Japanese agitation on the west coast. But Pearl Harbor rekindled the flames of hysteria and racial hatred, which fed on each other as false sightings of Japanese submarines and even Japanese invasion fleets off the west coast increased. Much of the suspicion and mistrust can be attributed to official reports and accounts. Secretary of the Navy Frank Knox, for example, claimed that a Japanese fifth column had been responsible for much of the damage at Pearl Harbor. There were also numerous press reports of sabotage and espionage by Japanese agents and sympathizers in Hawai'i.[25] An editorial in the San Francisco Examiner early in 1942 called for immediate evacuation of the Japanese: "I am for the immediate removal of every Japanese on the West Coast to a point deep down in the interior. I don't

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[22] *Id.* at 26 n.78 (citing *Yellow Peril*, ORGANIZED LABOR, March 11, 1905).
[23] *Id.* at 35.
[24] *Id.* at 46.
[25] *Id.* at 71-72.

mean a nice part of the interior either."[26] The *Los Angeles Times* had called for evacuation the day before.[27]

Pressure group action intensified. The Joint Immigration Committee announced that "[t]his is our time to get things done that we have been trying to do for a quarter of a century."[28] The Chamber of Commerce hired a lobbyist to coordinate the anti-Japanese movement; he was instrumental in bringing together the west coast congressional delegation (WCCD), and authored its first resolution calling for evacuation. The WCCD was instrumental in promoting anti-Japanese policies. Much of its lobbying was directed at General DeWitt, then the newly appointed head of the Western Defense Command. DeWitt proved quite receptive to these views. He argued that "[i]n the war in which we are now engaged, racial affinities are not severed by migration. The Japanese race is an enemy race."[29]

DeWitt's racial views and the west coast hysteria combined to create a formidable anti-Japanese juggernaut, so powerful that it could ignore and overcome convincing evidence that the Japanese living on the west coast posed no threat to national security. Admiral Harold Stark, Chief of Naval Operations, for example, testified before the WCCD that it would have been impossible for the Japanese to mount a sustained attack on the west coast. Fear of invasion was matched by fear of sabotage, notwithstanding much evidence to the contrary. Both the FBI and the Office of Naval Intelligence (ONI) reported that the risk of sabotage was minimal; one estimate in early 1942 was that only about 3,500 Japanese citizens and aliens were dangerous.[30]

General DeWitt announced his evacuation plan for the Japanese on February 14, 1942. He justified it by reference to numerous incidents of illicit signaling to Japanese ships off the west coast, by claims that the FBI had seized large quantities of firearms and other contraband in their searches of the homes and businesses of Japanese residents, and by his conclusion that the Japanese—citizen and alien alike—were largely unassimilated (and unassimilatable) and continued to maintain strong ethnic allegiances, an insularity which he believed was likely to result in treachery.[31]

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[26] *Id.* at 75 n.17 (citing Henry McLemore, *Editorial*, SAN FRANCISCO EXAMINER, Jan. 29, 1942).

[27] *See generally id.* at 73-80.

[28] *Id.* at 78 n.26 (citing MINUTES OF MEETING, CALIFORNIA JOINT IMMIGRATION COMMITTEE, Feb. 7, 1942, at 18-19, 25-30).

[29] HEADQUARTERS WESTERN DEFENSE COMMAND AND FOURTH ARMY, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 1942, 34 (June 5, 1943) (hereinafter FINAL REPORT).

[30] CWRIC REPORT, *supra* note 9, at 55.

[31] FINAL REPORT, *supra* note 29, at 55.

Each of these allegations had been challenged by other government agencies. The FBI and the FCC had already rebutted DeWitt's charges of illicit shore-to-ship signaling.[32] Further, the claim that the Japanese possessed large quantities of contraband arms was wholly specious. Following Pearl Harbor the FBI had searched Japanese homes and found an insubstantial quantity of weapons. But after a raid on a sporting goods store owned by a Japanese American, the seizure of the store's stock of hunting rifles and ammunition vastly inflated the inventory of contraband seized that was attributed to Japanese Americans.[33]

When the lack of incriminating evidence made it difficult to maintain the charge that all Japanese citizens and nationals posed a security threat, DeWitt and the War Department developed an alternative justification. They argued that wholesale evacuation—instead of merely detaining enemy aliens—was necessary because determining individual loyalty was impossible. When the FBI and the ONI claimed that possible disloyalty among the Japanese could be handled on an individual basis, DeWitt responded that "there isn't such a thing as a loyal Japanese and it is impossible to determine their loyalty by investigation."[34]

If racism was the energizing force for the internment policy, there were other factors which contributed to it. Morton Grodzins, for example, explained the internment by focusing on powerful west coast pressure groups—mainly economic (agricultural) groups joined by nativist groups and patriotic organizations.[35] Grodzins also emphasized the pro-evacuation sentiments of leading west coast politicians, including California's attorney general and later governor, Earl Warren. "Every prominent west coast political leader and virtually every local law enforcement officer made known their belief in the necessity for evacuation."[36]

Jacobus tenBroek, Edward Barnhart, and Floyd Matson attributed major responsibility to the military and the government as well as to the west coast public:

> [T]he claim of "military necessity" was unjustified . . . the dereliction was one of folly, not knavery. The racism exhibited by the general [DeWitt] was blatant and unmistakable, and clearly corresponded to (if it did not surpass) that of articulate public opinion along the Pacific Coast in the early months of the war. But this

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[32] GRODZINS, *supra* note 16, at 291-94.

[33] *Id.* at 134-36.

[34] IRONS, JUSTICE AT WAR, *supra* note 9, at 269 (citing transcript of telephone conversation (Jan. 14, 1943) (on file in Box 7, Record Group 338, National Archives)).

[35] GRODZINS, *supra* note 16.

[36] *Id.* at 253. In his memoirs, however, Warren wrote: "I have since deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of freedom and the rights of citizens." EARL WARREN, THE MEMOIRS OF CHIEF JUSTICE EARL WARREN 149 (1977).

> is [an] additional reason for believing that the military did not need to be persuaded . . . .[37]

President Franklin Roosevelt also harbored anti-Japanese prejudices, and his support for the policy was obviously essential. Roosevelt was convinced that the entire Japanese community was dangerous to American security. Following Pearl Harbor, distinctions between the Japanese who carried out the attack and Japanese American citizens evaporated: "[A] Jap was a Jap."[38] President Roosevelt accepted DeWitt's recommendation, conveyed to him by Secretary of War Henry Stimson and Assistant Secretary of War John J. McCloy, that all Japanese Americans be evacuated and interned. In so doing he rejected the objections of Attorney General Francis Biddle and a number of his deputies at the Department of Justice[39] But President Roosevelt was content to allow the policy to be carried on by others, particularly the military authorities, although he did direct his subordinates to "be as reasonable as you can."[40]

B. Review in the Supreme Court

Three significant cases testing the constitutionality of these orders came before the Supreme Court during the war. All involved citizens, none of whom was remotely thought to be disloyal.[41] In *Hirabayashi v. United States*,[42] the

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[37] TENBROEK ET. AL., *supra* note 20, at 208.

[38] Reply Brief for Appellants, Hirabayashi v. U.S., 320 U.S. 81, at 1, n.2 (1943) (citing Statement of General DeWitt, *quoted in* SAN FRANCISCO NEWS, April 13, 1943, at 1).

[39] In his autobiography, Biddle wrote: "the program was ill-advised, unnecessary, and unnecessarily cruel . . . ." FRANCIS BIDDLE, IN BRIEF AUTHORITY 213 (1962). Stimson later acknowledged that "to loyal citizens this forced evacuation was a personal injustice," but he maintained that the evacuation was a legitimate exercise of the war powers. HENRY STIMSON AND MCGEORGE BUNDY, ON ACTIVE SERVICE IN PEACE AND WAR 406 (1948). Justice Tom Clark, who during the war had served as liaison between the Justice Department and the Western Defense Command, later concluded: "I have made a lot of mistakes in my life, but [one] that I acknowledge publicly . . . is my part in the evacuation of the Japanese from California in 1942." JOHN WEAVER, WARREN: THE MAN, THE COURT, THE ERA 113 (1967).

[40] IRONS, JUSTICE AT WAR, *supra* note 9, at 58 (citing STETSON CONN, ET. AL., THE UNITED STATES ARMY IN WORLD WAR II: THE WESTERN HEMISPHERE GUARDING THE UNITED STATES AND ITS OUTPOSTS 132 (1964)).

[41] There were a few cases during World War II in which citizens' rights were protected. *See* Schneiderman v. United States, 320 U.S. 118 (1943) (reinstating the citizenship of a naturalized citizen who was a communist at the time of his naturalization); Cramer v. United States, 325 U.S. 1 (1945) (reversing the treason conviction against a German-born U.S. citizen accused of aiding Nazi saboteurs). *Cf.* Melvin Urofsky, *The Court at War and the War at the Court*, 1 J. OF SUP. CT. HIST. 2, 5-6 (1996) ("in many areas the Court continued developments in the protection of civil rights and civil liberties . . ."); J. Woodford Howard, Jr., *The Cramer Treason Case*, 1 J. OF SUP. CT. HIST. 49 (1996) ("*Cramer* was the tribunal's sole decision during World War II to enforce and enlarge constitutional limits on executive war powers.").

[42] 320 U.S. 81 (1943).

Court unanimously upheld the curfew, the least restrictive of DeWitt's orders. Because *Hirabayashi* had received concurrent sentences for violating both curfew and exclusion orders, and since the Court upheld the sentence for curfew violation, it declined, under heavy pressure from Chief Justice Stone, to consider the more serious exclusion question.[43] Citing the pervasiveness of the war power, and accepting as fact the claim that the Japanese Americans represented a serious threat, Stone's opinion, though technically limited to upholding the curfew, spoke in broader terms and strongly endorsed the overall exclusion policy as a necessary expedient of the war effort.[44]

The Court did not engage in a separate examination of the facts, either as to the reality of a military threat to the west coast or the likelihood that Japanese Americans remained culturally attached to Japan and thus were potentially disloyal to the United States. "Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry," the Chief Justice wrote:

> [W]e cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of the population, whose number and strength could not be precisely and quickly ascertained . . . . In time of war, residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry.[45]

Stone conceded that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people."[46] But he argued that while racial classifications are normally unacceptable, "it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war . . . ."[47] Justice William Douglas, in a concurring opinion, added that "where the peril is great and the time is short, temporary treatment on a group basis may be the only practical expedient."[48] Justice Frank Murphy's concurrence was the only challenge to this reasoning; indeed he had originally

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[43] HOWARD BALL AND PHILIP COOPER, OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS, AND AMERICA'S CONSTITUTIONAL REVOLUTION 111 (1992).

[44] *Hirabayashi*, 320 U.S. at 97-100. "We cannot readily believe that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it." *Id.* at 99.

[45] *Id.* at 99.

[46] *Id.* at 100.

[47] *Id.*

[48] *Id.* at 107 (Douglas, J., concurring).

intended to dissent, and was reluctantly persuaded to join the majority only by Felix Frankfurter's heavy lobbying.[49]

One year later a no longer unanimous Court, in *Korematsu v. United States*,[50] reaffirmed these sentiments (although technically limiting its approval to the exclusion order). Again, the Court did not question the findings and recommendations of the military authorities. Justice Black argued for the majority that it was the military's prime responsibility to formulate and carry out whatever measures were needed to meet the threat.[51] He added that the Court could not say that the "war making branches of government" lacked adequate grounds for believing that such extraordinary measures were needed.[52] Black repeated Stone's earlier admonition against racial classifications, but concluded that this was not a policy based solely on such a classification:

> Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direct emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.[53]

"[H]ardships are part of war," Black added, and all citizens feel the impact of war "in greater or lesser measure: Citizenship has its responsibilities as well as its privileges . . . ."[54] In other words, Japanese American citizens had the responsibility to passively accept their exclusion and detention as a contribution to the war effort!

Three justices dissented. Roberts and Murphy criticized the racist basis of the exclusion program as inconsistent with the Constitution it purported to protect.[55] Jackson, not disagreeing, argued that the Court should not approve policies merely because it was powerless to prevent them. In time of emergency, he wrote, the nation must rely on its elected leaders not only to meet the threat but to do so as constitutionally as possible.[56] The courts could not, and thus should not be expected to, play an active role. Jackson's opinion

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[49] *Id.* at 109 (Murphy, J., concurring). *See also* J. WOODFORD HOWARD, JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 306 (1968).

[50] 323 U.S. 214 (1944).

[51] *Id.* at 218.

[52] *Id.* at 218-19.

[53] *Id.* at 219-20.

[54] *Id.* at 219 (emphasis added).

[55] *Id.* at 225-26 (Roberts, J., dissenting) ("[This] is the case of convicting a citizen for not submitting to imprisonment in a concentration camp, based on his ancestry . . . without evidence or inquiry concerning his loyalty and good disposition toward the United States."); *id.* at 233, 236-37 (Murphy, J., dissenting) ("justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment . . .").

[56] *Id.* at 242-48 (Jackson, J., dissenting).

implied that such questions were inherently nonjusticiable, and thus beyond the purview of any court.[57]

Korematsu involved a more drastic measure of racial discrimination than *Hirabayashi,* yet the Supreme Court employed an even less careful standard of review. In a sense this was necessary because by the time *Korematsu* was decided the tide of the war in the Pacific had turned; there was no longer, if there ever had been, a conceivable threat to the west coast. CWRIC concluded in 1982, for example, that "[i]f the Court had looked hard, it would have found that there was nothing there."[58] In other words, there was no credible basis for the policy. Indeed, President Roosevelt was advised early in 1944 to begin returning the Japanese Americans to their homes, but decided to wait until after the impending presidential election.[59]

The contrast between the Court's supine deference to the military in *Korematsu* and *Hirabayashi*, and the post-war *Duncan v. Kahanamoku*,[60] is revealing. Justice Black, again writing the opinion, employed a more rigorous standard of review to examine and rebuke the actions of the military in suspending the writ of habeas corpus in Hawai'i during the war.[61] The post civil war case of *Ex Parte Milligan*, condemning the exercise of emergency wartime powers to deprive citizens of their rights, had been ignored by the Supreme Court in its *Korematsu* opinion.[62] *Milligan* not only stands for the principle that constitutional rights cannot be abridged in time of emergency except through the legitimate suspension of the writ of habeas corpus, but also for the proposition that an emergency has to be real and not imagined, and that the courts have some duty to ascertain the facts of its existence.

The potential impact of *Milligan* had been debated within the Justice Department in preparing for the *Korematsu* case. It is unlikely the government could have prevailed if the *Milligan* precedent was embraced by the Supreme Court. The DOJ strategy was therefore to ignore *Milligan* as much as possible, and where necessary to distinguish it on a factual basis—that it focused on a martial law question in which a civilian was deprived of the right to trial in a

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[57] *Id.* at 244-47.

[58] CWRIC REPORT, supra note 9, at 237.

[59] IRONS, JUSTICE AT WAR, *supra* note 9, at 269. War Department officials reached the conclusion as early as the spring of 1943 that there was no longer any military justification for the exclusion of loyal Japanese from the west coast. According to CWRIC it is unclear whether President Roosevelt was aware of this conclusion prior to May, 1944. Stimson and McCloy may have been unwilling to risk the opposition of General DeWitt and west coast politicians by advising the president to take this action. General DeWitt left the Western Defense Command in the fall of 1943, and the exclusion ended in December, 1944—18 months after any conceivable justification for it had ended. *Id.*

[60] 327 U.S. 304 (1946).

[61] *Id.* at 324.

[62] *See generally Ex Parte* Milligan, 71 U.S. 295 (1866).

civil court in an area where the civilian courts were operating.[63] The Court obliged by not ever mentioning *Milligan* in its opinion.

However, in *Duncan*, when the war was over, *Milligan* was "rediscovered" by the Court.[64] Supreme Court decisions during war or emergency are often quite different from decisions after the crisis has passed. In the words of Edward Corwin:

> Indeed, in total war the Court necessarily loses some part of its normal freedom of decision and becomes assimilated like the rest of society, to the mechanism of the national defense. Sometimes it is able to put on a stately parade of judicial clichés to a predetermined destination, but ordinarily the best it can do is pare down its commitments to a minimum in the hope of gaining its lost freedom in quieter times.[65]

The Court did sound a cautiously different note in *Ex Parte Endo*,[66] decided on the same day as *Korematsu*. Endo's loyalty had been established and the Court, determining that internment was not appropriate for a loyal citizen, ruled that she was entitled to a writ of habeas corpus and immediate release from detention. But Justice Douglas' opinion, noting that neither Roosevelt's executive order nor the act of Congress specifically authorized detention, was careful not to cast doubt on the constitutional legitimacy of the internment program or undermine the authority of *Korematsu*.[67] Rather he argued that "the [statutory] authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted at least when his loyalty is conceded."[68]

Douglas specifically distinguished the *Milligan* precedent, which had established that a citizen who was not charged with a crime could not be detained and tried by a military tribunal in an area where the civilian courts were functioning normally.[69] However, while noting that Endo had been detained by a civilian agency (the War Relocation Authority), Douglas ignored the fact that she was initially detained by military order without any judicial proceedings. Announcement of the *Endo* decision, on December 18th, 1944, was delayed for several weeks, to permit the War Department to issue a statement "announcing" that internees whose loyalty had been demonstrated would be released early in the new year.[70]

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[63] *See generally* IRONS, JUSTICE AT WAR, *supra* note 9, at 278-319.

[64] *Duncan*, 327 U.S. at 322. *See also id.* at 326 (Murphy, J., concurring) ("Tested by the *Milligan* rule, the military proceedings in issue plainly lack constitutional sanction.").

[65] EDWARD S. CORWIN, TOTAL WAR AND THE CONSTITUTION 177 (1947).

[66] Ex Parte Endo, 323 U.S. 283 (1944).

[67] *Id.* at 300-01.

[68] *Id.* at 302.

[69] *Id.* at 297-98.

[70] IRONS, JUSTICE AT WAR, *supra* note 9, at 344-45.

C. *The Redress Movement*

Efforts to eradicate the stain of the Japanese exclusion and detention began almost immediately after the war had ended. In 1945, Eugene Rostow suggested three forms of reparation for

> our own part in a program which violated every democratic social value, yet was approved by Congress, the President, and the Supreme Court . . . .
>
> The first was the obligation of the federal government to protect the rights of Japanese Americans. Second, financial indemnities should be provided for the heavy property damages the Japanese Americans have suffered. Finally, the basic issues should be presented to the Supreme Court again, in an effort to obtain a reversal of these wartime cases. In the history of the Supreme Court there have been important occasions when the Court itself corrected a decision occasioned by the excitement of a tense and patriotic moment . . . . Similar public expiation in the case of the internment of Japanese Americans from the West Coast would be good for the Court, and for the country.[71]

Efforts at redress were substantial, but partial and fragmented. The Evacuation Claims Act of 1948 provided compensation for economic losses (approximately $1,500 per person), albeit at a level well below actual losses. The act required elaborate evidence as to actual loss, which many internees were unable to produce; and it contained other incentives toward settling claims below their full value.[72] It made no provision for loss of income, or for pain and suffering. Nevertheless, the act provided some formal recognition by the government, just four years after *Korematsu*, of the hardships endured and the grave injustices that had been perpetrated. In 1952, Congress restored the status of several hundred Japanese American employees in the postal service.[73] In 1972, the Social Security Act was amended to give Japanese Americans retirement credits for the time they were interned,[74] and in 1978 federal civil service retirement provisions were similarly amended.[75]

There were also some efforts to prevent a recurrence. Ironically, the first step came with passage of the notorious Immigration and Nationality Act (McCarran

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[71] Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945). As examples, Rostow cited *Ex Parte* Milligan, 71 U.S. 295 (1866), and West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), which had overruled an earlier case and held that students who were Jehovah's Witnesses could not constitutionally be required to salute the flag.

[72] 50 U.S.C. App. § 1981 (1994).

[73] Act of July 15, 1952, Pub. L. No. 82-545, 66 Stat. 634.

[74] 42 U.S.C. § 431 (1996).

[75] 5 U.S.C. § 8332 (1996).

-Walter Act) of 1952.[76] Despite its restrictive racially discriminatory features, the Act permitted limited Japanese immigration and extended naturalization privileges to resident Japanese aliens, privileges immigrants from Japan had not been eligible for since 1790. In 1965, the Act was further amended to place Japanese and other Asians on a par with Europeans in determining immigration eligibility.[77]

In 1950, Congress passed the Emergency Detention Act (Title II of the Internal Security Act) to lay the groundwork for any future need to detain large groups of people in times of emergency. A number of the detention camps were "mothballed" for future use.[78] The Act was justified by reference to the *Korematsu* and *Hirabayashi* cases. But Title II was repealed in 1971.[79] At the same time Congress provided that "in order to insure that no detention camps can be established without at least [sic] the acquiescence of Congress, . . . no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[80] Thus future detention camps were not completely foreclosed, but would have to be authorized by Congress.[81] In 1976, President Gerald Ford formally rescinded Executive Order 9066, stating that "an honest reckoning must include a recognition of our national mistakes."[82] President Ronald Reagan signed the Civil Liberties Act of 1988, which provided $20,000 to "each internment camp survivor" and also included a national apology.[83]

Two efforts to secure judicial redress were undertaken in the 1980s. The first, and more successful, was the effort to overturn the convictions of the three named defendants in the internment cases that reached (and were approved by) the Supreme Court: Minoru Yasui, Gordon Hirabayashi, and Fred Korematsu. The second was an ultimately unsuccessful class action suit designed to force the government to pay reparations to the internees beyond the small amounts to cover property losses Congress had appropriated after the war.[84]

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[76] Act of June 27, 1952, Ch. 477, Title I, § 107, 66 Stat. 166 (codified as amended at 8 U.S.C. § 1101-1524 (1997)).

[77] Act of Oct. 3, 1965, Pub. L. 89-236, § 2, 79 Stat. 911 (codified at 8 U.S.C. § 1152 (1997)).

[78] Act of Sept. 23, 1950, ch. 1024, Title II, § 111, 64 Stat. 1028 (codified as amended at 50 U.S.C. § 811-826 (1970)) *repealed by* Act of Sept. 25, 1971, Pub. L. 92-128, § 2, 85 Stat. 348.

[79] *Id.*

[80] 18 U.S.C. § 4001(a) (1971).

[81] *See* Sandra Takahata, *The Case of Korematsu v. United States: Could it be Justified Today?*, 6 U. HAW. L. REV. 109, 148-49 (1984).

[82] Proclamation No. 4417, 41 Fed. Reg. 35, 7741 (1976).

[83] Civil Liberties Act of 1988, Pub. L. 100-383, 102 Stat. 903 (codified at 50 U.S.C. § 1989(b) (1996)).

[84] Hohri v. United States, 586 F. Supp. 769 (D.D.C. 1984), *rev'd*, 782 F.2d 227 (D.C. Cir. 1986), *rev'd*, 482 U.S. 64 (1987).

The effort to reverse the *Yasui, Hirabayashi,* and *Korematsu* convictions was based largely on the discovery by Peter Irons[85] that the government had knowingly employed tainted evidence in its prosecutions and briefs, and in its argument before the Supreme Court. Specifically at issue was the claim by General DeWitt that the loyalty of Japanese Americans could not be determined on an individual basis. DeWitt's racial bias, as well as his true motivations for ordering the curfew and internment, were then deliberately covered up by the government over the objection of some officials in the Department of Justice.[86] DeWitt's revised claims of military expediency, and of a possible conspiracy in the Japanese American community, had been contradicted, as we have seen, by other government agencies, including FBI Director J. Edgar Hoover.

A *coram nobis* ("error before us") petition was filed in each case. An ancient writ which traces its heritage to the English common law, *coram nobis* is used to permit those who have been released from custody after conviction and final judgment to seek reversal because of "fundamental error" or "manifest injustice." Unlike its better known, and constitutionally guaranteed cousin, habeas corpus, *coram nobis* is not available to those still in custody; and, more important, it applies only to issues of fact. Thus it requires the production of new evidence that would persuade a judge that a grave injustice had been committed. This was the first time that *coram nobis* was used to initiate a challenge to a Supreme Court decision. It met with considerable intransigence from the Reagan Administration, which sought to avoid any judicial action that might impeach the credibility or character of the former government officials involved.[87] Even non-Reagan Administration members were concerned. Former Justice Arthur Goldberg, a member of CWRIC, expressed concern about the effects the *coram nobis* petitions would have on the credibility of the Supreme Court.[88]

All three petitions were filed in 1983 in the federal district courts where the original convictions had been obtained.[89] Korematsu's petition alleged that "evidence was suppressed or destroyed in the proceedings that led to his conviction and its affirmance." The government, in a two page brief, "confessed that the internment of Japanese Americans was part of an unfortunate episode in our history," and added that "without any intention to

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[85] IRONS, JUSTICE AT WAR, *supra* note 9.

[86] *Id.* at 206-12.

[87] PETER IRONS, JUSTICE DELAYED 17 (1989).

[88] *Id.* at 13.

[89] Hirabayashi v. United States, 627 F. Supp. 1445 (W.D. Wash. 1986); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); Yasui v. United States, Civil No. 83-151-BE (D. Or. 1984).

disparage those persons who made the decisions in question . . . it would not be appropriate to defend this forty year old misdemeanor conviction."[90]

Judge Marilyn Hall Patel rejected the government's argument that it could simply "cease prosecuting" the case, and thus that there was no need for a *coram nobis* determination.[91] Patel asserted that the CWRIC Report "provides ample support for the conclusion that the denial of the [*coram nobis*] motion would result in manifest injustice and that the public interest is served by granting the relief sought."[92] But the report did not refer to the evidence that the government knowingly withheld information from the courts, including the Supreme Court, when they were considering the critical question of military necessity. Omitting this evidence of duplicity allowed CWRIC to claim that the "actions taken were within the war-making powers of the Executive and Legislative branches and . . . were beyond judicial scrutiny so long as they were reasonably related to the security and defense of the nation and the prosecution of the war."[93]

Judge Patel ruled that it was unnecessary to the *coram nobis* petition to decide whether the Supreme Court would have reached a different conclusion if it had been given a full and truthful accounting of the facts.[94] She stated that the appropriate remedy for a *coram nobis* violation could not address errors of law, and thus that she was powerless fundamentally to affect the Supreme Court's affirmance of Korematsu's conviction.[95] But she overturned the conviction with the following words: "[A]s a legal precedent [the Supreme Court's decision] is now recognized as having very limited application. As historical precedent it stands as a constant caution that in time of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees."[96] The government declined to appeal, thus preventing Patel's decision from being reviewed either by the Court of Appeals or the Supreme Court.

Yasui's petition was less successful. In response to the same argument by the government's lawyer (Victor Stone, who argued all three cases), a federal judge concluded that Yasui had introduced no new evidence and dismissed the

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[90] IRONS, JUSTICE DELAYED, *supra* note 87, at 211 (citing Government's Response and Motion, U.S. District Court for the Northern District of California, Oct. 4, 1983).

[91] *Korematsu*, 584 F. Supp. at 1411.

[92] *Id.* at 1417.

[93] *Id.* at 1418 (citing Brief for the United States 11-18, Korematsu v. United States, 323 U.S. 214 (1944)).

[94] *Id.* at 1419.

[95] *Id.* at 1420.

[96] *Id.*

petition. The decision was appealed, but ultimately dismissed as moot following Yasui's death.[97]

In the *Hirabayashi* case, Judge Donald S. Voorhees held an evidentiary hearing from which he concluded that there was evidence that DeWitt had ordered the exclusion because of his belief that it was impossible to separate loyal from disloyal Japanese no matter how much time was devoted to the task.[98] This contradicted what the government originally stated as a justification for the curfew and exclusion orders: that the orders were a necessary military expedient, and that there was insufficient time for individual loyalty determinations.

Judge Voorhees did address the possible effect on the Supreme Court if it had known of DeWitt's true reasons for ordering exclusion. He concluded that the Court would have decided the exclusion question, and at least arguably also would have rejected its articulated basis.[99] Thus he overturned the exclusion order conviction. As for the less burdensome curfew order, which the Supreme Court had addressed, Voorhees concluded that the Court would still have decided against Hirbayashi since the curfew order was primarily based on a military necessity argument.[100] He then decided that the curfew order conviction should not be overturned because it did not represent "an error of the most fundamental character," and because it had not been shown that nondisclosure was actually prejudicial to Hirabayashi on that count.[101] Thus he granted the *coram nobis* writ in part, vacating the exclusion conviction but upholding the curfew conviction.[102]

Both sides appealed to the Court of Appeals for the Ninth Circuit, which reversed in part, holding that Hirabayashi's curfew conviction also should have been overturned.[103] It held that Judge Voorhees erred in assuming that even if the Supreme Court had possessed all of the relevant information, it would have treated the curfew order less stringently than the exclusion order because the former involved a lesser violation of rights.[104] That information, Judge Schroeder's opinion for the Court of Appeals said, showed conclusively that the Solicitor General's argument before the Supreme Court deliberately obscured the racist basis of General DeWitt's order.[105] The government had argued that DeWitt's racist views were not the sole basis for the order, but Schroeder noted

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[97] IRONS, JUSTICE DELAYED, *supra* note 87, at 29-30.
[98] Hirabayashi v. United States, 627 F. Supp. 1445, 1454 (W.D. Wash. 1986).
[99] *Id.* at 1457.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 1457-58.
[103] Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987).
[104] *Id.* at 594.
[105] *Id.* at 600-01.

that the Solicitor General himself, in oral argument before the Supreme Court, had conceded that "it was the views of the Commanding General which counted . . . ."[106] In fact, most of the evidence of racial bias was provided to the Supreme Court by Hirabyashi's lawyers and amici. The government had asked the Supreme Court to take judicial notice of the fact that the conviction was based on military necessity, but the Court took judicial notice only of the government's reasons for President Roosevelt's executive order. Attempting to convince the Court to accept an incorrect version of the facts, Judge Schroeder wrote, was an abuse of the solicitor general's special relationship with the Supreme Court.[107] The government did not petition the Supreme Court for a writ of certiorari.

The net result of the *coram nobis* cases, therefore, was the legal vindication of Hirabayashi and Korematsu and a strong denunciation by two federal district judges, and a court of appeals, of the government's conduct in formulating, applying, and legally enforcing the curfew and exclusion orders. There was also a strong undercurrent of criticism of the racial bias behind the orders, but the *coram nobis* format precluded any direct examination of the equal protection questions involved, or any opportunity to express concern with the emergency/war powers basis of the Supreme Court's decisions. A full reexamination of the broad constitutional issues could come only from the Court itself. By not seeking review of the *coram nobis* decisions, the Reagan Administration "protected" the Court from having to decide whether to reconsider the basic constitutional issues.

D. Repudiation in the Supreme Court

The Supreme Court however, has now taken at least a step in that direction. In its recent affirmative action decision, *Adarand Constructors, Inc. v. Pena*,[108] the Court supported its conclusion that the same equal protection standards apply to the federal government as to the states by noting the adverse consequences of permitting the federal government greater leeway.[109] Virtually all of the briefs discussed the exclusion cases, although none directly asked the Court to declare that they were wrongly decided. *Korematsu* was cited by all the parties—those favoring and those opposing affirmative action—to support the proposition that strict scrutiny should always be employed in reviewing the

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[106] *Id.* at 600.

[107] *See generally id.* at 602.

[108] 115 S. Ct. 2097, 2106-07 (1995).

[109] *Id.* at 2107-08 ("Cases decided after McLaughlin [v. Florida] continued to treat the equal protection obligations imposed by the Fifth and Fourteenth Amendments as indistinguishable . . . ." and "[w]e do not understand a few contrary suggestions appearing in cases in which we found special deference to the political branches of the Federal Government to be appropriate.").

validity of racial classifications.[110] Interestingly, not a single brief even hinted at the disparity between Justice Black's statement that racial classifications are entitled to "the most rigid scrutiny," and the fact that actually only the most deferential standard of reasonableness had been applied.

But Justice O'Connor for the majority, and Justice Ginsburg in dissent, did address that question. *Hirabayashi*, Justice O'Connor wrote, articulated but did not apply the tough standard of strict scrutiny "with most unfortunate results."[111] Stone's opinion had condemned racial distinctions as "odious to a free people," and declared that "racial discriminations are in most circumstances irrelevant and therefore prohibited.[112] But he also cited the then existing doctrine, later changed by *Bolling v. Sharpe*,[113] that the Fifth Amendment "restrains only such discriminatory legislation by Congress as amounts to a denial of due process" and applied a much more deferential standard to uphold the curfew policy. *Bolling* itself cited *Korematsu* and *Hirabayashi* as precedents for mandating strict scrutiny by the federal government in cases involving racial classifications.[114] Justice Black's opinion in *Korematsu* had articulated a strict scrutiny standard but then "inexplicably relied on the principles announced in the . . . *Hirabayashi* case to conclude"[115] that while exclusion from one's home was a more serious deprivation than a curfew order, "the racially discriminatory order was nonetheless within the Federal government's power."[116]

In a footnote O'Connor expressed clear sympathy with the *Korematsu* dissenters, especially Murphy's condemnation of the orders as falling into "the ugly abyss of racism." She also quoted with approval Justice Powell's statement in the *Bakke* case that "political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance (as in *Korematsu*)," but that racial or ethnic determinations must be "precisely tailored to serve a compelling governmental interest."[117] O'Connor concluded by noting that "*Korematsu* demonstrates vividly that even the 'most rigid scrutiny' can sometimes fail to detect an illegitimate classification . . . . Any

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[110] *See, e.g.*, Brief for the Associated General Contractors of America, Inc. as Amicus Curiae, Brief for the Pacifica Legal Foundation as Amicus Curiae, and Brief for the Equality in Enterprise Opportunities Assn., Inc. as Amicus Curiae, *Adarand*, 115 S. Ct. 2097 (1995).

[111] *Adarand*, 115 S. Ct. at 2106.

[112] Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

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

[114] *Id.* at 499 n.3.

[115] *Adarand*, 115 S. Ct. at 2106 (citing *Hirabayashi*, 320 U.S. 217).

[116] *Id.* at 2106-07.

[117] *Id.* at 2110 (citing concurring opinion by Powell, J. in Regents of Univ. of California v. Bakke, 438 U.S. 255, 299 (1978)).

retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future."[118]

Although dissenting from the Court's condemnation of affirmative action policies, Justice Ginsburg observed that the scrutiny in *Korematsu* which the Court described as "most rigid . . . nonetheless yielded a pass for an odious, gravely injurious racial classification."[119] And, she added, "A Korematsu-type classification, as I read the opinions in this case, will never again survive scrutiny: Such a classification, history and precedent instruct, properly ranks as prohibited."[120] Although Ginsburg spoke only for herself and Justice Breyer, it is reasonable to assume that the other dissenters on the affirmative action question—Stevens and Souter—did not disagree with her condemnation of *Korematsu*. Likewise, no member of the majority expressed any objections to O'Connor's repudiation of the equal protection reasoning in that case.

The Court in *Adarand* thus did not overrule *Hirabayashi* or *Korematsu*, but its condemnation was clear and direct. Acceptance of racial discrimination to meet a wartime emergency was, however, only one element of the *Korematsu* decision. The opinions in the *Adarand* case make clear that our heightened cultural, political, and judicial sensitivity to racial discrimination diminishes the likelihood of *Korematsu* redux. But as O'Connor went to some length to point out, a "suspect classification" designation requiring strict scrutiny is not necessarily "strict in theory, but fatal in fact."[121] It is thus, at least theoretically in the affirmative action context[122] but perhaps even more likely in national security crises, still conceivable that the government could provide to the Court's satisfaction an adequately compelling argument to sustain an emergency based racial classification even under the strict scrutiny test. The Supreme Court's record of timely and effective challenges to government in wartime is, to say the least, not very strong. As Laurence Tribe has written, the paradox of the war powers is that "because they are exercised in an emergency, they are the constitutional grants of authority that the Supreme Court is least likely to limit."[123] Thus *Adarand*, by itself, though a welcome repudiation of *Hirabayashi*

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[118] *Id.* at 2117.

[119] *Id.* at 2136.

[120] *Id.*

[121] *Id.* at 2117.

[122] According to O'Connor's opinion in *Adarand*, a racial classification, at least in theory, can withstand strict scrutiny analysis: "When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test set out in previous cases." *Id.* at 2101.

[123] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 355 (1988). *Cf.* Chief Justice Earl Warren's views written in 1962:

> War is a pathological condition for our Nation. Military judgments sometimes breed actions that, in more stable times, would be regarded as abhorrent. Judges cannot detach themselves from such judgments, although by hindsight, from the vantage point of more

and *Korematsu*, is no absolute assurance that a mass deprivation of rights in an emergency would be effectively challenged by the Supreme Court.

The possibility of just such an exception, for example, was raised in Justice Black's concurring opinion in a 1968 case, *Lee v. Washington*.[124] In a per curiam opinion the Court had held unconstitutional under the 14th Amendment an Alabama law that required segregation of the races in prisons and jails. Black's concurrence, joined by Stewart and Harlan, included the following language: "[P]rison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails."[125] There is no reference to this opinion in *Adarand*, and it did not address a deprivation of property and liberty of the same magnitude as occurred in the Japanese American cases. But it suggests that a racial classification might be acceptable in very special circumstances implicating the war powers, albeit with a modicum of due process that was not present in the Japanese cases.

Projecting the impact of *Adarand* as a barrier to future equal protection rights deprivations is complicated by another recent Supreme Court decision, *Romer v. Evans*.[126] The potential strength of the *Adarand* precedent is based on the Supreme Court's traditional three-tiered framework in which race and ethnicity are suspect classifications that trigger the nearly insurmountable test of strict scrutiny. However, Justice Kennedy's opinion in *Romer*, invalidating, on equal protection grounds using a balancing test, Colorado's anti-gay rights referendum, at least implies that even racial deprivations will be judged in a similar way, balancing degree of animus and relative harm to the victims against asserted government interests, rather than by applying the strict scrutiny test of compelling interest and least restrictive alternative.[127] This might make emergency based deprivations at least slightly more vulnerable to national security arguments.

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tranquil times, they might conclude that some actions advanced in the name of national survival had in fact overridden the strictures of due process.

Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 183-85 (1962). *But see also* WARREN, *supra* note 36.

[124] Lee v. Washington, 390 U.S. 333 (1968).

[125] *Id.* at 334.

[126] 116 S. Ct. 1620 (1996).

[127] *See* EVAN GERSTMANN, THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION (1998). *Cf.* Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (striking down a city ordinance that required special use permits for group houses for the mentally retarded). Formally employing only the rational basis test, Justice White's majority opinion said: "Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination. To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate government purpose."

III. INSTITUTIONAL FACTORS

To explore further how the Supreme Court might act in similar circumstances in the future, this section examines in more detail the institutional factors that account best for the Court's decisions in the *Hirabayashi, Korematsu,* and *Endo* cases. It focuses on how the Justices, individually and collectively, perceived their role and the role of the Court in circumstances in which the nation's very existence was thought to be at stake. These were not easy cases to decide, involving as they did the collision of major constitutional principles and doctrines—individual rights vs. the perceived imperatives of national survival. The record reveals a Court determined to support the war effort as its first priority, with a majority willing to overlook obvious discrimination in fact while at the same time paying obeisance to equality rights in the abstract.[128]

When World War II broke out, feelings of patriotism and concern about the success of the war effort affected Americans nearly universally, including the Justices of the Supreme Court. Frank Murphy and Hugo Black, at the behest of the President, addressed audiences on the need to support the war effort. Murphy spoke to a Catholic audience about the dangers the Nazis posed to religious freedom following President Roosevelt's decision (unpopular in the Catholic community) to send aid to the Soviet Union.[129] Black returned to Alabama to speak at a "Win-the-War Rally."[130] Some Justices conducted informal and formal investigations: Black went to Alabama to inquire into work stoppages in the mines,[131] and Owen Roberts headed a commission that investigated the attack on Pearl Harbor.[132] Chief Justice Stone, however, turned down a request to head an investigation of rubber shortages.[133] Murphy, to symbolize his support of the war effort, reenlisted in the Army during the summer of 1942.[134] Unsuccessful at obtaining a battlefield commission, he nevertheless attended officer's training in North Carolina. Finally, the President continued to rely on the Justices he had placed on the Court as

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[128] *See* Melvin Urofsky, *The Court at War, and the War at the Court*, 1 J. OF SUP. CT. HIST. 1-3 (1996).

[129] SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 212 (1975).

[130] ROGER NEWMAN, HUGO BLACK 313 (1994).

[131] *Id.*

[132] FINE, *supra* note 129, at 213. *See* COMMISSION APPROVED BY THE PRESIDENT OF THE UNITED STATES TO INVESTIGATE AND REPORT THE FACTS RELATING TO THE ATTACK MADE BY JAPANESE ARMED FORCES UPON PEARL HARBOR IN THE TERRITORY OF HAWAII ON DECEMBER 7, 1941, ATTACK UPON PEARL HARBOR BY JAPANESE ARMED FORCES, S. Doc. No. 159, 77th Cong., 2d Sess. 1-21 (1942).

[133] NEWMAN, *supra* note 130, at 313.

[134] FINE, *supra* note 129, at 217.

informal advisors on issues relating to the war: Frankfurter helped redraft the Lend-Lease legislation,[135] Byrnes helped draft the first War Powers Act,[136] and Douglas, Jackson, and Murphy advised on other issues. From President Roosevelt's perspective, enlisting the Justices in the war effort was a shrewd strategy: It drew them personally into the prosecution of the war and gave them a personal stake in insuring its success, while using them to legitimate wartime policies. This compromising of judicial independence and objectivity, and undermining of the separation of powers doctrine, would, Roosevelt knew, make it more difficult for the Justices to vote against him when legal challenges to war measures reached the Court.

Personal friendships were also important to understanding the outcome of these cases. For example, Hugo Black had known General DeWitt since 1930, their wives were friends, and his former messenger worked on DeWitt's staff.[137] Felix Frankfurter had lobbied President Roosevelt extensively to appoint his old friend Henry Stimson as Secretary of War, and Stimson called Frankfurter periodically to "get the news."[138] Frankfurter had also successfully pushed for the appointment of one of his former students, John J. McCloy, as Assistant Secretary of War. McCloy played a considerable role in defending and implementing the internment policy, and also in briefing Frankfurter on a regular basis.[139] In theory, the Supreme Court may be an ivory tower, the Justices detached and objective agents of the law. What we find here, however, is a Court charged with assessing the means to achieve ends to which all the Justices were intensely committed. There is no better example of the importance of environment and context, and the frailty of judicial independence, in Supreme Court decisionmaking.

A. The Hirabayashi Case

Gordon Hirabayashi, a senior at the University of Washington, was convicted of violating the curfew and exclusion orders on May 11, 1942. In its haste to get the case to the Supreme Court for early review, the Court of Appeals for the

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[135] LEONARD BAKER, BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY 385-86 (1984). Frankfurter's extrajudicial wartime activities were indeed substantial, and they were rooted in his unique perspective on the nature of war. According to Baker: "Whatever assistance he gave, he came to believe that it was neither a Democratic nor Republican task. This belief became stronger as the war years progressed." *Id.*

[136] *Id.*

[137] NEWMAN, *supra* note 130, at 314.

[138] MELVIN UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES 66 (1991).

[139] BALL AND COOPER, *supra* note 43, at 115 ("Frankfurter was receiving information, especially with respect to the Japanese exclusion cases involving the War Relocation Authority, on a weekly basis from John McCloy . . . .").

Ninth Circuit even failed to note the arguments in Hirabayashi's defense; and, breaking its own rules, the court did not permit one of its judges to file a dissent from its affirmance of conviction.[140]

Chief Justice Stone, promoted to the chief justiceship by President Roosevelt in 1941 as a bipartisan gesture on the eve of the war, assumed an uncharacteristcially strong leadership position.[141] In an effort to affirm the decision of the appeals court and provide unequivocal and timely judicial support for the war effort, Stone argued that the various phases of the policy—curfew, exclusion, relocation, and detention—should be treated separately.[142] Thus the legality of the curfew, the least intrusive restriction, would not hinge on the more questionable legality of the other phases. Since Hirabayashi had received concurrent sentences for violating the curfew and exclusion orders, Stone persuaded the Court to deal only with the curfew conviction.[143] Black and Frankfurter worked closely with Stone in drafting an opinion that was extremely deferential to the military, and in persuading the other Justices to accept this position unanimously. The primary obstacles they faced were Murphy's inclination to write a dissenting opinion, and to a lesser extent Douglas' intent on writing a concurring opinion.

Stone's draft opinion included a very broad construction of the war powers. Essentially ignoring the *Milligan* precedent against extra-constitutional emergency powers, Stone wrote that the war power includes the power to deal with the "evils that attend the rise and progress of the war."[144] This was very similar to Hughes' classic statement that "the power to wage war is the power to wage war successfully."[145] It was also in keeping with Justice Sutherland's expansive construction of the government's "sovereign" powers over foreign affairs in the *Curtiss-Wright* case.[146] Black, who thought it essential that Stone

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[140] FINE, *supra* note 129, at 437.

[141] *See* David Danelski, *The Influence of the Chief Justice in the Decisional Process of the Supreme Court, in* AMERICAN COURT SYSTEMS (Sheldon Goldman & Austin Sarat eds., 1978) (arguing that Stone was a weak and ineffective leader).

[142] HOWARD, *supra* note 49, at 303.

[143] Hirabayashi v. United States, 320 U.S. 81, 102 (1943) ("We decide only the issue as we have defined it—we decide only that the curfew order as applied . . . was within the boundaries of the war power . . . .").

[144] FINE, *supra* note 129, at 438.

[145] CHARLES EVANS HUGHES, WAR POWERS UNDER THE CONSTITUTION, A.B.A. REP. 232, 238 (1917); HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATIONS, METHODS AND ACHIEVEMENTS; AN INTERPRETATION 102-10 (1928).

[146] United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936). Sutherland characterized the war power as an attribute of sovereignty that did not depend on an affirmative constitutional grant of power. Although the historical and factual basis for Sutherland's argument for sovereignty based extra-constitutional powers has long been repudiated, the case is still cited in support of the use of inherent and emergency powers. *Cf.* Dames & Moore v. Reagan, 453 U.S. 654 (1982).

emphasize that the Supreme Court could not review the wisdom of military authorities in time of war, drafted a concurring opinion but withdrew it when Stone incorporated his argument.[147]

Frankfurter lobbied hard to solidify Stone's position on the separability of the different phases. Responding to Frankfurter's suggestions, Stone incorporated word for word his statement that "[w]e decide the issue only as we have defined it—we decide that the curfew order as applied, and at the time it was applied, was within the boundaries of the war power.[148] While this was technically correct, the broad language of the opinion was properly understood as (and was intended to be) more than merely an endorsement of the curfew order.

As the Stone opinion took shape and was circulated to the other Justices, Douglas expressed some doubt about joining it. He was specifically concerned about the absence of language indicating that at some point in time due process required the government to permit citizens an opportunity to prove their loyalty.[149] Douglas was concerned that Stone's opinion was too sweeping in its implicit acceptance of the categorization of all Japanese Americans as disloyal. He circulated a draft concurring opinion which emphasized these two points, leading Stone to add a paragraph indicating that "the Court was not deciding whether anything that had occurred since *Hirabayashi* violated the curfew order required a judicial inquiry concerning his loyalty or 'whether the courts could provide a procedure for determining the loyalty of individual . . . citizens of Japanese ancestry.'"[150]

Frankfurter supported Stone's original draft opinion. He met with Black who was said to have "been arguing against Douglas' invitation to bring 'a thousand habeas corpus suits in the district courts.'"[151] Douglas then offered some additional changes to the majority opinion so that he could join it. But Stone informed Douglas that if he accepted Douglas' suggestions, very little of the structure of his own opinion would remain and he would lose most of its adherents.[152] Douglas' opinion draft was also derided by Murphy as appealing to the mob, and by Jackson as "a 'hoax' because it promised something that could not be realized."[153] Stone eventually abandoned his initial concessions to Douglas, restored his opinion to its original form, and left Douglas to concur

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[147] NEWMAN, *supra* note 130, at 314.

[148] BALL AND COOPER, *supra* note 43, at 111 (citing Hirabayashi v. United States, 320 U.S. 81, 102 (1943)).

[149] FINE, *supra* note 129, at 439.

[150] *Id.* at 438 (citing Stone Memorandum for the Court, June 4, 1943).

[151] *Id.* at 439 (citing a letter from Frankfurter to Stone dated June 4, 1943).

[152] ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 673-75 (1956).

[153] FINE, *supra* note 129, at 439 (citing JOSEPH LASH, FROM THE DIARIES OF FELIX FRANKFURTER 251-52 (1975)).

alone. Douglas condemned the Stone opinion to Murphy as "being written for the American Legion," but eventually did not contest the Court's deference to the military's perception of the likelihood of a Japanese invasion.[154]

Rutledge also drafted a lengthy concurrence in which he stated that the military authorities had gone to the brink of legitimate constitutional power, and that there were limits to such power subject to judicial review. Rutledge's opinion, which he said caused him greater anguish than any other save one, was revised to a short statement focusing on his contention that he did not think that Stone's draft meant that that there was no limit to the military power that the courts could not review.[155] Rutledge thus joined the majority, but only very tentatively.

Frank Murphy saw in the military's actions a thinly veiled racism, and a clear contradiction of the Court's opinion in *Milligan*.[156] In a draft dissent, he blasted the majority for blindly accepting the military's factual claims, which he believed could not withstand even a limited review under the rational basis test. In his judgment, even the curfew order could not be sustained. Justice Reed thought that Murphy was giving up too much by conceding the possibility of some group disloyalty, and thus undermining the logic of his opinion: "[I]f you admit this you give your case away. Military protection only needs reasonable grounds, which this record has. You cannot wait for an invasion to see if loyalty triumphs."[157] Reed declined to join Murphy's draft opinion.

Frankfurter worked tirelessly to get Murphy to change his vote. Never an admirer of Murphy's legal skills, Frankfurter "peppered" him with notes about the case and pleas to withhold his dissent. Frankfurter wrote to Murphy: "Please, Frank—with your eagerness for the austere functions of the Court & your desire to do all that is humanly possible to maintain and enhance the corporate reputation of the Court, why don't you take the initiative with the Chief in getting him to take out everything that either offends you or that you would want to express more irenically."[158]

Murphy rejected these condescending entreaties to overlook clear racial discrimination in the name of institutional unity. He wrote back to Frankfurter: "Felix, I would protect rights on the basis of ancestry—But I would never deny them."[159] Frankfurter, ever the professor, responded: "That's not good enough for me. I don't want any of my fellow citizens to be treated as objects of favor,

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[154] *Id.* at 437.

[155] *Id.* at 441 (citing a letter from Rutledge to Stone dated Aug. 12, 1943).

[156] Murphy wrote in his notes during oral argument, "Ex Parte Milligan 77 years governs this case. Counsel. There was no suspension of the writ in this area." HOWARD, *supra* note 49, at 304 n.11a.

[157] *Id.* at 306.

[158] *Id.* (citing a letter from Frankfurter to Murphy dated June 5, 1943).

[159] *Id.* (citing a letter from Murphy to Frankfurter dated June 5, 1943).

i.e. as inferiors."[160] At the next day's conference, Frankfurter added: "F.M. Are you writing Indian cases on the assumption that rights depend on 'ancestry'? If so—I cannot give my imprimatur to such racial discrimination!"[161] Murphy was not persuaded and continued to maintain that the curfew order was based on unconstitutional racial bias.

Several days later Frankfurter, growing more belligerent, wrote again:

> Of course I shan't try to dissuade you from filing a dissent in that case—not because I do not think it highly unwise but because I think you are unmovable. But I would like to say two things to you about the dissent: (1) it has internal contradictions which you ought not allow to stand, and (2) do you really think it is conducive to the things you care about, including the great reputation of this Court, to suggest that everybody is out of step except Johnny, and more particularly the Chief Justice and seven other Justices of this Court are behaving like the enemy and thereby playing into the hands of the enemy?[162]

The combination of pressures from Reed and Frankfurter, and perhaps not wanting to be the lone dissenter in wartime, eventually convinced Murphy to change his opinion from a dissent to a concurrence. But it read like a dissent in arguing that the military authorities had gone to the "very brink of constitutional power."[163] While Murphy and Rutledge thus emphasized the limited nature of the Court's opinion, and Douglas stressed that Japanese Americans could not be indefinitely detained, the prevailing theme of Stone's majority opinion was the need for judicial deference to a military judgment to ensure the success of the war effort, even at the cost of a noxious racial classification.

B. The Korematsu Case

Fred Korematsu was convicted of violating the exclusion order. When his case came to the Supreme Court in 1944 the Court, in Murphy's words, "blew up."[164] Even though exclusion was part of a sequence that inevitably led to evacuation and detention, the Court, as it had done in *Hirabayashi*, again limited the scope of its ruling. Stone thus began the conference on the *Korematsu* case by suggesting that it was governed by *Hirabayashi*: "[I]f you can do it for curfew you can do it for exclusion."[165] Of course this contradicted the premise of the *Hirabayashi* opinion, which nominally applied only to the

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[160] *Id.* (citing a letter from Frankfurter to Murphy dated June 5, 1943).
[161] *Id.* at 307 (citing a letter from Frankfurter to Murphy dated June 6, 1943).
[162] *Id.* at 307-08 (citing a letter from Frankfurter to Murphy dated June 10, 1943).
[163] Hirabayashi v. United States, 320 U.S. 81, 111 (1943) (Murphy, J. concurring).
[164] HOWARD, *supra* note 49, at 333.
[165] FINE, *supra* note 129, at 444 (citing Murphy conference notes).

curfew issue. Four other Justices initially sided with Stone: Roberts, Black, Frankfurter and Rutledge. The opinion was assigned to Black, making him "hopping mad"[166] because writing it might compromise his reputation as a civil libertarian. Black was the most liberal justice in the majority, however, and Stone recognized that an opinion by Black upholding the exclusion policy might help to legitimize both the policy and the Court's decision. But if Black was a liberal, he was also, at least at the time, one of the Court's firmest believers in deference to military authority in time of crisis.[167]

Black circulated an opinion that stressed the Court's minimal role in oversight of military decisions. Stone did not think he focused closely enough on the specific exclusion order, however, and drafted a concurring opinion to emphasize that the validity of exclusion did not require a broader analysis of the confinement program in relocation centers (even though exclusion was obviously a predicate to relocation and detention).[168] When Black incorporated some of Stone's views, the concurrence was withdrawn. This helped to persuade Douglas to eventually side with the majority after Black had incorporated some other changes that Douglas suggested. Douglas' original draft dissent rested largely on statutory grounds, and his views could therefore be incorporated into Black's final opinion without his having to give in on the military necessity argument.[169]

The other initial dissenters—Roberts, Jackson, and Murphy—could not be swayed. Murphy's dissent was the most notable and critical of the three. His opinion was the only one that extensively and critically analyzed General DeWitt's Final Report. A strong supporter of the war, as we have seen, Murphy supported deference to military authority in the abstract. But his analysis revealed all the flaws in DeWitt's argument and its racial bias. He described the Report's findings as based on "questionable racial and sociological grounds not ordinarily within the realm of expert military judgment."[170] The Court should not defer to such questionable evidence. Murphy argued that *Korematsu's* exclusion went beyond the brink of constitutional power into "the ugly abyss of racism."[171]

Roberts also condemned the racial bias of the decision, and the majority's strategy of separating evacuation and detention, which he regarded as "single

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[166] NEWMAN, *supra* note 130, at 316.

[167] *Cf.* Black's opinion in Reid v. Covert, 354 U.S. 1 (1956) (stating that military trial of civilian dependents is inconsistent with the Constitution).

[168] Urofsky, *supra* note 128, at 77; FINE, *supra* note 129, at 444 (citing Murphy conference notes).

[169] NEWMAN, *supra* note 130, at 317; FINE, *supra* note 129, at 446.

[170] Korematsu v. United States, 323 U.S. 214, 236 (1944) (Murphy, J., dissenting).

[171] *Id.* at 233 (Murphy, J., dissenting).

and indivisible."[172] He rejected Black's application of the *Hirabayashi* principles upholding the curfew to the much broader deprivation of exclusion and detention.

Jackson, who in *Hirabayashi* had stated that "he did not believe a military commander was 'bound by due process,' now, without distinguishing between military action on the battlefield and military orders affecting civilians, took the more extreme position that military decisions were simply not 'susceptible of intelligent judicial appraisal.' "[173] The armed forces, he said, must protect a society and not merely its Constitution. "But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient."[174] He drew a distinction between the "mild deprivation of liberty" approved in *Hirabayashi*, which he had reluctantly supported, and the harsher deprivation at issue in *Korematsu*.[175] The courts, he concluded, should not be "made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority."[176]

Frankfurter's concurrence was a response to the dissenters, but particularly Jackson, with whom he had engaged in numerous disputes over fundamental issues of constitutional rights. Frankfurter agreed with Jackson that the Court could not properly and effectively intervene to prevent the Japanese internment, but rejected Jackson's nihilistic view of the Court's constitutional role in military emergencies. He was bothered even more by Jackson's position that the internment orders were unconstitutional. Under Jackson's theory, Frankfurter believed, the Supreme Court would be in a very uncomfortable, if not untenable position: openly permitting "unconstitutionality" to pass unsanctioned. To maintain the Court's legitimacy and proper role, it must not acquiesce in unconstitutional orders; better that it passively review and defer to constitutional ones. To Frankfurter, therefore, it was not only necessary for the Supreme Court as an institution, but also constitutional under the war powers, to entrust to the military the task of prosecuting a war effectively. The relationship between the military and the Court had to be seen as positive and legitimate. It had to be predicated on the assumption that military orders were deferred to *because* they were constitutional.

Frankfurter recognized that the military might act improperly, but believed that such excesses were tolerable so long as they were sanctioned by Congress. In effect he was calling for recognition of a separate "constitution for war[:]

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[172] *Korematsu*, 323 U.S. at 226 (Roberts, J., dissenting).
[173] *Id.* at 245 (Jackson, J., dissenting).
[174] *Id.* at 244 (Jackson, J., dissenting).
[175] *Id.* at 246-47 (Jackson, J., dissenting).
[176] *Id.* at 247 (Jackson, J., dissenting).

[T]he validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless."[177] And he concluded, "To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours."[178] Clearly, Frankfurter was giving priority to legislation supporting the armed forces over constitutional rights.

C. The Endo Case

The historical record is clear that unlike the acrimonious debate over *Hirabayashi* and *Korematsu*, "there was instant unanimity in the *Endo* case."[179] Chief Justice Stone once again took a strong leadership position in conference, framing the question as whether the military could continue to detain a concededly loyal American citizen. He noted that the Court's affirmation of the original exclusion order was based on the assumption that there were disloyal persons in the Japanese American population. Stone argued that once an individual's loyalty was proven, there could be no grounds for continued detention.[180] The problem, therefore, was to move away from *Korematsu* (decided the same day) without undercutting it.

This explains why Douglas' majority opinion failed to reach the constitutional issue, which had been argued by the parties; it was less an act of deference than an equivocal message to the President advising a change of course. In contrast to *Hirabayashi* and *Korematsu*, Douglas challenged the military's judgment on the need for continued detention. Noting that the enabling act and the Executive Order creating the WRA were silent on the question of detention, and thus that the power to detain must have come from Congress' implied powers, Douglas stated the balance between individual liberties and war powers quite differently than either Stone or Black had done. "[I]f there is to be the greatest possible accommodation of the liberties of the citizen with this war measure," he stated, "any such implied power must be narrowly confined to the precise purpose of the evacuation program."[181] Yet Douglas was not officially undercutting *Hirabayashi* and *Korematsu* because his solicitude for individual liberties was tied to the lack of specific

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[177] *Id.* at 224 (Frankfurter, J., concurring).

[178] *Id.* at 225 (Frankfurter, J., concurring).

[179] BALL AND COOPER, *supra* note 43, at 115 (citing Douglas' conference notes).

[180] IRONS, JUSTICE AT WAR, *supra* note 9, 323-24. Irons observed that Stone cited Solicitor General Fahy's concession from oral argument in answering "his own rhetorical question: 'Once loyalty is shown the basis for the military decision disappears[,] [t]his woman is entitled to summary release.'" *Id.*

[181] *Ex Parte* Endo, 323 U.S. 283, 302 (1944).

congressional authorization of detention. By implication, his opinion still conceded to Congress the authority to give priority to national security considerations.

A standard reponse to this interpretation of *Endo* is that *Hirabayashi* and *Korematsu* were concerned with military power, while in *Endo* the Court was reviewing civilian power. Thus there was no inconsistency nor any backtracking from the theme that the Court must defer to military judgment in time of war. But while control over the detention camps formally rested with the WRA, it was the military that exercised ultimate control over the inmates at those camps. Thus, in reality, *Endo* asserted control over a military responsibility. And in so doing the Court may have been sending a signal that the *Milligan* decision still retained some constitutional validity, and that at least when it wished to do so, the Supreme Court had the institutional competence to decide such questions. One suspects that the doctrinal obfuscation of *Endo* was not an accident.

Interestingly, although the Court was unanimous in ruling that Mitsuye Endo should be given her freedom, and Douglas' opinion was ready on November 4th, it would be several weeks before the disposition of the case would be announced. On November 28th, Douglas wrote an agitated letter to Stone in which he complained that:

> The matter is at a standstill because officers of the government have indicated that some changes in detention plans are under consideration. Their motives are beyond criticism and their request is doubtless based on important administrative considerations. Mitsuye Endo, however, has not asked that the decision of this Court be stayed. She is a citizen, insisting on her right to be released—a right which we will agree she has. I feel strongly that we should act promptly and not lend our aid in compounding the wrong by keeping her in unlawful detention any longer than is necessary to reach a decision.[182]

What Douglas did not realize was that the delay was due to pressures of presidential politics, in which Stone was partially involved. As Peter Irons observed:

> What Douglas never learned was that Stone had enlisted in the high level campaign to protect President Roosevelt from political consequences of the decision to end the internment program . . . . Although the decision to open the camp gates had been made soon after the November elections, public announcement of the move was complicated by the Endo case. White House officials, and perhaps Roosevelt himself, undoubtedly hoped to blunt criticism

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[182] BALL AND COOPER, *supra* note 43, at 116 n.58 (citing a letter from Douglas to Stone dated Nov. 28, 1944) (on file in the Papers of William O. Douglas, Box 115, Library of Congress, Washington D.C.)).

> of their lengthy delay in making this decision by announcing it from an executive branch office. Waiting until after the Supreme Court issued an opinion that declared the detention of "loyal" citizens to be unlawful might strike the press and the public as capitulations to the judiciary.[183]

A day before the Court announced the cessation of Endo's ordeal, the War Department declared that loyal Japanese would be released from the internment camps.

D. Understanding the Court's Decisions

The Supreme Court's adjudication of the Japanese internment cases reflects the precarious situation in which it often finds itself in times of national emergency. In such situations there is a need for the Court both to protect itself as an institution by supporting popular government policies, and to avert a clash with a popular president who might decline to follow an adverse judicial ruling and thus expose its institutional weakness. What was the likelihood of President Roosevelt complying with a Supreme Court decision requiring the return of the Japanese Americans to their homes in 1943, or even after, as in 1944, the crisis had largely evaporated? The Justices were certainly familiar with President Roosevelt's 1937 "Court Packing Plan," and at least some of them may have known of the President's readiness to disobey an expected adverse decision in the Gold Clause Cases.[184]

As discussed above, the emergency powers doctrines crafted by Frankfurter and Jackson, albeit following different paths, were designed not only to maximize the discretion of the war making branches in the interests of national security, but also to shelter the Court as an institution from making unpalatable and possibly destabilizing decisions. But there is additional evidence to show how strongly a majority of the Court was determined not to expose its vulnerability even at the risk of some obvious distortions and compromises on individual liberties. A recounting of some of these tactics suggests the lengths to which the Court might go, in future cases involving national emergencies, to protect its power and prestige.

The equal protection question is a case in point. Even allowing that the equal protection clause was not nearly as well developed in the 1940s as it has become, and its full application to the federal government not yet established,

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[183] IRONS, JUSTICE AT WAR, *supra* note 9, at 344.

[184] Norman v. Baltimore & Ohio R.R. Co., 294 U.S. 240 (1935); Nortz v. United States, 294 U.S. 317 (1935); Perry v. United States, 294 U.S. 330 (1935). Roosevelt was determined to ignore a judicial order to return to the Gold Standard in the Gold Clause Cases, and his preparation of a radio address explaining his position is described *in* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 86-88 (1995).

a close study of the *Hirabayashi* and *Korematsu* opinions reveals just how unbalanced the Court's treatment of the equality principle was. Realistically, the Court could not invalidate the internment and supersede the prerogatives of the war making branches. But it was also not willing to abandon the concepts of equal protection and protection of individual rights completely. Chief Justice Stone, after all, was the author of the celebrated "Footnote 4" which had placed "discrete and insular minorities" in a protected position and established the conceptual basis for the constitutional rights revolution to come.[185] Miscasting the factual record made it possible for the Court to maintain that it was, at least in the abstract, still committed to those ends; and it made the internment at least slightly more palatable legally and publicly.

In *Hirabayashi* the Court held that the curfew order, which was applicable only to persons of Japanese ancestry and therefore inescapably a racial classification, was justified only if "in the light of all the facts and circumstances there was any substantial basis for the conclusion . . . that the curfew . . . was a protective measure necessary to meet the threat of sabotage and espionage . . . ."[186] The Court found that there were facts presented which "supported the judgment of the war-waging branches of the government that some restrictive measure was urgent."[187] It was then that the Court had to determine whether imposing those restrictions on one racial group was a reasonable means of securing the nation's defense. To answer this question affirmatively it had to abandon strict scrutiny in practice while reaffirming it in principle. It justified doing so by accepting the government's obviously racist and wholly specious argument that the Japanese as a people had a dangerous propensity to commit acts of treason. But the Court did not scrutinize the government's claim of impending Japanese treachery, despite extensive argumentation to the contrary by *Hirabayashi*, and a plethora of evidence contained in the amicus briefs. And it retreated from any obligation to apply strict scrutiny by noting that (at the time) the federal government was not to be held to the same equal protection standard as the states.

A nearly identical strategy was evident in *Korematsu*. The Court paid no heed to the already abundant evidence that Japanese Americans, as a group, posed no security risk. It rejected Korematsu's claim that it was improper for the Court to take judicial notice or assume judicial knowledge of highly dubious facts that were based on mere suspicion, and on General DeWitt's personal prejudices. It also rationalized exclusion by claiming that it was necessitated by the inability of the authorities "to bring about an immediate

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[185] United States v. Carolene Products Corp., 304 U.S. 144, 152-53 n.4 (1938). *See also* PAUL MURPHY, THE CONSTITUTION IN CRISIS TIMES: 1918-1969 242 (1972).

[186] Hirabayashi v. United States, 320 U.S. 81, 95 (1943).

[187] *Id.* at 101.

segregation of the disloyal from the loyal . . . ."[188] This assertion was false. The government had argued, as had General DeWitt, that no loyalty review would ever be effective, and there was simply no support in the record for the Court's contention that the purpose of internment was to facilitate a temporary sifting of the loyal from the disloyal.

Another misrepresentation in *Korematsu* involved the detention issue. The Court refused to consider the constitutionality of detaining all those of Japanese ancestry indefinitely; instead it chose to consider only the validity of the exclusion order. Justice Black held that "we cannot say either as a matter of fact or law that [Korematsu's] presence in that [assembly] center would have resulted in his detention in a relocation center."[189] Yet the contention that reporting to an assembly center did not inevitably result in detention in a relocation center was false—at best, wishful thinking. To reach that conclusion Black had to ignore General DeWitt's statement that the assembly centers were expressly designed to facilitate evacuation to relocation centers.[190] By artificially separating the exclusion and detention orders, the Court could ignore the *Milligan* precedent and consider only the less repressive exclusion order. It could also avoid the embarassing question of whether a loyal American citizen, having committed no crime other than failing to submit to an exclusion order, could be imprisoned by the military authorities.

The claim was made in the redress litigation that the government's lack of candor before the Supreme Court, indeed its deception and suppression of evidence, lulled the Court into acquiescence. If the Court had known the truth it would surely have decided these cases differently. While the Court honestly may not have seen things as clearly as it should have—the blinders of the adjudicatory process are well known—the explanation that it was duped is untenable. General DeWitt's claims of imminent treachery by Japanese Americans had been effectively impeached by the ACLU's amicus curiae brief, which showed how flawed and insufficient the government's evidence was.[191] The Japanese American Citizen's League (JACL) filed a brief in *Hirabayashi* with extensive refutation of the charges that the Japanese as a race were genetically imbued with treacherous instincts.[192] The briefs filed in *Korematsu*

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[188] Korematsu v. United States, 323 U.S. 214, 219 (1944).

[189] *Id.* at 221.

[190] FINAL REPORT, *supra* note 29, at 34. "It was concluded that evacuation and relocation could not be accomplished simultaneously. This was the heart of the plan. It entailed provision for a transitory phase. The program would have been seriously delayed if an evacuation had been forced to await the development of Relocation Centers." *Id.* at 78.

[191] Brief of the American Civil Liberties Union as Amicus Curiae 12-20, Hirabayashi v. United States, 320 U.S. 81 (1943).

[192] Brief for the Japanese American Citizens League as Amicus Curiae 12-68, Hirabayashi v. United States, 323 U.S. 81 (1943).

were even more detailed and comprehensive on this point.[193] The JACL directly challenged DeWitt's lack of good faith and systematically refuted each one of his justifications for evacuation. It pointed out to the Court the actions of the FBI in rounding up possible saboteurs and spies immediately after Pearl Harbor, and argued that any danger had thus been effectively blocked.[194]

A plausible argument thus can be constructed that the Court did indeed know—must have known—that the government's justifications for the internment policy were groundless, and that it chose to ignore these facts. It is true that some damaging evidence was withheld by the solicitor general, but there was nonetheless ample information before the Court for it to reject the factual basis of the curfew and exclusion policies. Murphy's biting dissent dispels any illusion of a fogbound and misled Supreme Court.

> The exclusion order necessarily must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic, or experience could be marshalled in support of such an assumption.[195]

> The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices . . . .[196]

Nor can it be claimed that DeWitt's arguments were accepted for want of any contradictory evidence. The Justices' support of the internment effort simply cannot be attributed to ignorance and deception. The conclusion is thus inescapable that the Court made the decisions it wanted (or felt it had) to make to preserve its institutional power and prestige, support the war effort, and maintain for future use, a broad capacity to support the government's use of its war and emergency powers. This exercise in judicial statesmanship was justified by selective renditions of fact and some dubious constitutional interpretations.

Statements by some of the participating Justices after the war had ended, statements made long after the true facts had been clearly apprehended and widely disseminated, reveal a mixed inclination toward reassessment (and

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[193] Brief of the Japanese American Citizens League as Amicus Curiae 52-69, Korematsu v. United States, 323 U.S. 214 (1944).

[194] *Id.* at 69-82.

[195] *Korematsu*, 323 U.S. at 235 (Murphy, J., dissenting).

[196] *Id.* at 239.

perhaps some prejudice as well). Justice Douglas, for example, observed in a footnote to his opinion in *DeFunis v. Odegaard* [197] that:

> The decisions were extreme and went to the verge of wartime power; and they have been severely criticized. It is, however, easy in retrospect to denounce what was done, as there actually was no invasion of our country . . . . But those making plans for defense of the Nation had no such knowledge and were planning for the worst.[198]

James Simon, Douglas' biographer, emphasized Douglas' patriotism and his sincere belief that the west coast was imperiled by a Japanese invasion.[199] Douglas' clerk during the war, Professor Vern Countryman, attributed Douglas' vote in *Korematsu* to his conclusion that "[i]n view of 'threatened air raids and invasion by the Japanese forces' and the danger of 'sabotage and espionage' the government could rationally act on the basis of race alone."[200] Yet this explanation is not convincing. When *Korematsu* was decided in 1944, there was surely no longer a threat of air raids, much less of a Japanese invasion of the west coast. The naval war in the Pacific was all but won. Countryman's defense thus rings hollow; and it was, in any case, undercut by Douglas' later apology in his memoirs: "Technically . . . the question of detention was not presented to us. Yet evacuation via detention camps was before us, and I have always regretted that I bowed to my elders and withdrew my opinion."[201]

Justice Stanley Reed attributed his support for internment to General DeWitt's claims of incipient sabotage and treachery: "[M]aybe it was hysteria, but the record shows that there were authenticated cases of treasonable actions."[202] We know, and Reed should have known, that this claim was patently untrue. There were no authenticated cases of treason committed by persons of Japanese ancestry. Alleged incidents of sabotage, which General DeWitt blamed on the Japanese, were, as we have seen, refuted in briefs filed with the Supreme Court in *Hirabayashi*.

Hugo Black's later reflections, sadly, reveal more than a tinge of racism. In an interview in 1967, Black said:

> I would do precisely the same thing today, in any part of the country . . . . [T]hey all look alike to a person not a Jap. Had they attacked our shores you'd have a

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[197] DeFunis v. Odegaard, 416 U.S. 312 (1974).

[198] *Id.* at 339 n.20 (1974) (Douglas, J., concurring).

[199] JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 243-45 (1980).

[200] VERN COUNTRYMAN, THE JUDICIAL RECORD OF JUSTICE WILLIAM O. DOUGLAS 126 (1974).

[201] WILLIAM O. DOUGLAS, THE COURT YEARS: 1937-1975 at 279-80 (1980).

[202] Stanley Reed, *Oral History Memoir, in* COLUMBIA UNIVERSITY ORAL HISTORY COLLECTION at 305 (Meckler Publishing, n.d.).

> large number fighting with the Japanese troops. And a lot of innocent Japanese Americans would have been shot in the panic. Under the circumstances I saw nothing wrong in moving them away from the danger area.[203]

IV. INSTITUTIONAL CHOICES: CONSTITUTIONAL LIBERTIES AND/OR NATIONAL SECURITY

This case study of the Japanese American decisions provides a starting point for a more systematic analysis of the likelihood that the Supreme Court would, in a future crisis, act resolutely and effectively to protect constitutional liberties. Paul Murphy has noted the interplay of institutional and political factors likely to affect the Court's protection of constitutional rights during wartime:

> The Court's overall posture in the Japanese cases was in some ways understandable, given the state of total war, national emphasis upon full cooperation in the war effort, the high status the military held at the time, and the reluctance of the Commander-in-Chief to do anything but acquiesce fully in the military decision.[204]

Elaborating on this view, I have identified five factors that, in various combinations, might contribute to such a determination: a) the perceived severity and nature of the crisis, balanced against b) the severity and nature of the deprivation; c) the interplay of legal and constitutional doctrines; d) political and environmental conditions; and e) institutional factors such as the structure, role, and internal dynamics of the Supreme Court. A brief exploration of these factors sets the stage for future research.

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[203] *Justice Black, Champion of Civil Liberties for 34 Years on Court, Dies at 85*, N.Y. TIMES, Sept. 26, 1971, at 76. The *Times'* obituary says that these words were uttered in 1967, and this date is confirmed by NEWMAN, *supra* note 130. However, Gerald Dunne, another of Black's biographers, dates the statement to 1956. GERALD DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 213 (1977). Black's position in *Korematsu* and *Hirabayashi* seems, in any case, philosophically at variance with his plurality opinion in Reid v. Covert, 354 U.S. 1 (1957), invalidating a provision of the Uniform Military Code that subjected civilian dependents accompanying the armed forces abroad to courts martial, thereby depriving them of their constitutional right to trial by jury in a civil court:

> It is true that the Constitution expressly grants Congress the power to make all rules necessary and proper to govern and regulate those persons who are serving in the "land and naval Forces." But the Necessary and Proper Clause cannot operate to extend military jurisdiction to any group of persons beyond that class described in Clause 14—the land and naval Forces.

Id. at 20-21.

[204] MURPHY, *supra* note 185, at 241-42.

A. Perceived Severity and Nature of the Crisis

The Supreme Court does not operate in a vacuum. Constitutional litigation is always contextual. Even long standing and relatively stable doctrines must be interpreted and applied to particular cases. The Japanese American cases demonstrate just how strongly the Justices were committed to supporting the war effort, and how determined a majority of Justices were to justifying the internment policy in the face of evidence that undermined the claims of military necessity and understated the hardships and discrimination imposed on a large group of citizens. The Court's institutional cooptation into the war effort colored its views and compromised its ability to render fair and effective justice. The perceived severity of any future crisis, and the Court's estimate of the level of national risk, will always determine, at least initially, whether it is a "constitution for war" or the Constitution that will be applied, and at what discount. While the United States may be more solicitous of individual and group rights than some other nations, its citizens more willing and able to seek redress in the courts for alleged rights deprivations, and its courts more willing to protect those rights, such claims have rarely succeeded at the highest level when they appear to undermine government action in time of serious emergency.[205]

B. Severity and Nature of the Claimed Deprivation of Rights and Liberties

The severity of the crisis will inevitably be balanced against the severity and degree of the particular deprivation at issue: The greater the crisis and risk to national security, the greater the deprivation that will be rationalized and tolerated. Assessments of harmful consequences are central to such a determination. Systematic mass deprivations are, by their very nature, more politically risky and therefore, more difficult to justify than individual deprivations that are distributed throughout the population and do not fall exclusively on a particular racial, ethnic, religious, or political group capable of mass organization and response. Many of the Supreme Court's decisions protecting constitutional rights in time of emergency have involved either individuals or relatively dispersed target groups. But minority groups today have greater resources, and increased capacity for mobilization to fight back

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[205] *See, e.g.*, Abrams v. United States, 250 U.S. 616 (1919); Schenck v. United States, 249 U.S. 47, 52 (1919); MARK NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTY (1991); RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH. *See also* MARY ANN GLENDON, A NATION UNDER LAWYERS (1994).

against proposed deprivations.[206] Likewise, the perceived degree of harm to the targeted group, and the likelihood of recovery and compensability, will always be considered, at least implicitly.

Timing, as we have seen, is also important. The Supreme Court's willingness to seriously challenge constitutional deprivations has, historically, been more likely after the crisis has abated or passed. And it has been at least covertly sensitive to the likelihood of presidential compliance, which implicates questions of public and congressional support. The Court cannot be expected to act boldly and resolutely against the united warmaking efforts of the president and congress.

C. Legal and Constitutional Doctrines

Legal and constitutional doctrines are not absolute, their meaning is not set in stone. "Applying" a doctrine in a particular case always implicates a particular set of facts and perceptions and depends on the first two factors just discussed. The rule of precedent, stare decisis, at least in constitutional cases at the Supreme Court level, is not a command but a policy of guidance. Precedents are not absolutes but often variables to be followed, applied, rejected, or manipulated in order to reach what the Court, or any justice, believes to be the "correct" result in a particular case (and in a particular context).[207] Doctrinal importance and complexity are also relevant. There are often competing doctrines or precedents relevant to a particular case or issue, and some priorities may have to be established. Likewise, as was abundantly true in the Japanese American cases, the "liberal" or "conservative" predispositions of the justices are not always accurate markers of doctrinal outcome. The actual votes in these cases did not accurately portray the nuanced language of the opinions or the fluidity of changing positions.[208]

In the Japanese American cases there were three doctrinal clusters that had to be considered and balanced against each other: Governmental powers—enumerated, implied, or inherent—to deal with war and other national emergencies; the meaning and application of the Fifth Amendment's equal pro-

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[206] *See* STUART SCHEINGOLD, THE POLITICS OF RIGHTS (1974); MICHAEL MCCANN, RIGHTS AT WORK (1994). The Equal Protection Clause, which has empowered minorities greatly in both the legal and political arenas, could no longer be brushed aside so easily in determining the legitimate hardships and burdens of war.

[207] For a discussion of the variability of stare decisis in constitutional adjudication, and the concept of "watershed decisions," *see* the plurality opinion of Justices Souter, O'Connor, and Kennedy in Planned Parenthood of Pennsylvania v. Casey, 505 U.S. 833 (1992), and the many responses to that opinion.

[208] *See* J. Woodford Howard, *On the Fluidity of Judicial Choice*, 61 AM. POL. SCI. REV. 43 (1968).

tection component in this context; and issues of justiciability, including the doctrine of political questions. A fourth potentially important constitutional doctrine, the prohibition on bills of attainder,[209] was mentioned by the appellants and some of the amici in *Hirabayshi* and *Korematsu*;[210] and it was raised by Justice Jackson in oral argument in *Hirabayashi*.[211] But the Court did not consider the matter. However later developments suggest that the bill of attainder prohibition might be of significance in adjudicating similar rights deprivations in a future crisis.[212]

We have seen how an expansive and very deferential interpretation of the government's war powers was employed to justify the internment policy and the consequent severe deprivation of the victims' "rights" that might have been protected under the equal protection component of the Fifth Amendment, even as it then applied to the federal government. Rights are always contingent on circumstances and context. Since those cases were decided, the war powers/emergency/inherent powers doctrinal cluster has remained relatively

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[209] U.S. CONST. art. I, § 9, cl. 3.

[210] *See, e.g.*, Brief for Northern California Branch of the American Civil Liberties Union, Amicus Curiae 82, Hirabayashi v. United States, 323 U.S. 81 (1943); Brief for Appellant 47; Korematsu v. United States, 323 U.S. 214 (1944).

[211] *See* IRONS, JUSTICE AT WAR, *supra* note 9, at 220.

[212] The Supreme Court's bill of attainder jurisprudence indicates that for a challenge to a government action to succeed along such lines, three elements must be present. First, the action must affect an identifiable individual or a clearly named class of individuals. Although attainders originally listed the people affected, the Court has held that attainders may also exist when a category or class is described, and escape from that class or category is not readily possible. *Cf.* Cummings v. Missouri, 4 Wall. 27 (1866) (striking down amendments to state constitution requiring loyalty oaths of certain public officials); United States v. Lovett, 328 U.S. 303 (1946) (invalidating a federal law stripping three named civil servants of their positions). Second, there must be some penalty or harm imposed that goes above and beyond the incidental limiting effects of permissible legislation. For example, action restricting occupational choice to particular individuals goes beyond a mere licensing scheme and would likely not be permitted. *Cf.* United States v. Brown, 381 U.S. 301, 303 (1965) (striking down a federal law preventing individuals who had been members of the Communist Party from serving as labor union officials); Nixon v. Adm'r of Gen. Services Admin., 433 U.S. 425 (1977) (upholding federal law requiring former President Nixon to turn over his official papers to the government); Selective Service Sys. v. Minnesota Public Interest Research Group, 468 U.S. 447, 481 (1984) (upholding federal law requiring proof of registration with selective service to establish eligibility for federal higher education financial assistance). Finally, the harm must be imposed absent normal judicial proceedings. The use of courts to establish whether or not an individual fits the prescribed class is insufficient; a personal evaluation of the individual's actions must be provided for to avoid an unconstitutional attainder.

An Act of Congress (or executive order) which prohibits individuals, based on race, from living in their homes, would seem to fit within the umbrella of actions prohibited by the Bill of Attainder Clause. But even outside of the context of race, for example where the disloyalty of individuals is alleged without any opportunity for the individual to prove otherwise, an unconstitutional attainder might exist. Indeed, such action would constitute a punishment, affecting an identifiable class of individuals, in the absence of substantive judicial proceedings.

untouched. There has been no subsequent crisis of the same magnitude to test it.[213]

Likewise we have already noted the subsequent development of the concept of equality in our constitution and in American life, and, as expressed in the *Adarand* case, a profound, "near absolute" commitment to constitutional color blindedness.[214] But even in the *Adarand* case, it was acknowledged that there might be some circumstances under which a racial classification might be narrowly tailored to meet a compelling interest.[215] General DeWitt's internment policy was neither narrowly tailored nor factually compelling, but nevertheless it prevailed. But those words—"compelling interests" and "narrowly tailored"—have a diaphanous quality that leave them vulnerable to emergency power claims.

Nevertheless, it would certainly be much more difficult for a future Supreme Court to accept such blatant equal protection deprivations. Much would depend on how such a deprivation is perceived by the Court and its publics. If it is viewed by the Court as the primary doctrine subject to a war powers limitation, it will be more difficult to overcome. But if, as in the Japanese American cases, equal protection claims are considered as a threat to national security and survival, which are accorded higher priority, then its doctrinal power will be more limited. Recall that Congress has not barred future detention actions but merely made them subject to authorization by statute. It is true that the Court has said, in *United States v. Robel*, that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit . . . . [E]ven the war power does not remove constitutional limitations safeguarding essential liberties."[216] But the *Robel* case did not involve an emergency or crisis

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[213] The closest the Supreme Court came was in its affirmance of President Carter's executive order, pursuant to an act of Congress, freezing Iranian assets in the United States in response to the hostage takeover of the American Embassy in Teheran. Carter's later executive agreement with Iran (approved by incoming President Reagan) to establish an international claims tribunal to adjudicate claims against Iran by Americans who, by that agreement, were barred from raising those claims in the federal courts, was also weakly and perhaps reluctantly supported by the Supreme Court as a permissible exercise of executive inherent powers in the absence of direct congressional support. But the decision turned on whether the president could deprive American citizens of their right to litigate claims in American courts without express approval by Congress (as opposed to mere acquiescence), rather than on whether Congress could have closed the courts to such claims by statute. *See* Dames & Moore v. Regan, 453 U.S. 654 (1982).

[214] *See generally* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995). It should be noted, of course, that *Adarand* concerned affirmative action (benign) classifications and might be limited to that context. Justice O'Connor's opinion, however, seemed to be addressed more broadly to all suspect classifications.

[215] *Id.* at 2101.

[216] United States v. Robel, 389 U.S. 258, 263-64 (1967).

situation. There can be little doubt that where such a crisis existed, greater judicial deference would be expected.

The justiciability issue was described in the debate between Justices Frankfurter and Jackson. Both believed that the Supreme Court should not, or could not, interfere with the crisis policies of the war making branches. Jackson argued that in such circumstances the nation would simply have to trust its political and military leaders, and that the Court should simply step aside. What he objected to in his *Korematsu* dissent was the Court placing its imprimatur on a policy he believed to be unconstitutional. Frankfurter, on the other hand, helped to lead the Court in creating a constitutional justification, however tortured, to support the war effort. The issue of justiciability is likely to arise in future crises (as it has in recent cases involving military actions), but the question of whether the Court should "opt out" or merely defer in a particular crisis is simply not susceptible to predetermined rules or predictions. The very nature of nonjusticiable "political questions" is that they call for discretion in judging the "appropriateness" of judicial consideration in a particular context. However, the controlling political questions case, *Baker v. Carr*,[217] puts most foreign policy and foreign affairs questions in this excluded category, and thus theoretically (but only theoretically) out of the reach of Supreme Court adjudication.[218]

D. Political and Environmental Factors

As described previously, the Supreme Court in the Japanese American cases was concerned about backing the war effort, as well as with preserving its institutional integrity and authority. In any future case of this kind the Court would necessarily be influenced by such factors as who had authorized, and who was carrying out, the challenged policy. Following Jackson's classic statement on inherent powers in the Steel Seizure case,[219] much would depend on whether the president and congress were acting together, at cross purposes, or whether the president was acting in the absence of congressional support but with no focused opposition. The president's popularity and electoral situation might also be important—although it would cut both ways. A popular

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[217] 369 U.S. 186, 211-15 (1962).

[218] *See, e.g.*, Goldwater v. Carter, 444 U.S. 996 (1979); Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990). There is a significant body of opinion that holds that the political question doctrine is improper and mischievious, if not unconstitutional, and that the Court cannot avoid deciding cases properly within its jurisdiction. *See* Martin H. Redish, *Judicial Review and the Political Question*, 79 NW. U. L. REV. 159 (1985). However, given the Court's discretionary certiorari jurisdiction, it does not have to invoke the political questions doctrine in order to avoid deciding a case it thinks is "too hot to handle."

[219] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

president might be more inclined than a lame duck to disobey a court order he believed was not in the national interest; but she might also calculate (differently than President Roosevelt did in 1935) the electoral risk in defying the Supreme Court.

Constitutional politics is responsive to popular attitudes, as well as social and cultural forces. Even though the Supreme Court's equal protection jurisprudence has advanced to favor equality far beyond what was true in the 1940s, latent racism and intolerance in our society are still prevalent. Studies show that individual professions of racial equality are little more than skin deep, and thus popular tolerance of (or inertia towards) race based emergency policy in sufficiently threatening circumstances is not unthinkable.[220] On the other hand, civil rights policies and concerns, and the willingness to litigate to enforce them, are so deeply embedded into our legal culture of "rights consciousness," that even war powers based rights deprivations would be subject to much stricter scrutiny than they were in the Japanese American cases.

Media response and attention would also impose significant limits on any government action that involved mass, or even individual, rights deprivations in a crisis. The government's rendition of critical facts, and its arguments of military necessity, would be analyzed critically and debated widely. Yet the media would also face the burden of "balancing" rights deprivations with the severity of the crisis. In times of crisis no one, no institution, wants to be responsible for the worst case scenario coming to pass.

E. Institutional Factors: Structure, Role, and Internal Dynamics

Perhaps the single greatest factor contributing to the likelihood that the Supreme Court would protect constitutional liberties in a future crisis is the Court's role transformation that had just begun in the late 1930s, and would not develop fully for nearly a generation. That transformation was in its incipient stages when World War II began, and was largely set aside during the war. Prior to the New Deal revolution, the Court was more concerned with government power and property rights than with individual liberties. Even today, as both the vision and the legacy of the Warren Court as the nation's protector of liberties have begun to fade, the Supreme Court is still viewed by most people (however naively) as their insurance against arbitrary treatment and

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[220] Joel B. Grossman and Charles R. Epp, *The Reality of Rights in an 'Antolerant' Society*, THIS CONSTITUTION (1991). *Cf.* the famous statement by Judge Learned Hand: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it." THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 190 (1952).

discrimination by government.[221] Although there is a gap between perception and reality in the efficacy of a "rights approach" to protecting liberties ("the myth of rights"),[222] it would be more difficult for the Court today to ignore the rights of citizens on a pretense as flimsy as that employed in the Japanese American cases. The Court's constituency and expectations of its commitment to protect constitutional rights have changed substantially.

Structural factors would also play a role. The proliferation of concurring and dissenting opinions, and the Court's persistent fragmentation and individualization, might work against calls for institutional unity of the kind that helped forge the Japanese American cases outcomes. The justices are now less likely to be responsive to pleas for unanimity and more willing to express their individual views. Even in a case of this potential magnitude, a stable majority might be difficult to attain. To avoid divisive confirmation battles, presidential nominations increasingly favor individuals whom they do not know personally; justices might thus have greater latitude to vote against the president who appointed them. Enhanced ethical norms would certainly impede the president from "enlisting the justices" as President Roosevelt did so successfully in 1942.

There also have been some changes in the role and norms governing the solicitor general. The tradition of the solicitor general "confessing error" when the government is in the wrong, and his institutional responsibility to be candid with the Supreme Court, would almost certainly bar the kind of advocacy dissembling in support of the internment policy that took place in 1943 and 1944. The solicitor general's traditional autonomy and prestige give the office some leverage against executive branch demands. But the solicitor general remains primarily an agent of the executive branch.[223]

V. CONCLUSION

Two distinguished constitutional scholars, Laurence Tribe and Paul Murphy, quoted earlier in this article, argued (a generation ago) that the Supreme Court's decisions in *Korematsu* and *Hirabayashi*, however lamentable, were at least "understandable" in the context of the times. Tribe, for example, wrote that under the circumstances there was "no reasonable alternative to deference."

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[221] GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 3-4 (1991) ("We Americans want courts to protect minorities and defend liberties and to defer to elected officials.").

[222] *See* SCHEINGOLD, *supra* note 206; MCCANN, *supra* note 206.

[223] For a lively debate on the solicitor general's obligations to the executive branch, and his autonomy from executive branch intrusion, and the alleged politicization of the solicitor general's office during the Reagan administration, *see* LINCOLN CAPLAN, THE TENTH JUSTICE (1987); CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION: A FIRSTHAND ACCOUNT (1991).

The verdicts of history, of the Congress and several presidents, of the federal judges who heard the redress cases, and indeed of the Supreme Court itself in the *Adarand* decision, however, have not been so kind.

It would be comforting to believe that by recognizing this historic institutional failure we are relieved of the disconcerting prospect that it might be repeated. Such fears can also be assuaged by assuming that the total war conditions of 1942 could never happen again; and that if, by chance, they did and constitutional rights were again at risk, the Supreme Court would have the institutional fortitude (and considerably greater societal, cultural, and doctrinal support) to "preserve and defend" the Constitution. But the Constitution is not just about rights. It is also about governance and power as well as national security and identity. No court can afford to exclude from its deliberations either rights or powers; some balance is required. One cannot expect that arguably legitimate war powers claims will be summarily dismissed. One can, and should, expect that governmental emergency powers likely to result in severe rights deprivations be factually grounded, demonstrably compelling, restrictively tailored to meet actual crisis needs, and in accord with procedural due process norms; that the heavy burden for meeting these standards is the government's to bear; and that the Supreme Court would be willing to take a stand when the government has not met these requirements. But the Court's decision in such a case will always be one of politics and judgment as well as law; and it will not always be able to make a decision based on complete information or reasoned consideration. It is therefore impossible to say with assurance that "it could not happen again." The best way to insure that it will not, however, is to ensure that during crisis or war, "law is not silent."

The Inherent Hostility of Secular Public Education Toward Religion: Why Parental Choice Best Serves the Core Values of the Religion Clauses

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I. INTRODUCTION

Public school curriculum has been at the center of the "culture war" that conservative religious believers, particularly evangelical and fundamentalist Christians,[1] claim is being waged in America.[2] Many religious parents feel that

[1] "Traditional religious believers" includes evangelical and fundamentalist Christians because they are the ones who generally object to school curriculum and bring the lawsuits. George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students*, 43 CASE W. RES. L. REV. 707, 708 (1993) [hereinafter Dent, *God and Caesar*]. Although fundamentalists and evangelicals are distinguishable, they are treated more or less synonymously in this article. For a history of fundamentalist Christianity and its beliefs, and an analysis of its disenchantment with the culture of modernity, *see* Nomi Maya Stolzenberg, *"He Drew a Circle that Shut me Out": Assimilation, Indoctrination, and the Paradox of Liberal Education*, 106 HARV. L. REV. 581, 614-628 (1993); STEPHEN BATES, BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS 40-64 (1993). The term traditional religious believers also encompasses "traditional Catholics, Orthodox Jews, and smaller sects." Dent, *God and Caesar, supra*, at 708. Although often diametrically opposed in key religious beliefs, these groups share a common feeling that the secularism in schools and American culture is hostile to traditional

public schools teach their children values that are diametrically opposed to their own.[3] For example, a recent picture book for first graders promoted in New York public schools depicts "Heather" as the daughter of "two mommies"—a lesbian couple.[4] For older students, the school system distributed a "Teenager's Bill of Rights," that included "the right to decide whether to have sex and who to have it with" and "the right to use protection when I have sex," along with other explicit and graphic material:

> Condoms can be sexy! They come in different colors, sizes, flavors, and styles to be more fun for you and your partner. You can put them on together . . . . Guys can get used to the feel of condoms while masturbating.
>
> SUCKING: A lot of guys still enjoy sucking and getting sucked. The biggest risk from sucking is getting cum in the mouth. The only way to be totally safe is to lick only the shaft or to use a condom.[5]

Public school curricula such as the New York sex education program have been the subject of bitter litigation and national controversy. On one side, educators and policymakers argue that such educational programs are necessary to teach children tolerance and respect for diversity in an increasingly multicultural society,[6] as well as to make responsible, informed decisions in an age

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beliefs and values. Sociologist James Davison Hunter argues that these conservative religious groups are forming "pragmatic alliances" based on their common outlooks and assumptions—for example, their "commitment . . . to an external, definable, and transcendent authority." JAMES DAVISON HUNTER, CULTURE WARS 44, 47 (1991). The traditional wings of Protestant, Catholic and Jewish groups are termed the "orthodox alliance." *Id. See also* Fred Barnes, *The Orthodox Alliance,* THE AMERICAN ENTERPRISE, Nov./Dec. 1995, at 70-71. The tendency toward orthodoxy is counter-balanced by a tendency toward "progressivism" in the liberal factions of Catholicism, Protestantism and Judaism. HUNTER, *supra* at 44. Progressives identify with the "spirit of the modern age, a spirit of rationalism and subjectivism" where truth is "viewed as a process, as a reality that is ever unfolding," and are allied with "secularists," those who "range from the vaguely religious to the openly agnostic or atheistic." Secularists are generally progressive in their moral and political views although some, such as conservative and neo-conservative intellectuals are "drawn toward the orthodox impulse." *Id.* at 44-45.

[2] John D. Woodbridge, *Culture War Casualties,* CHRISTIANITY TODAY, Mar. 6, 1995. Professor Woodbridge cites various examples of Christian thinkers and leaders who argue that there is a culture war—a "civil war of values"—in America. His article is actually a critique of "culture war" rhetoric.

[3] Dent, *God and Caesar, supra* note 1, at 708-09.

[4] Michael W. McConnell, *"God is Dead and We Have Killed Him!": Freedom of Religion in the Post-Modern Age,* 1993 B.Y.U. L. REV. 163, 188 (1993) [hereinafter McConnell, *God is Dead*].

[5] Phillip E. Johnson, *Is God Unconstitutional?,* 66 U. COLO. L. REV. 461, 464 n.12 (1995) [hereinafter Johnson, *Is God Unconstitutional?*] (quoting William Tucker, *Revolt in Queens,* AM. SPECTATOR, Feb. 1993, at 26).

[6] For example, the Sex Information and Education Council of the U.S. ("SIECUS") supports multicultural and diversity education that advocates tolerance of alternative family

when issues of sexuality and AIDS are complex and have literally life and death consequences.[7] On the other side, conservative religious parents feel that the secular values taught in many public schools are foreign and antagonistic to their own, resulting in a school system that they feel is "deeply ideological and alienating" and that cannot be "trusted" with their children.[8]

Conservative religious complaints are not merely those of an isolated fringe. According to one national survey, 69 percent of Evangelical Christians agreed that "public schools [were] teaching the values of secular humanism."[9] Conservative Catholics felt similarly.[10] Since these groups represent a very substantial portion of Americans,[11] their complaints raise an important question: Is there something about the very structure of the educational system that creates hostility toward religious belief (or at least toward traditional religious belief)?

This Article argues that the education system, as presently structured, creates an inherent tendency to be hostile toward traditional religious believers. Parts II, III and IV explore the structure of the school system and how fundamental constitutional principles of neutrality toward religion and non-coercion of religious choices are easily violated in such a system. This Article argues that an educational system that provides parents with the meaningful capacity to choose alternative instruction for their children best serves fundamental religious liberty principles. Accommodations of religious believers within the public schools are examined in Part V, and Part VI explores a system of educational vouchers as the ideal means of protecting parental choice.

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arrangements such as those with gay and lesbian couples. *See* Carolyn Patierno, *Where are the Children of the Rainbow Now?*, Feb./Mar. 1993, SIECUS REPORT, at 17; Susan E. Vasbinder, *Sexual Orientation Education and Homophobia Reduction Training*, Feb./Mar. 1993, SIECUS REPORT, at 17.

[7] *See, e.g.*, Sharon Pomeranz, *Condoms Overturned on Appeal: Teens Stripped of Their Rights*, 4 AM. U. J. GENDER & L. 216 (1995).

[8] STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 172 (1993); HUNTER, *supra* note 1, at 202-05; Dent, *God and Caesar*, *supra* note 1, at 709-10.

[9] HUNTER, *supra* note 1, at 203.

[10] *Id.* Professor Hunter writes: "[T]he majority of conservative Catholics were disquieted by the public schools as well. The majority of both liberal and traditional Catholic priests (80 percent), for example, agreed that the values of secular humanism were being taught in the schools." *Id.*

[11] According to a University of Akron survey published in 1992, 25.9% of Americans identified themselves as "Evangelical Protestants," 23.4% as Roman Catholics. Richard N. Ostling, *In So Many Gods We Trust*, TIME, Jan. 30, 1995, at 72.

II. THE PRESENT EDUCATIONAL SYSTEM AND FUNDAMENTAL RELIGIOUS LIBERTY PRINCIPLES

The educational system as presently structured at least tends toward hostility to traditional religious believers. It violates two basic First Amendment religious liberty principles: the principle of neutrality toward religion and the principle of non-coercion of religious conscience.

A. The Present Educational System

The effect of the American education system on religious liberty must be assessed in light of both the nature of the public education curriculum and the structure of the educational system as a whole.

1. The nature of public school curriculum

Two aspects of the public school curriculum are relevant for purposes of this discussion. First, public school curriculum does not teach only technical knowledge; it deliberately seeks to include a broad range of subjects—history, the arts, social sciences, the family and sexuality, ethics, the natural sciences. These subjects intersect with fundamental questions of human nature and morality that have traditionally been the province of religion.[12] Furthermore, schools seek to teach students not only academic knowledge, but how to be good people and citizens; they seek to shape students' character and to teach them values.[13]

The second crucial aspect of school curriculum is that in teaching all of these matters, schools are absolutely prohibited from teaching religious doctrine; they may not endorse or inculcate religious perspectives.[14] Even though school

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[12] Warren A. Nord, *Religion, the First Amendment, and Public Education,* 8 BYU J. PUB. L. 439, 439 (1994).

[13] *See* Tyll Van Geel, *The Prisoner's Dilemma and Education Policy,* 3 J. L. ETHICS PUB. POL'Y 301, 304-09 (1988) (surveying tradition of value-inculcation in education); AMY GUTMANN, DEMOCRATIC EDUCATION 50-52 (1987) (arguing that inculcating "democratic character" is one of the purposes of primary education). Public schools "inevitably inculcate values." Ingber, *Religion or Ideology, infra* note 44, at 239. From the way that chairs are set up to the way that history is taught to the inclusion of sex education and Gay and Lesbian History Month in the curriculum, schools involve the teaching of values. GUTMANN, *supra,* at 53. Even the attempt to be value-neutral teaches value-neutrality as a value. *Id.* at 55. *See* Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship,* 62 U. CHI. L. REV. 131, 158 n.114 (1995) for list of scholarly articles exploring the question of whether value-neutrality is possible in school curriculum.

[14] Edwards v. Aguillard, 482 U.S. 578, 584 (1987).

subjects perhaps are inseparable from what Jeffrey Kane terms "considerations of the human spirit—matters relating to our ultimate conceptions of ourselves, the world, and our moral responsibilities"[15]—schools may only teach these subjects from a secular perspective.

2. The structure of the educational system

The present educational system is a curious admixture of the values of commonality and respect for individual choice. On one hand, public education is compulsory in all fifty states and non-attendance invites criminal liability.[16] The public classroom has a powerful ability to influence the beliefs of young children in their formative years; and the result is something like a state monopoly on children's minds.[17]

On the other hand, recognizing the indoctrinating potential of "prescrib[ing] what . . . [is] orthodox"[18] in such a monopolistic system, the Court has protected the rights of parents to choose alternate schooling to keep their children free from being standardized by the state.[19] This right, however, is illusory for many Americans who do not have the financial means to pay for private schooling;[20] and because of the "government's refusal (or supposed constitutional incapacity) to fund private alternatives to public education[,]"[21] the practical effect of compulsory education laws is compulsory *public* education—the "educational experience that will 'shape and form'" the beliefs of many American children "is set by the state."[22]

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[15] Jeffrey Kane, *Choice: The Fundamentals Revisited, in* THE CHOICE CONTROVERSY 46, 47-48 (Peter W. Cookson, Jr., ed., 1992). *See also* Nord, *supra* note 12, at 439.

[16] Lines, 12 J. L. EDUC. 189, 194-97 (1983), *in* MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 44-46 (1992); George W. Dent, Jr., *Religious Children, Secular Schools,* 61 S. CAL. L. REV. 863, 891 (1988) [hereinafter Dent, *Religious Children, Secular Schools*]. Professor Dent makes the further point that, "[e]ven if attendance were not compulsory, the economic importance of education makes it terribly onerous to forego education altogether. Even the Amish in *Yoder* did not seek that." *Id.*

[17] Kane, *supra* note 15, at 54; Richard A. Baer, Jr., *"Strict Neutrality" and Our Monopoly System, in* THE SCHOOL-CHOICE CONTROVERSY: WHAT IS CONSTITUTIONAL? 15 (James W. Skillen ed., 1993).

[18] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[19] Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

[20] Stephen Arons, *The Separation of School and State: Pierce Reconsidered,* 46 HARV. EDUC. REV. 76, 101 (1976).

[21] Michael W. McConnell, *Neutrality Under the Religion Clauses,* 81 NW. U. L. REV. 146, 161-62 (1986), *quoted in* Jay Alan Sekulow et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools,* 46 MERCER L. REV. 1017, 1020 (1995).

[22] Kane, *supra* note 15, at 54.

B. Fundamental Religious Liberty Principles

The effect of the present educational system must be assessed in light of two fundamental religious liberty principles. The first is the principle of neutrality.[23] Neutrality means that government, and hence public schools, may neither prefer nor disparage any particular religion;[24] they may not, in the words of the second prong of the infamous *Lemon* test, advance or inhibit religion.[25] Neutrality not only means governmental neutrality between religions, it also means that schools must be neutral "between religion and nonreligion."[26] They may not "prefer those who believe in no religion over those who do believe."[27]

The second principle is liberty of conscience. Stated broadly, this means that religious citizens are free to worship, believe, practice, preach, proselytize and teach in accordance with the dictates of their conscience—free from governmental coercion.[28] Liberty of conscience is protected primarily by the Free Exercise Clause, and in the education context it means the freedom of parents and students to "choose [their] own course with reference" to "religious training, teaching, and observance, free of any compulsion from the State."[29] This principle respects the paramount right of parents to direct the religious education of their children.[30]

The principle of liberty of religious conscience is arguably the "core" value of the First Amendment. Indeed, the concept that government must be neutral

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[23] Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1634-43 (1989). For list of cases setting forth requirement of government neutrality toward religion, *see* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 2 n.6 (1987). Professor Laycock discusses the concept of neutrality with its many ramifications in Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

[24] School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 215, 225 (1963).

[25] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). This article discusses neutrality in the Establishment Clause context, although there is also a Free Exercise aspect of neutrality. *See* Church of Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217, 2240-41 (1993).

[26] Epperson v. Arkansas, 393 U.S. 97, 104 (1963) (emphasis added). The Court in *Epperson* stated the principle as follows:

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of nonreligion; . . . . The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

Id. at 103-04.

[27] Zorach v. Clauson, 343 U.S. 306, 314 (1952) (emphasis added).

[28] Adams & Emmerich, *supra* note 23, at 1598-1604; McConnell, *God is Dead*, *supra* note 4, at 167.

[29] School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 222 (1963).

[30] Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972). For further discussion *see infra* note 116.

between religions merely serves the greater goal of protecting individuals from coercion of conscience.[31] As Justice Goldberg stated, both Religion Clauses serve the "single end" of "promot[ing] and assur[ing] the fullest possible scope of religious liberty and tolerance for all and . . . nurtur[ing] the conditions which secure the best hope of attainment of that end."[32]

The present day educational system, in its curriculum and structure, has an inherent tendency to violate these two constitutional principles. Part III explores the Establishment Clause aspect of these principles, examining contentions that schools prefer unbelief to belief by establishing a "religion of secularism." Although there is much insight to be gained from this analysis, ultimately it is the liberty principle that provides the most useful means of understanding the hostility toward religion that the present educational system creates. This non-coercion principle is explored in Part IV.

III. SECULAR PUBLIC SCHOOLS: NEUTRAL OR HOSTILE TOWARD TRADITIONAL RELIGION?

The Establishment Clause, as interpreted by the Supreme Court, requires that schools, to be neutral toward religion, must not teach religious doctrine; they must confine their teaching to secular subjects and perspectives.[33] The "transmission of religious belief[]. . . is . . . committed to the private sphere"[34]—the home, church, "and the inviolable citadel of the individual heart and mind"[35]—while schools teach non-religious matters necessary for equipping students to live in society.[36] In this way, the public school can maintain a wholesome distance from the bitter doctrinal conflicts between competing religions and sects.[37]

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[31] Adams & Emmerich, *supra* note 23, at 1598-1604.

[32] *Id.* at 1598 (citing School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)).

[33] Illinois ex rel. McCollum v. Board of Educ. of School Dist. No. 71, 333 U.S. 203, 315 (1948). Justice Brennan in Edwards v. Aguillard stated:

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.

Edwards v. Aguillard, 482 U.S. 578, 584 (1987).

[34] Lee v. Weisman, 112 S. Ct. 2649, 2656 (1992).

[35] School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 226 (1963).

[36] Illinois ex rel. McCollum v. Board of Educ. of School Dist. No. 71, 333 U.S. 203, 216-17 (1948) (Frankfurter, J., concurring).

[37] *Id.* The rationale behind the concept of separation was many-sided. One powerful rationale was to prevent fusion of powerful sects of groups with governmental functions "to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies." *Schempp*, 374 U.S. at 222. The Establishment Clause was thus

In their promotion of secular knowledge, however, schools may not "oppose" religion by "preferring those who believe in *no* religion over those who do believe."[38] As Justice Goldberg warned, an "untutored devotion to the concept of neutrality" can result in a "brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious."[39] This devotion to the secular in public schools could conceivably result in the establishment of what Justice Clark termed a "religion of secularism."[40]

Is this what is happening in public schools? Is the study of secular knowledge and the promotion of secular value-systems in schools tantamount to the establishment of a religion of secularism? This is what conservative religious believers have argued. Although they have been unsuccessful, and probably rightly so, their contentions raise important insights about the nature of secular public education.

A. Secular Humanism and the Smith Case

Religious believers have used Justice Clark's language to argue that schools are establishing a religion of secularism. The most prominent among these attempts is the claim by fundamentalist Christians and others that the government and public schools are propagating the religion of "secular humanism."

1. Secular humanism

As the influence of the turbulent social upheaval of the 1960s reached the public classrooms, traditional religious believers—particularly fundamentalist Christians[41]—increasingly felt that the public schools, which at one time had

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meant to protect minority religions from domination by a majority religious group which could exert its power within a given community. *McCollum*, 333 U.S. at 217 (Frankfurter, J., concurring). Keeping schools secular was also meant to "preserv[e] . . . the community from divisive conflicts, . . . the Government from irreconcilable pressures by religious groups, . . . religion from censorship and coercion however subtly exercised . . . ." *Id.* at 217 (Frankfurter, J., concurring). *See* Sanford Levinson for autobiographical reflections on growing up Jewish in a school system which endorsed "non-sectarian" Christianity through school prayer and other practices. Sanford Levinson, *Some Reflections on Multiculturalism, "Equal Concern and Respect," and the Establishment Clause of the First Amendment*, 27 U. RICH. L. REV. 989 (1993).

[38] Zorach v. Clauson, 343 U.S. 306, 314 (1952) (emphasis added).

[39] School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg. J., concurring).

[40] *Id.* at 225.

[41] Conservative Catholics also complained as early as the 1950s about the "problem of secular humanism" in schools. HUNTER, *supra* note 1, at 202.

nominally supported their worldview, became increasingly "secularized" and hostile to their beliefs.[42] Where before, school days began with a prayer and a Bible reading, public schools in the 1970s and 1980s taught evolution, new rules about sex and gender, and values clarification—a curriculum that encouraged children to find their "own" values; the schools challenged traditional authority, traditional morality, and downplayed or ignored traditional religion in history and social studies texts.[43]

In short, God and traditional values seemed to be moved aside, replaced by a new belief and value system, a new faith, if you will. This new "religion," in which God was irrelevant to morality, human relationships, and history, and humans pre-eminent, was decried by fundamentalists as the religion of "secular humanism."

Secular humanism, despite its characterization as a vague, undefinable term,[44] does have substantive content and, if narrowly defined, is at least arguably a religion.[45] Secular humanism has an organized body of adherents—

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[42] BATES, *supra* note 1, at 51-57. Public schools in the 19th century sought to assimilate the millions of immigrants, who were primarily Jewish and Catholic, into the "the American way of life, which included a reasonable, non-sectarian, watered-down, Protestant religion." McConnell, *God is Dead, supra* note 4, at 178. The ethos of these "common schools" was hardly "non-sectarian," though it attempted to only present the "'common core' of American religion" under the vision of Horace Mann. BATES, *supra* note 1, at 41-43. Catholics eventually gave up on the common schools and so was born the Catholic parochial school movement. *Id.* at 42. See also JOHN W. WHITEHEAD AND ALEXIS I. CROW, HOME EDUCATION RIGHTS AND REASONS 37-58 (1993) for brief survey of the history and philosophy of education in the United States.

[43] BATES, *supra* note 1, at 51-57; Stolzenberg, *supra* note 1, at 621-23.

[44] People for the American Way described secular humanism as a "catch-all stamp of disapproval for any course, book or teaching method that doesn't advance the Far Right's sectarian beliefs." Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 318 n.534 (1989) [hereinafter Ingber, *Religion or Ideology*] (quoting GAINESVILLE SUN, Mar. 14, 1987, at 1B). Another critic states, "trying to define secular humanism is like trying to nail Jell-O to a tree." BATES, *supra* note 1, at 53. *See also* JAMES HITCHCOCK, WHAT IS SECULAR HUMANISM? WHY HUMANISM BECAME SECULAR AND HOW IT IS CHANGING OUR WORLD 7 (1982) (describing the attitude of critics toward secular humanism as "something, which although people talk about it, does not really exist . . . . a kind of bogey man invented by certain hysterical individuals to discredit others with whom they happen to disagree").

[45] *See, e.g.*, Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603 (1987) (arguing that "secularism should be considered a religion for establishment purposes because it is a belief system that offers truly competitive answers to the same ultimate questions that are addressed by traditional religions" *Id.* at 663); Peter D. Schmid, Comment, *Religion, Secular Humanism and the First Amendment*, 13 S. ILL. U. L.J. 357 (1989) (arguing that secular humanism is a religion); *but see* Ingber, *Religion or Ideology, supra* note 44, at 306 (secular humanism is not a religion for First Amendment purposes). The answer to the question of whether secular humanism is a religion of course depends upon one's definition of religion. In dicta, the Court has listed Secular Humanism as a "non-theistic"

members of the American Humanist Association and other organizations[46]—who at least at one time identified themselves as religious.[47] It has its

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religion along with Taoism, Buddhism and Ethical Culture. Torasco v. Watkins, 367 U.S. 488, 495 n.11 (1961). Two "conscientious objector" cases, United States v. Seeger, 380 U.S. 163 (1965) and Welsh v. United States, 398 U.S. 333 (1970), provide a broad definition of religion that could easily include secular humanism within its ambit. In both cases, conscientious objectors who did not believe in a Supreme Being but had strong beliefs about war were held by the Court to fit within the statutory provision exempting individuals from combat who "were opposed to participating in war due to 'religious training and belief.'" Schmid, *supra*, at 362 (quoting *Seeger*, 380 U.S. at 165). As summarized by Schmid, beliefs to qualify as religious beliefs must 1) "be taken seriously without any reservation, i.e., an ultimate concern" and 2) "occupy a place parallel to that filled by God in traditionally religious persons." Schmid, *supra*, at 365 (discussing *Seeger* and *Welsh;* the *Seeger* test was articulated in this manner: a religious belief is "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God . . . . " *Seeger*, 380 U.S. at 176, *cited in* Schmid, *supra*, at 364). As Schmid points out, however, Wisconsin v. Yoder, 406 U.S. 205 (1972) restricted this expansive interpretation of religion, asserting that mere "philosophical and personal" beliefs such as those of Henry David Thoreau's were not subject to the protections and limitations of the Religion Clauses. *Yoder*, 406 U.S. at 215-16, *cited in* Schmid, *supra*, at 365. However, Schmid argues that secular humanism is indeed a religion, *id.* 377-87, and secular humanism might indeed fit within the definitions, or "useful indicia", of religion enunciated by some courts. *Id.* at 366-69 (discussing Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) and Africa v. Commonwealth of Pa., 662 F.2d 1025, 1032 (3d Cir. 1981)). The *Africa* court lists these indicia as:

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.

Africa, 662 F.2d at 1032 (citing Malnak v. Yogi, 592 F.2d 197, 207-10 (3d Cir. 1979). *See also* Church of the Chosen People (North American Panachate) v. United States, 548 F. Supp. 1247 (D. Minn. 1982) and Jacques v. Hilton, 569 F. Supp. 730 (D. N.J. 1983).

Under these indicia, secular humanism, narrowly defined, may indeed be a religion. *See* Schmid, *supra*, at 377-87 and discussion *supra* notes 45-53 and accompanying text. Whether secular humanism is being advanced in public schools is a different question. *See* discussion *infra* notes 55-76 and accompanying text.

For a survey of various scholarly proposals for definitions of religion for constitutional purposes, including functional approaches, "ultimate concerns," "comprehensive belief systems," analogical (comparison to something indisputably religious), and the extra temporal consequences test of Dean Choper, see Ingber, *Religion or Ideology*, *supra* note 44, at 267-77. *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 14-6, 1178-88 (2d ed. 1988) (discussing various definitions of religion for First Amendment purposes, including possibility of a "dual definition" for the Free Exercise and Establishment Clauses).

[46] BATES, *supra* note 1, at 55; Schmid, *supra* note 45, at 383.

[47] Schmid, *supra* note 45, at 383. Schmid observes that the "American Humanist Association, along with the American Ethical Union, promoted itself as and accepted the classification of a religious group in *Torasco* and *Seeger.*" *Id.* Richard Baer, Jr., observes that the first secular humanists in the early part of this century, including John Dewey, identified secular humanism as a "faith" and a religion. Baer, *supra* note 17, at 28. Citing various writers,

own creeds, the Humanist Manifestoes I and II and the Secular Humanist Declaration,[48] and, like traditional religions, these beliefs comprise "a comprehensive worldview that answers life's ultimate questions" and claims its "answers are universally valid and superior to other views."[49]

The basic tenets of secular humanism, as summarized by Stanley Ingber, are:

1) supernatural phenomena are irrelevant;
2) human beings are "natural objects";
3) human beings are innately good and have a "potential to achieve self-realization through reason";
4) the "individual [is] the sole and ultimate judge of his or her own morality."[50]

Baer continues:

> Indeed, the claim that secular humanism is a religion was not originally made by Catholic and Protestant fundamentalist critics of humanism but by humanists themselves. Humanist J. H. Randall expressed the conviction that "the faith that alone promises salvation is the faith in intelligence." In the preface to his book *Humanism: A New Religion,* Dr. Charles Francis Potter writes: "The purpose of this book is to set forth . . . the principal points of the new religion called Humanism." Potter claims that "Humanism is not another denomination of Protestant Christianity; it is not a creed; nor is it a cult. It is a new type of religion altogether."
>
> Such claims were commonplace among nontheistic or secular humanists, and are particularly prominent in *Humanist Manifesto I* (1933), which explicitly defines humanism as religious and as constituting a new religion. The very last paragraph begins with the sentence: "So stand the theses of religious humanism."

Id. at 28-29 (footnotes omitted).

"Most contemporary secular humanists," however, do not claim they are religious. *Id.* at 29. Professor Baer argues that the change in self-identification was political:

> I can find no serious discussion among nontheistic humanists as to why the earlier claim that they were religious and that humanism constituted a new religion was dropped. My own view is that the descriptor "religious" was dropped mainly for political reasons. As long as the religious qualification made it easier for secular humanists to gain access to the public square and particularly to public education, the claim was made with enthusiasm. But when, during the post-World War II period, the Supreme Court began to drive religion out of government public schools, this religious designation proved to be a distinct liability, and so it was discreetly dropped.

Id. at 30.

[48] BATES, *supra* note 1, at 55. Although Bates characterizes secular humanism as a small and uninfluential religion, the signers of the Manifestoes and Humanist Declarations include some very prominent people, including John Dewey, who signed the first Humanist Manifesto in 1933, and "Isaac Asimov, Sidney Hook, B.F. Skinner, Betty Friedan, Gunnar Myrdal, and Andrei Sakharov," who signed the Humanist Manifesto II. *Id.* at 55.

[49] BATES, *supra* note 1, at 56.

[50] Ingber, *supra* note 44, at 293. Ingber's summary is a fair statement of how humanists themselves describe their philosophy, as is evidenced by the statement on the inside cover of THE HUMANIST magazine, published by the American Humanist Association:

The Humanist Manifesto II declares that "[w]e can discover no divine purpose or providence for the human species. While there is much that we do not know, humans are responsible for what we are or will become. No deity will save us; we must save ourselves."[51] Secular humanism extols the scientific method as the best source of knowledge and teaches that humans evolved.[52] The morality of the Manifesto II is also quite anti-traditional, encouraging sexual liberation and the right of individuals to "abortion, divorce, and birth control."[53]

To many fundamentalists, when the new curriculum began appearing, it looked and smelled a lot like the public schools were introducing a religion of secular humanism. Many lawsuits were filed. Courts, however, were generally unsympathetic.[54]

> Humanism is a rational philosophy informed by science, inspired by art, and motivated by compassion. Affirming the dignity of each human being, it supports the maximization of individual liberty and opportunity consonant with social and planetary responsibility. It advocates the extension of participatory democracy and the expansion of the open society, standing for human rights and social justice. Free of supernaturalism, it recognizes human beings as a part of nature and holds that values—be they religious, ethical, social, or political—have their source in human experience and culture. Humanism thus derives the goals of life from human need and interest rather than from theological or ideological abstractions, and asserts that humans must take responsibility for their own destiny.

Statement, THE HUMANIST: A MAGAZINE OF CRITICAL INQUIRY AND SOCIAL CONCERN, May/June 1996, inside cover.

[51] Ingber, *Religion or Ideology, supra* note 44, at 318 (quoting HUMANIST MANIFESTO II 16 (1973)). Secular humanism is hostile to traditional religious beliefs. The Humanist Manifesto II states that traditional beliefs in heaven and hell, in a human soul, and in the creation of humankind by a direct act of God are "dangerous and represent obstacles to human progress," that a belief in a "prayer-hearing God, assumed to love and care for persons . . . is an unproved and outmoded faith," and that the belief in salvation is "harmful." *Id.* at 293 n.364. One secular humanist author "declared that humanism must triumph over 'the rotting corpse of Christianity' if 'the family of humankind is to survive.'" BATES, *supra* note 1, at 56.

[52] Ingber, *Religion or Ideology,* supra note 44, at 293 n.364, 318.

[53] *Id.*

[54] The two major cases that issued a broad challenge to an entire curriculum as promoting secular humanism in violation of the Establishment Clause were Smith v. Board of Sch. Comm'rs of Mobile County, 655 F. Supp. 939 (S.D. Ala.), *rev'd,* 827 F.2d 684 (11th Cir. 1987) and Williams v. Board of Educ. of County of Kanawha, 388 F. Supp. 93, 94-95 (S.D. W. Va. 1975), *aff'd,* 530 F.2d 972 (4th Cir. 1975). *Williams* did not actually mention secular humanism but the plaintiffs had similar objections to the curriculum as in the *Smith* case, alleging that the schools encouraged anti-Christian ideas and thus inhibited Christianity. *Williams,* 388 F. Supp. at 94-95.

In Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528 (9th Cir. 1985), *cert. denied,* 474 U.S. 826 (1985), plaintiffs sought to remove a novel from the 10th grade literature curriculum on grounds that it promoted the religion of secular humanism.

Plaintiffs in other cases alleged that schools taught various tenets of secular humanism, such as evolution, Wright v. Houston Ind. Sch. Dist., 366 F. Supp. 1208, 1209 (S.D. Tex. 1972), *aff'd*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974), McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255, 1273-74 (E.D. Ark. 1982), *aff'd*, 723 F.2d 45 (8th Cir. 1983) (allegation that evolution is a religion) and sex education, Smith v. Ricci, 446 A.2d 501 (N.J. 1982) (sex education course advances secular humanism by inhibiting traditional religions to the point of establishing secularism as a religion).

One court upheld the termination of a teacher for teaching Christianity in classes as not violative of the Establishment Clause. The plaintiff had alleged that the school was establishing secular humanism and being hostile to religion. Fink v. Board of Educ. of Warren County Sch. Dist., 442 A.2d 837 (Pa. Commw. Ct. 1982).

A recent case is Peloza v. Capistrano Unified School District, 37 F.3d 517 (9th Cir. 1994) where a high school biology teacher challenged a school district's requirement that he teach evolution as an establishment of the religion of secular humanism. *Id.* at 521.

See also Crowley v. Smithsonian Inst., 636 F.2d 738, 740 (D.C. Cir. 1980) (lawsuit alleging that evolution exhibit in Smithsonian unconstitutionally supports religion of secular humanism); Civic Awareness of America Ltd., v. Richardson, 353 F. Supp. 1358 (E.D. Wis. 1972) (suit to enjoin provision of federal funds to Planned Parenthood because birth control is a tenet of secular humanism).

An interesting twist is one case wherein a suit was brought by secular humanist philosopher Paul Kurtz, who sought to deliver secular remarks to the House and Senate in the same manner that the Congressional Chaplain addressed these bodies. He lost the case. Kurtz v. Baker, 829 F.2d 1133 (D.C. Cir. 1987).

The main reasons that courts advanced for finding no establishment of religion are (these cases do not include discussion of the *Smith* analysis which is discussed *infra*): they did not view the particular challenged ideas (such as evolution) as religious, *Wright*, 366 F. Supp. at 1210-11 (S.D. Tex. 1972) (evolution is primarily scientific, not religious), *McLean*, 529 F. Supp. at 1274 ("Yet it is clearly established in the case law, and perhaps also in common sense, that evolution is not a religion and that teaching evolution does not violate the Establishment Clause"), or because the challenged program did not "advance" religion, even conceding that secular humanism was a religion. *Civic Awareness*, 353 F. Supp. at 1358-60 (the mere harmony of laws and ideas with religious tenets does not violate the Establishment Clause); *Crowley*, 636 F.2d at 742 (assuming that evolution rests on faith, it does not mean secular humanism is being advanced). The fact that ideas in school curriculum were offensive to or contradicted religious beliefs does not amount to an Establishment Clause violation. *Williams*, 388 F. Supp. at 96. Courts also noted the fact that there was no nexus between the alleged governmental practice advancing secular humanism and a known secular humanist organization. *Crowley*, 636 F.2d at 740 n.3 (Smithsonian exhibit); *Grove*, 753 F.2d at 1538 (THE LEARNING TREE novel was not "purchased from nor provided by official humanist organizations" to schools; "[n]or d[id] the work carry the imprimatur" of humanist organizations).

Some plaintiffs sought "balanced treatment," that is, since a school was teaching secular humanist values, which are religious, it should give equal time to Bible classes or other Christian values. The response of the courts was basically that "two wrongs don't make a right." If secular humanism was in fact a religion, the remedy is to prohibit the favoring of secular humanism, not to adopt laws favoring Christian practices to counter-balance secular humanism. Doe v. Human, 725 F. Supp. 1503, 1508 n.2 (W.D. Ark. 1989), *aff'd*, 923 F.2d 875 (8th Cir. 1990), *cert. denied*, 499 U.S. 922 (1991) (holding that schools cannot teach Bible classes in school to "balance" alleged secular humanism); Rhode Island Federation of Teachers, AFL-CIO v. Norberg, 630 F.2d 850 (1st Cir. 1980) (holding that if secular humanism is in fact

2. *The Smith case*

The key case is *Smith v. Board of School Commissioners of Mobile County*,[55] decided by the 11th Circuit in 1987. In *Smith*, parents challenged forty-four textbooks in the Mobile County Alabama school system as promoting the religion of secular humanism.[56] Textbooks seemed to promote the same kind of moral relativism explicated in the Humanist Manifestoes, teaching that

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a religion, the remedy is to prohibit secular humanism, not adopt tax deductions and other forms of monetary aid for other religions); *McLean*, 529 F. Supp. at 1274 (if evolution is a religion, teaching creation, a religious belief, is not the answer).

See also Nadine Strossen, *"Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom*, 47 OHIO ST. L.J. 333, 336-45 (1986) (discussing leading secular humanism cases involving textbooks).

[55] 827 F.2d 684 (11th Cir. 1987). The other key case dealing with secular humanism at around this time was Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528 (9th Cir. 1985), *cert. denied*, 474 U.S. 826 (1985). *Grove* involved a novel assigned for 10th grade English literature class that allegedly taught anti-Christian themes. 753 F.2d at 1539. The novel, THE LEARNING TREE, about the "coming of age" of a young African-American boy, has a decidedly naturalistic bent about questions of life and death, portrays religious people as either hypocrites or having a "blind" faith, and contains highly offensive profanity directed at God and Jesus Christ. 753 F.2d at 1543, 1547-49, 1552. For example, the minister is portrayed as a shallow character with a taste for fried chicken, *id.* at 1543, and no serious answers to the struggles of his parishioners, *id.* at 1548 (where a man who is apparently struggling with his sexual identity is given no real answers). In one scene, after questions about the after-life, the boy's deeply religious mother concedes that maybe heaven and hell do not exist after all, but that she has believed all her life and "[i]t's awful hard now, this late, not to believe . . . ." *Id.* at 1546. The final scene where his mother dies presents an ultimately naturalistic view of death and life, with spiritual understandings portrayed as unreal and unsatisfactory—unlike the "good, solid body." *Id.* at 1552. In one scene, Newt witnesses a drunken person shooting into the air, hollering, "I'm gonna blow the ass off Jesus Christ, the long-legged white son-of-a-bitch!" *Id.* at 1547. He witnesses another shouting to the minister that the Christian God is a "poor white trash God." *Id.* at 1549.

[56] *Smith*, 827 F.2d at 688. The origin of the *Smith* claim illustrates the feeling that conservative Christians had in the midst of the "school prayer" decisions. *Smith* is a companion case to *Wallace v. Jaffree*, the U.S. Supreme Court case that declared the "moment of silence" practices in Alabama unconstitutional. Smith v. Board of Sch. Commissioners of Mobile County, 655 F. Supp. 939, 942 (S.D. Ala. 1987), *rev'd*, 827 F.2d 684 (11th Cir. 1987). The *Smith* plaintiffs had originally sought to join the *Wallace* case as defendant-intervenors. They requested that if the plaintiffs in *Wallace* succeeded in enjoining school prayers, that the injunction would be expanded to include the teaching of "religions of secularism, humanism, evolution, materialism, agnosticism, atheism and others" in schools. *Smith*, 655 F. Supp. at 642. The *Smith* case thus represents the phenomena described by Stephen Bates: "Depicting secular humanism as a religion" thus represents a desire on the part of fundamentalist Christians to "even the score." BATES, *supra* note 1, at 56.

"[v]alues are personal and subjective,"[57] and that "[n]one of us can be certain that our values are right for other people."[58] Traditional teachings were challenged (for example, "[d]ivorce is basically a neutral event"[59]), and the role of Christianity in history and culture slighted or ignored.[60]

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[57] *Smith*, 655 F. Supp. at 1004.

[58] *Id.* at 992. The texts promoted the same "man-centeredness" of secular humanism as well. *Id.* at 986 ("you are the most important person in your life.").

[59] *Id.* at 1008. "Divorce is considered an acceptable way of solving a problem," *id.* at 1005, and the family "a group of people who live together in one house," *id.* at 1010. The texts also questioned the wisdom of traditional religious counsel, advising teachers against telling children that lying is a "sin," or that God takes people to heaven when they die. The passage about lying:

> When Gary Simon was growing up, his father used to tell him that it was a sin against God to tell a lie. Today, Gary works to teach his own son Mark honesty. However, he does not tell his son that God will punish him for lying. Instead, he explains to Mark that people will not believe in him or trust him unless he tells the truth.

Id. at 1001. And a passage about death:

> Do not say, "God took Daddy away because He wants Daddy to be with Him in heaven." Not only is this confusing, but it causes the child to fear and hate God for taking the father away.
>
> The simplest way to talk to a child about death is to talk about how flowers and pets die. If you explain that death is a normal part of life, the child will be able to accept it.

Id. at 1001.

[60] *Id.* at 983-85. The history texts seem to present a cumulative picture that religion was irrelevant in daily life and society. For example:

> The religious influence on the abolitionist movement, women's suffrage, temperance, modern civil rights and peace movements is ignored or diminished to insignificance. The role of religion in the lives of immigrants and minorities, especially southern blacks, is rarely mentioned. After the Civil War, religion is given almost no play.

Id. at 984. The Great Awakening and the religious aspect of the Puritans are "generally not mentioned. Colonial missionaries are either not mentioned or represented as oppressors of Native Americans." *Id.* at 983-84.

This omission of traditional theistic religions from history curriculum has been repeatedly confirmed in several studies commissioned by diverse groups such as "the National Institute for Education, People for the American Way, Americans United for Separation Between Church and State, and the Association for Supervision and Curriculum Development." McConnell, *God is Dead, supra* note 4, at 180 (citing O.L. DAVIS, JR., ET AL. LOOKING AT HISTORY: A REVIEW OF MAJOR U.S. HISTORY TEXTBOOKS 3-4, 11 (1987); CHARLES C. HAYNES, A TEACHER'S GUIDE: RELIGIOUS FREEDOM IN AMERICA 6 (1986); PAUL C. VITZ, RELIGION AND TRADITIONAL VALUES IN PUBLIC SCHOOL TEXTBOOKS: AN EMPIRICAL STUDY 3-7 (1985); *Educators Urge Turn to Studies About Religion*, N.Y. TIMES, July 2, 1987, at A16). *Id.* at 180 n.63.

After a study of "ninety widely used elementary and secondary textbooks," New York University educational psychology professor Paul Vitz (also an expert witness in the *Smith* case, *Smith*, 655 F. Supp. at 983-84) concluded that the textbooks were biased against religion and traditional values. Richard F. Duncan, *Religious Civil Rights in Public High Schools: The Supreme Court Speaks on Equal Access*, 24 IND. L. REV. 111, 112 (1990). For example, one social studies book included "thirty pages on the Pilgrims, including the first Thanksgiving" but "did not contain even one word or image that referred to religion as a part of Pilgrim life." *Id.*

The federal district court was persuaded by the plaintiffs' arguments and held that there was a "systematic . . . promotion of [the] belief-system" of secular humanism in the textbooks.[61] The "humanistic psychology" of the values clarification program inculcated "faith assumption[s]" that "self-actualization is the goal of every human being," that humans have no spiritual "attributes or component, that there are only temporal and physical consequences for man's actions, and that these results, alone, determine the morality of an action."[62]

The district court was "quickly slapped down"[63] by the Eleventh Circuit Court of Appeals. The Eleventh Circuit held that the curriculum was neutral toward religion;[64] it did not advance secular humanism or inhibit Christianity,[65]

Or consider the examples that William Bennett, former Secretary of Education, found, citing the same studies:

> Professor Vitz's study documents case after case of exclusions, misrepresentations, and distortions. One world history book completely ignores the Reformation. An American history textbook defines the Pilgrims as "people who take long trips." Another defines fundamentalists as rural people who "follow the values and traditions of an earlier period."

WILLIAM J. BENNETT, THE DE-VALUING OF AMERICA: THE FIGHT FOR OUR CULTURE AND OUR CHILDREN 208 (1992).

Warren Nord also confirms the picture. Nord, *supra* note 12, at 439. There has been a recent change in the pattern, however, as schools, textbook publishers, and other interested organizations have sought to implement curricula that acknowledge the role of religion, including traditional religion, in history and society. CARTER, *supra* note 8, at 208-09.

[61] 655 F. Supp. at 983. Judge Hand had to first find that secular humanism was a religion for constitutional purposes. Based on Court precedent, he defined religion as a belief-system that addresses "fundamental questions of the nature of reality and man's relationship to reality," with certain outward characteristics such as group organization, hierarchical structure, and authoritative literary texts. Judge Hand found that secular humanism fit neatly into this definition. *Id.* at 979-83.

[62] *Id.* at 986. For a critique of the claim of value-neutrality of Values Clarification programs, see GUTMANN, *supra* note 13, at 55-56. Judge Hand also found that the omission of the role of religion from the history texts was so grave as to "equal ideological promotion" of the secular humanist notion that religion is irrelevant to society. *Smith*, 655 F. Supp. at 985.

[63] CARTER, *supra* note 8, at 171.

[64] Smith v. Board of Sch. Comm'rs of Mobile County, 827 F.2d 684, 692 (11th Cir. 1987).

[65] *Id.* at 690. The court used the three-pronged *Lemon* test, which asks three questions to determine the validity of a governmental action under the Establishment Clause. First, does the action have a "secular legislative purpose"?; second, is its "primary effect" one that "neither advances nor inhibits religion"?; and third, does the action "foster 'an excessive government entanglement with religion'"? *Smith*, 827 F.2d at 689. Because the parties agreed that the "purpose" and "entanglement" prongs were not implicated, the court relied on the second prong of *Lemon*, analyzing whether the textbooks had the "primary effect" of advancing or inhibiting religion. *Smith*, 827 F.2d at 690. *See also* Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1539 (9th Cir. 1985), *cert. denied*, 474 U.S. 826 (1985) (stating that the "crux" of Establishment Clause analysis is whether the challenged action has the primary effect of advancing secular humanism and inhibiting Christianity). Primary effect is judged by whether the use of the forty-four textbooks "conveys a message of endorsement [of secular humanism]

even assuming arguendo that secular humanism was a religion.[66] The court acknowledged that the curriculum did advance beliefs "consistent with secular humanism," but argued that "mere consistency with religious tenets is insufficient to constitute unconstitutional advancement of religion."[67] The textbooks were involved in the secular project of inculcating the fundamental values of "independent thought, tolerance of diverse views, self-respect, . . . and logical decision-making."[68]

B. *Smith and the Difficulty of Finding a Religion of Secularism*

The *Smith* case illustrates the difficulty of arguing for an unconstitutional "religion of secularism" in public school curriculum. Were a school to teach atheism, such a claim would undoubtedly succeed.[69] Schools, however, rarely

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or disapproval" of Christianity. *Smith*, 827 F.2d at 690; *Grove*, 753 F.2d at 1539. The particular secular humanist ideas must be taken in the context of the books as a whole. 827 F.3d at 692. *Smith*, along with the *Grove* case, provide the key analysis for claims that secular humanism or non-theistic religions are being taught in textbooks. *See* Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680 (7th Cir. 1994) (analyzing whether Impressions curriculum advances witchcraft and Neo-Paganism); Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373 (9th Cir. 1994) (involving the same Impressions curriculum); Guyer v. School Bd. of Alachua County, 634 So.2d 806 (Fla. Dist. Ct. App. 1994), *cert. denied*, 115 S. Ct. 638 (1994) (holding that Halloween celebrations did not advance religion of witchcraft, even assuming that witchcraft is a religion).

[66] 827 F.2d at 689. The court could thus avoid the "delicate question" of defining religion for First Amendment purposes. *Id.*

[67] *Id.* at 690, 692. *See also Grove*, 753 F.2d at 1539 (Canby, J., concurring). Some ideas were undoubtedly consistent with Christian doctrines as well. *Smith*, 827 F.2d at 692. Similarly, mere *in*consistency with religious beliefs would not exhibit governmental hostility toward religion in violation of the Establishment Clause. *Id.* at 692-93. The "mere consistency" doctrine is from McGowan v. Maryland, which upheld the validity of mandatory Sunday closing laws against Establishment Clause attack. McGowan v. Maryland, 366 U.S. 420, 422 (1961). As the Court stated:

> [T]he Establishment Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian [sic] religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy. The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decaloque.

Smith, 827 F.2d at 691-92 (quoting McGowan v. Maryland, 366 U.S. 420, 422 (1961)).

[68] *Id.* at 692.

[69] *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1002 (1990). Atheism, it seems, is a clear example of a nontheistic religion of secularism. As Professor Laycock argues:

or never do this.[70] Instead, they teach ideas such as those found in the *Smith* textbooks, ideas that seem to represent an assortment of views on human beings and moral values held by many secular intellectuals who in no way identify themselves as secular humanists.[71] Indeed, argues Nomi Stolzenberg, what fundamentalists label secular humanism is merely a part of the "entire worldview of modernity," a "worldview [that] is pervasive and diffuse."[72]

To find an Establishment Clause violation in promoting such ideas, a court would have to define religion so broadly that any philosophical idea "remotely connected with ultimate concerns" would be religious, the teaching of which would violate the Establishment Clause.[73] Such a broad definition of religion would seem to "sever" the Religion Clauses "from any general understanding of what religion is and from the purposes that likely gave it birth."[74] Indeed, it

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> For constitutional purposes, the belief that there is no God, or no afterlife, is as much a religious belief as the belief that there is a God or an afterlife. It is a belief about the traditional subject matter of religion, and it is a belief that must be accepted on faith, because it is not subject to empirical investigation . . . . This constitutional conception of religious belief as any belief about religion explains why atheists are protected from persecution, and why the government cannot establish atheism.

Id. (Professor Laycock cites two cases protecting atheism as a religious belief: Torasco v. Watkins, 367 U.S. 488, 496 (1961) and EEOC v. Townley Eng. & Mfg. Co., 859 F.2d 610, 613 (9th Cir. 1988), *cert denied*, 109 S. Ct. 1527 (1989). Laycock, *supra*, at 1002 n.29).

Professor Ingber argues that atheism cannot be promoted in schools but for different reasons. Ingber, *Religion or Ideology*, *supra* note 44, at 314. He does not classify atheism as a religion because he defines religion as a "unified system of beliefs and practices relative to sacred things." *Id.* at 285 (quoting EMILE DURKHEIM, THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE 62 (J. Swain trans. 1965)). "[R]eligious duties must be based in the 'otherworldly' or the transcendent," which Ingber clarifies to mean belief in a "transcendent reality." *Id.* at 285-86.

Ingber distinguishes ideologies such as communism and feminism from religion, arguing that ideologies, while sharing many characteristics of religion such as being "comprehensive moral systems" and addressing "ultimate concerns," *id.* at 281, are not religious because they do not rest upon a belief in a transcendent reality, *id.* at 285.

Under Ingber's definition, atheism is not a religion but an ideology. *Id.* at 293. Nevertheless, atheism is an irreligious ideology, an ideology that is "opposed or hostile to religion." *Id.* at 310, 313-14. Promotion of irreligious ideologies in schools would be an inhibition or opposition to religion that is a violation of the principle of neutrality. *Id.* at 310-11, 313-14.

[70] Ingber, *Religion or Ideology*, *supra* note 44, at 318.

[71] Stolzenberg, *supra* note 1, at 614.

[72] *Id.*

[73] Dent, *Religious Children, Secular Schools*, *supra* note 16, at 879.

[74] Ingber, *Religion or Ideology*, *supra* note 44, at 270. Stanley Ingber makes the point that while a theologian may have little difficulty classifying ideologies such as "Communism, Marxism, Nazism, Italian Facism, and Japanese militarism," as religions, such a classification for Constitutional purposes would wreak havoc on our country:

> To interpret the free exercise clause, however, to treat as religious the Communist's and Fascist's claim for legal exemption (from taxes, for example) and every other claim that

would render meaningful interpretation of the Religion Clauses—and the operation of the public school system—impossible.[75]

Thus, absent a school doing something blatant such as requiring students to begin the day with a recitation of the Humanist Manifesto ("No deity will save us; we must save ourselves"),[76] Justice Clark's statement that schools may not promote a "religion of secularism" may forever remain dicta.

C. *Secular Ideologies: The Nurturing of a Secular Worldview*

While the district court's opinion in *Smith* may have been, in the words of Stephen Carter, a "legal blunderbuss,"[77] it does highlight an important facet of present-day public school curriculum—the ideological nature of many of the disciplines and perspectives taught in public schools. The humanistic psychology and values clarification programs in the Alabama textbooks—with their teachings that moral values are subjective and that the highest purpose for human beings is self-actualization—do seem to inculcate "faith-assumptions" about the nature of human beings and ethics. Although they are not religions for constitutional purposes, they seem to be "belief-systems," or, as Stanley Ingber says, "ideologies," that fulfill many of the same functions of religions, "offering answers to the cosmic questions of the meaning of life, providing comprehensive moral systems, and, more generally, suggesting the 'ultimate concerns' that can direct individuals when making significant life choices."[78]

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is tied even remotely to the claimant's ultimate concern would be to sever the clause from any general understanding of what religion is and from the purposes that likely gave it birth.

Id.

[75] This is the essential point made by George Dent, Jr.:

[I]f Secular Humanism is defined narrowly enough to be, arguably, a religion, it cannot be shown that the public schools are advancing it in violation of *Lemon*. But if Secular Humanism is defined so broadly that one can argue it is being advanced in the public schools, it becomes so vague that it no longer meets any plausible definition of religion.

Dent, *Religious Children, Secular Schools*, *supra* note 16, at 879.

[76] Judge Canby, in *Grove*, implied that a factor in finding an Establishment Clause violation would be if there was a direct connection between an identifiable secular humanist organization and the textbooks used. Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1538 (9th Cir. 1985) (Canby, J., concurring), *cert. denied*, 474 U.S. 826 (1985). In holding that a school's inclusion in its literature curriculum of THE LEARNING TREE (a novel with concededly secular humanist ideas, *see* discussion *supra* notes 55 and 109) did not impermissibly entangle the school with religion, he observed, "THE LEARNING TREE was neither purchased from nor provided by official humanist organizations. Nor does the work carry the imprimatur of these or similar religio-philosophical bodies." *Id.*

[77] CARTER, *supra* note 8, at 171.

[78] Ingber, *Religion or Ideology*, *supra* note 44, at 281.

There are a number of problems with allowing secular ideologies to be taught in public schools.

1. Illiberal education

Allowing secular ideologies in schools to offer their "answers" to "cosmic questions," or, simply, the "Big Questions—Who are we? What is reality like? How ought we to live? What is worthy of our deepest loyalty and commitment?"[79]—while excluding religious answers results in a school system that is "strikingly illiberal" and "indoctrinates students against religion."[80] As Warren Nord argues:

> A liberal education must avoid indoctrination. We indoctrinate when we systematically avoid giving students the intellectual and imaginative resources to make sense of competing interpretations of contested matters. . . . [A] good deal of what we teach students—about history, nature, morality, and human nature—is religiously contested, yet students are taught virtually nothing about religious interpretations of these contested matters. In this respect, public education is strikingly illiberal; public education indoctrinates students against religion.[81]

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[79] Baer, *supra* note 17, at 15-16. Jeffrey Kane argues that all "pedagogical judgments" —whether they be regarding "[t]he nature and significance of testing, the organization of classrooms, the levels of engagement required of students, the role of art and music in the curriculum, [or] virtually every other aspect of the educational experience" "implicitly transmit . . . answers" to fundamental questions of human existence. Kane, *supra* note 15, at 48. He lists some of these fundamental questions as follows:

> What is knowledge? What is intelligence and how may it be best developed? What is learning and how can it be measured? What is the nature of the world? How shall it be studied and interpreted? Is truth to be found through revelation or the scientific process, or is it knowable at all? What is it to be human? Is the very foundation of human identity to be found in the divine or are we social animals? What values or "valuing" processes would we teach? Are these responsibilities incumbent upon us by virtue of humanity or are our relations with ourselves, one another, and the larger world circumscribed by questions of the "common good"?

Id. at 47.

Thus, pedagogical judgments about how to develop the intellect of children are inseparable from spiritual commitments—"articles of faith, whether theistic or antitheistic, whether metaphysical or positivistic." *Id.* at 47-48. "[I]n education, the questions of human intellect and of human spirit constitute an indivisible unity." *Id.* at 48.

[80] Nord, *supra* note 12, at 439.

[81] *Id.*

The schools thus fail their mission to stimulate "analysis and inquiry"[82] by "contract[ing] the spectrum of available knowledge"[83] and creating a distorted marketplace in ideas.[84]

2. *A tendency toward the progressive*

The second problem with allowing secular ideologies to be taught in schools is that the conclusions they reach on intimate moral issues such as sexuality and the nature of the family tend to be different from those of traditional religions. The Humanist Manifesto II, for example, advocates sexual liberation and the right of individuals to "abortion, divorce, and birth control."[85] Secular approaches tend to favor new alternative configurations of the family that include gay and lesbian couples, and question traditional gender roles as oppressive.

Secular morality tends to be "progressive," emphasizing the importance of human autonomy and self-determination.[86] An emphasis on the pre-eminence of autonomy—the right of the individual to make his own choices with regard to moral issues—is hardly neutral toward traditional religious believers. Conservative religious people believe that moral questions are determined with reference to "an external, definable, and transcendent authority."[87] Although a believer may have the choice whether or not to obey the command not to commit adultery, the choice as to the rightness or wrongness of such an action is not his to make. A secular approach to morality that teaches children to make "their own choices" concerning the rightness or wrongness of whether to, for example, engage in pre-marital sexual intercourse is hardly neutral toward orthodox religious belief. As Amy Gutmann observes:

> Liberals insist that the state offer sex education for the sake of giving teenagers an unbiased choice among ways to live their own lives, but teachers cannot present teenagers with a neutral account of the choice among abstinence,

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[82] Strossen, *supra* note 54, at 358.

[83] Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866 (1982) (quoting Griswold v. Connecticut, 381 U.S. 479, 482 (1965)).

[84] Mitchell, *supra* note 45, at 663 (quoting Charles Black, *He Cannot Choose but Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960 (1953)). As Professor Mary Harter Mitchell argues, a school, when it presents "ultimate questions" and allows students to consider only answers from secular belief-systems from the "spectrum of competitive answers" to such questions, presents schoolchildren with "a gap-toothed spectrum, a spectrum missing pieces from traditional religions." *Id.*

[85] Ingber, *Religion or Ideology*, supra note 44, at 293 n.364, 318.

[86] HUNTER, *supra* note 1, at 76.

[87] *Id.* at 44 (emphasis omitted).

> contraception, and abortion. Agnosticism about the significance of sex is no more neutral than agnosticism about the existence of God.[88]

Whether a purely secular, or non-religious, approach to morality is inherently antagonistic to traditional religion is a difficult question,[89] but at least one prominent constitutional scholar acknowledges that the secular approach to resolving public moral disputes required by the Constitution "'distorts' the outcomes" against traditional religious views in the school curriculum.[90] This kind of distortion of the outcomes in favor of secular moralities is the very thing that creates a sense of frustration and alienation on the part of traditional religious believers.

3. *The marginalization of religion*

The effect of a requirement that only secular perspectives be promoted in public classrooms is to "marginalize" religious perspectives in the minds of young people.[91] Religious perspectives, because they are simply omitted, are made to appear irrelevant, outmoded, and not worth seriously considering, even if their secular ideological competitors do not have superior status as competing truth-claims.[92]

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[88] GUTMANN, *supra* note 13, at 108.

[89] For example, Professor Hunter notes that "[s]ome secularists . . . (particularly many secular conservative and neo-conservative intellectuals) are drawn to the orthodox impulse. For them, a commitment to natural law or to a high view of nature serves as the functional equivalent of the external and transcendent moral authority revered by their religiously orthodox counterparts." HUNTER, *supra* note 1, at 45-46.

[90] Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197-98 (1992). Thus, schools may teach ideological feminism, even though it is in some sense a "faith," *id.* at 201, and even if it "clashes" with the beliefs of traditional religions. As Professor Sullivan explains:

> The Religion Clauses enable government to pursue and endorse a culture of liberal democracy that will predictably clash over many issues with religious subcultures. The public classroom, for example, may inculcate commitments to gender equality that are incompatible with notions of the natural subordination of women to men drawn by some from the Bible. Protection for religious subcultures lies in exit rights, vigorously protected under the Free Exercise Clause: The solution for those whose religion clashes with a Dick and Jane who appear nothing like Adam and Eve is to leave the public school.

Id. at 213-14. For religious believers who reject the idea that the Bible teaches the "subordination" of women, yet who are nevertheless extremely uncomfortable with ideological feminism, there is something disconcerting about a constitutional theory and a school system where the best message to them is to "leave the public school"—especially if financial and practical factors make leaving the public school a non-option. It is precisely this tendency toward hostility that this article argues is inherent in a school system that is constitutionally required to be secular.

[91] Johnson, *Is God Unconstitutional?*, *supra* note 5, at 463.

[92] *Id.* at 463-66.

Secular ideological perspectives are not necessarily better, or even more objective and empirically verifiable, than religious perspectives. For example, it is not demonstrably clear that the view of human nature presented in the humanistic psychology of the *Smith* textbooks (that the highest purpose of human beings is "self-actualization")[93] is a better answer to the questions of "who we are" and "what is worthy of our deepest commitment" than the evangelical Christian view (that human beings are essentially depraved and "fallen" and are in need first and foremost of spiritual redemption through Jesus Christ).[94] Yet the former is permitted in public classrooms as being merely "consistent" with secular humanist beliefs, while the latter would not last a day.

Even apparently non-religious disciplines such as the social and natural sciences (evolution) implicitly teach children foundational beliefs about the nature and purpose of human beings, the world, society, and ethics.[95] As

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[93] Smith v. Board of Sch. Comm'rs of Mobile County, 655 F. Supp. 939, 986 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987).

[94] The atrocities of this and past centuries would seem to provide "empirical" support for the Christian doctrine of the basic fallenness and sinfulness of humankind. ROMANS 3:23; JEREMIAH 17:9. As one journalist writing on the Holocaust comments:

> But the Holocaust was clearly more than a testament to the beastliness of Germans or the excesses of fascism. In an editorial called "Gazing into the Pit," the *Christian Century* wrote that the atrocities showed "the horror of humanity itself when it has surrendered to its capacity for evil . . . . Buchenwald and the other concentration camps spell doom. But it is not simply the doom of the Nazis; it is the doom of man unless he can be brought to worship at the feet of the living God." Even for secular intellectuals, the Holocaust supplied the most powerful brief yet for the existence of original sin. Two centuries earlier, thinkers were asserting the perfectibility of man. Now, they were debating whether Germans were human. The answer, tragically, was yes.

Gerald Parshall, *Freeing the Survivors*, U.S. NEWS & WORLD REPORT, Apr. 3, 1995, at 50, 65.

[95] The natural sciences are traditionally viewed as disciplines that embody hard factual knowledge arrived at by empirical observation. However, the objectivity of the conclusions is questionable because the assumptions underlying much of modern scientific inquiry—for example, that "the cosmos is a closed system of material causes and effects"—are themselves not empirically testable. PHILLIP E. JOHNSON, DARWIN ON TRIAL 146 (2d ed. 1993) [hereinafter, JOHNSON, DARWIN ON TRIAL]. The exclusion of supernatural explanations for natural phenomena is itself a value choice that is arbitrary. Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 685-86 (1992).

The theory of evolution is the chief case in point. Evolution is commonly thought to be "a matter of objective fact, whereas creationism is a matter of subjective belief." *See* Gedicks, *supra*, at 683 (discussing the Court's treatment of evolution and creationism in Edwards v. Aguillard, 482 U.S. 578 (1986)). This has been challenged, however. In his book DARWIN ON TRIAL, Berkeley law professor Phillip Johnson persuasively sets forth the case that the theory of evolution has more to do with philosophy than with hard evidence. Johnson argues that the chief teaching of evolutionary theory—that "immensely complex" life-forms are the result of "mindless and purposeless natural processes"—is simply not supported by observable evidence and "is therefore not really part of empirical science at all but rather a deduction from naturalistic philosophy." JOHNSON, DARWIN ON TRIAL, *supra*, at 158. Belief in the theory of

evolution can only be maintained if one is committed to the philosophy of naturalism—the belief that "the entire realm of nature [is] . . . a closed system of material causes and effects, which cannot be influenced by anything from 'outside.'" *Id.* at 116. For a discussion of the basic premises of a naturalistic worldview, see JAMES W. SIRE, THE UNIVERSE NEXT DOOR 62-83 (1988).

Johnson examines and finds wanting the evidence in several fields of science. For example, in the field of pre-biological evolution (the study of the origin of the simplest forms of life) Johnson points out that, "[t]he simplest organism capable of independent life, the prokaryote bacterial cell, is a masterpiece of miniaturized complexity which makes a spaceship seem rather low-tech." JOHNSON, DARWIN ON TRIAL, *supra*, at 105. The probability of such a fantastically "complex entity . . . assembl[ing] itself by chance" from the "prebiotic soup" during the time of the earth's existence has been acknowledged by "secular" scientists to be almost nil. *Id.* at 105-06. In the famous metaphor of Cambridge astronomer Fred Hoyle, it is "as likely as that 'a tornado sweeping through a junkyard might assemble a Boeing 747 from the materials therein.'" *Id.*

Johnson further explains how Francis Crick, the "co-discoverer of the structure of DNA," also recognized the statistical impossibility of life evolving in the "time available on earth." *Id.* at 110. To overcome this difficulty, Crick advanced a "theory he called 'directed panspermia,'" in which he hypothesized that "an advanced extraterrestrial civilization, possibly facing extinction, sent primitive life forms to earth in a spaceship." *Id.* With delicious irony, Johnson concludes: "When a scientist of Crick's caliber feels he has to invoke undetectable spacemen, it is time to consider whether the field of prebiological evolution has come to a dead end." *Id.* at 111.

Evolution as a mechanistic explanation for how life began can only be maintained by assuming what it tries to prove—that only material processes are operative in the universe. *Id.* at 28, 116-17. If one holds this naturalistic outlook, one *must* postulate "undetectable spacemen" or some other far-out theory to explain the origin of life, for the possibility of a supernatural intelligent designer is a non-option. *See generally* JOHNSON, DARWIN ON TRIAL, *supra*. *See also* MICHAEL BEHE, DARWIN'S BLACK BOX (1996) (University of Lehigh professor of biochemistry's argument that at its most simple cellular levels, life is made of "irreducibly complex systems," i.e., systems "that require[] several interacting parts to function, where if you remove or destroy one of the parts, then the function is also destroyed." Mark Hartwig, *Darwinists Deny the Obvious*, FOCUS ON THE FAMILY CITIZEN, June 24, 1996 (Focus on the Family), at 1 (quoting Professor Behe and discussing his book)).

If Johnson's argument is correct, then teaching the theory of evolution in public schools is teaching a theory tinged with the "faith-assumptions" of naturalism. The philosophical implications of naturalistic evolution are not inconsequential. Although one might argue that there is no incompatibility between evolution and religious belief—God could have been "stand[ing] behind the scenes, guiding the 'natural' processes," Walter L. Bradley and Charles B. Thaxton, *Information and the Origin of Life*, *in* THE CREATION HYPOTHESIS 176-77 (J.P. Moreland ed., 1994), as believed by "theistic evolutionists," JOHNSON, DARWIN ON TRIAL, *supra*, at 128-29—a thoroughly mechanistic understanding of evolution does have "profound anti-theistic implications." *Id.* at 160. Professor Johnson discusses the work of Stephen Jay Gould:

> [Gould] has written that "before Darwin, we thought that a benevolent God had created us." Because of Darwin, however, we have learned that "no intervening spirit watches lovingly over the affairs of nature (though Newton's clockwinding god might have set up

> the machinery at the beginning of time and then let it run). No vital forces propel evolutionary change. And whatever we think of God, his existence is not manifest in the products of nature."

Id.

The theory of evolution, argues Johnson, is the "official creation story of modern culture" with far-reaching implications for "religion, philosophy, and cultural power." *Id.* at 157. Indeed, Johnson suggests that naturalism has become the "established constitutional philosophy" and that there is a danger that "the Supreme Court [has] established a national religion in the name of First Amendment freedoms." Johnson, *Is God Unconstitutional?*, *supra* note 5, at 475. *See also* PHILLIP E. JOHNSON, REASON IN THE BALANCE (1995) (arguing that naturalism is the philosophy underlying modern science, law, and education).

If the theory of evolution really does have such "profound anti-theistic implications" and if the evidence really is as shaky as Johnson argues, then it is not surprising that religious scientists and believers would question its validity and oppose its teaching in schools. JOHNSON, DARWIN ON TRIAL, *supra*, at 160. Yet the U.S. Supreme Court has declared that laws prohibiting the teaching of evolution in schools are an unconstitutionally motivated attempt to "tailor" school curriculum "to the principles or prohibitions" of a particular religious dogma. Epperson v. Arkansas, 393 U.S. 97, 106-07 (1968). And attempts to require balanced treatment of evolution with "creation-science" have likewise been declared unconstitutional, Edwards v. Aguillard, 482 U.S. 578 (1987), in spite of efforts (at least by the state's experts at trial) to define creation non-religiously as "a collection of scientific data supporting the theory that the physical universe and life within it appeared suddenly and have not changed substantially since appearing." *Id.* at 612 (Scalia, J., dissenting). Defined in this way, creation-science is a purely secular "scientific concept that can be presented without religious reference." *Id.* Nevertheless, the Court held that the "theory of creation science" contemplated by the statute "embodies a particular religious tenet" that a supernatural Creator created humankind. *Id.* at 593. *See also* McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982), *aff'd*, 723 F.2d 45 (1983) (invalidating similar "balanced treatment" statute in Arkansas).

In fairness to the Court, the legislative history in *Edwards* did indicate that some legislators who supported the bill had a religious concept of a supernatural creator in mind. *Edwards*, 382 U.S. at 591. Nevertheless, the analysis in both *Edwards* and *Epperson* erects significant barriers for religious believers who sincerely feel that evolution is bad science and bad philosophy that should at least be called into question—rather than afforded monopoly status—in the public classrooms. Both opinions struck down the respective statutes as having an impermissible religious purpose in violation of the first prong of *Lemon*. *Id.* at 593; *Epperson*, 393 U.S. at 107-09. For discussion of the purpose prong, see Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 143-45 (1992) [hereinafter McConnell, *Religious Freedom*]. In reaching their conclusions, the opinions specifically noted that a particular scientific theory was singled out "of many possible science subjects" merely because it conflicted with a particular religious doctrine of fundamentalist Christians. *Edwards*, 482 U.S. at 593; *Epperson*, 393 U.S. at 109. Because the statutes were enacted in the context of "historic and contemporaneous antagonisms between the teachings of certain religious denominations and the teaching of evolution," *Edwards*, 482 U.S. at 591, they had to be the product of "fundamentalist sectarian conviction." *Epperson*, 393 U.S. at 108.

Although the opinions were not solely based on these factors, they stand as significant barriers to Christians and other theists who wish to challenge the privileged status of evolution in the classroom by introducing curricular material that highlights the difficulties of the theory. For example, in Clayton County Georgia, a school board policy called for the posting of a disclaimer into biology textbooks which stated that macroevolution was an unproven theory and

Warren Nord observes, economics textbooks used in public schools present

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encouraged students to "[s]tudy hard and keep an open mind." Jill Nelson, *Creationism: The Debate is Still Evolving,* USA WEEKEND, Apr. 18-20, 1997, at 12. In Southern California, school board policy required a "candid scientific discussion of anomalous scientific data, and unsolved problems and unanswered questions" about evolution in addition to a "forceful presentation of well-established scientific data and conclusions" *for* evolution. FOCUS ON THE FAMILY CITIZEN, June 24, 1996 (Focus on the Family), at 1.

While these attempts are relatively modest—they mention nothing of "creation" and do not require anything like "equal time" (in Georgia, students are not required to read the disclaimer but they are required to listen to an evolutionist biology teacher for 100% of the classroom time)—under the *Edwards* and *Epperson* analysis both would be constitutionally suspect. They still single out evolution out of many possible science subjects, *id.* at 593, and are still enacted in the context of "historical and contemporaneous antagonisms" between Christian and evolutionary teachings. *Edwards,* 482 U.S. at 593. Indeed, the California policy was strongly opposed as an attempt to inject religion into the schools. FOCUS ON THE FAMILY CITIZEN, June 24, 1996 (Focus on the Family), at 1.

One wonders what would happen if religious believers, inspired by Martin Luther King, Jr.'s teaching that "[a] just law is a man-made code that squares with the moral law of . . . God," CARTER, *supra,* note 8, at 228 (citation omitted), sought to mandate the teaching of racial equality in social science and history textbooks. The action would be singling out a particular subject—race relations—out of many social studies and history topics and that solely because it conflicts with the particular religious views (that God created all races equal) of these believers. Yet it is unlikely in the extreme that *Edwards* would be used to invalidate such an action.

The difference seems to be nothing less than perception. People do not generally identify the civil rights movement with the particular beliefs of a certain religion; notions of equality are widely perceived to be secular ideas. On the other hand, creation-science is intimately associated with the clearly identifiable tenets of a highly visible traditional religion, fundamentalist and evangelical Christianity. Therefore, any attempt by Christians to influence school curriculum to counteract what they believe to be unfair bias is met with outcries of "fundamentalist repression," and "injecting religion into the schools." *Edwards,* 482 U.S. at 634 (Scalia, J., dissenting). Indeed, Stanley Ingber acknowledges that "[a]s long as the relationship between creation science and Genesis is sufficiently well-known by society generally, the teaching of creation science will continue to have a religious tinge regardless of how secular (or scientific) its presentation may be." Ingber, *Religion or Ideology, supra* note 44, at 324. In fact, Ingber argues that invalidating a law because of this "religious tinge" is a *correct* decision because public perception is a key factor in deciding whether there is an improper symbolic favoritism for a particular religion by the government. *Id.* Secular humanist ideas such as "self-actualization, moral relativism, and evolution," on the other hand, do not pose the same problems because "most of our national community is unaware of even the existence of the Humanist Manifestoes I and II . . ." *Id.* at 324-35.

The practical effect is that members of highly visible and traditional religions with clearly identifiable religious beliefs have second-class representation in the community consensus that the public school curriculum is supposed to reflect. The viewpoint of religious believers such as fundamentalist and evangelical Christians who genuinely feel that the teaching of evolution in schools is the teaching of bad science in support of anti-theistic philosophy is marginalized, that is, "without being refuted, it is . . . excluded from serious consideration" merely because it is categorized as religious. Johnson, *Is God Unconstitutional?, supra* note 5, at 463.

"the economic world in terms of the competition for scarce resources among self-interested individuals with unlimited wants."[96] In contrast, Dr. Nord offers the Catholic Bishops' Pastoral Letter on the economy, which insists that economic and social institutions must be measured in the light of "human dignity, realized in community with others and with the whole of God's creation," and thus must provide an "'option for the poor' and vulnerable."[97]

Is the view found in the school textbooks better than that of the Bishops' Pastoral Letter? Is it more objective or empirically-based? Both views seem to be competing understandings of the nature of human beings and society.[98] The "secular" view is not necessarily a superior explanation of reality than the religious one. But in the public schools, the secular view is given all the time as if it were the only way of looking at things.

Where religious parents feel most outraged, however, is when schools exclude religious perspectives in teaching subjects that answer the moral questions of "how we ought to live," especially in intimate areas such as human sexuality and the nature of the family. Schools inculcate a variety of moral commitments about how children "ought" to live—they teach children to be environmentally conscious, to practice safe sex; they teach that "hate" is bad and that tolerance and respect for people of different races, cultures, genders, and sexual orientations is good.[99]

Religious answers to the question of "how we ought to live," with their invocation of transcendent authority and moral absolutes, however, are often simply ignored, relegated to the private and comfortably safe realm of opinion and belief.[100] For example, after reviewing thirty high school textbooks used in North Carolina, Dr. Nord observes that the home economics texts "routinely manage to discuss human nature, values, decision-making, abortion, sexuality and the family with no mention of religion," including only "a throw-away line about consulting a clergyman in times of trouble."[101] The message communicated to children is that religious perspectives are irrelevant to making important decisions involving their sexuality—except in the limited and private enclaves of church and synagogue. The secular perspective is all the student hears, and he is not taught to question it; religious ideas that certain behaviors

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[96] Nord, *supra* note 12, at 445.

[97] *Id.* at 446 (quoting NATIONAL CONFERENCE OF CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY (1986)).

[98] *Id.* at 447.

[99] McConnell, *God is Dead, supra* note 4, at 179.

[100] *See* discussion *infra* note 289.

[101] Nord, *supra* note 12, at 441-42. After the Court made clear that religious teaching was not to be a part of the public schools, "educators, wishing to fulfill their role as value inculcators, . . . sought to fill the void with alternative secular perspectives on morality and ethics." Ingber, *Religion or Ideology, supra* note 44, at 315. The result was that a "number of avowedly nonreligious moral education programs have emerged." *Id.*

such as pre-marital sex are morally wrong (rather than simply irresponsible) are made to appear outmoded and irrelevant, or worse yet, oppressive and immoral[102]—all with the school's official imprimatur.[103]

Thus, in public schools, religious perspectives on important and fundamental matters are marginalized, that is, they are "excluded from serious discussion" "without being refuted" simply by being categorized as religious.[104]

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[102] The idea that pre-marital sexual intercourse is immoral (rather than merely irresponsible) is viewed as a "religious doctrine." For example, the Louisiana Court of Appeals recently ordered the following passage removed from a sex education curriculum on grounds that it promoted a "religious belief[], [or] subjective moral and ethical judgment[]" in violation of a state statute:

> One 42 year old woman with three children made the following statement to her teenage daughter: "I had sex before marriage. Even though I knew it was wrong, I tried to make myself think it was right because we were engaged. That didn't help . . . ."

Coleman v. Caddo Parish Sch. Bd., 635 So. 2d 1238, 1248, 1250 (La. Ct. App.), *writ denied*, 639 So. 2d 1171 (La. 1994).

The American Civil Liberties Union ("ACLU") of California in opposing abstinence-based sex education curriculum stated:

> It is our position that teaching that monogamous, heterosexual intercourse within marriage is a traditional American value is an unconstitutional establishment of a religious doctrine in public schools.

JAMES DOBSON AND GARY L. BAUER, CHILDREN AT RISK 26-27 (1990) (quoting Letter from Marjorie C. Swartz, Legislative Director, ACLU California Legislative Office, and Francisco Lobaco, Legislative Advocate, ACLU California Legislative Office, to California Assembly Education Committee (May 26, 1988)).

[103] Michael McConnell quotes one commentator's observations:

> Wherever we look—in history, social studies, reading texts, psychology, values education, the sciences both natural and social—the thrust in the public schools is to treat religion not at all, or as irrelevant, or as superstition.

Michael W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U. CHI. LEGAL F. 123, 142 (1991) (citing William R. Marty, *To Favor Neither Religion Nor NonReligion: Schools in a Pluralist Society, in* EQUAL SEPARATION 95, 99 (Paul J. Weber ed., 1990)).

[104] Johnson, *Is God Unconstitutional?*, *supra* note 5, at 463. Professor Phillip Johnson observes that this kind of marginalization of religion in the public school curriculum is akin to the exclusion of particular viewpoints from public forums forbidden under Free Speech doctrine. *Id.* In Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993), a school district denied a church's request to use school facilities after class hours to show a film series that featured a Christian psychologist, Dr. James Dobson, who addressed issues related to child-raising and family values in modern society. *Id.* at 2144-45. Even though premises were made available to a wide range of other community groups, including some that addressed the subject of the family, the school district denied the church's request because district rules prohibited access for "religious purposes." *Id.* at 2144. The Court held that the district had excluded the church on the basis of its religious viewpoint on the subject of "family issues and child-rearing"—a subject matter "otherwise includible" within the forum—and had thus violated the church's Free Speech rights under the First Amendment. *Id.* at 2147 (quoting Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 806 (1985)). *See also*

Rosenberger v. Rector & Visitors of University of Virginia, 115 S. Ct. 2510, 2517 (1995) (holding that University of Virginia could not deny student funding to a religious magazine that addressed issues of critical concern, especially since it had funded a broad spectrum of secular groups addressing similar issues; the University of Virginia had engaged in unconstitutional viewpoint discrimination). For further discussion of *Rosenberger* and viewpoint discrimination against religious perspectives, see Andrew A. Cheng, Note, *Rosenberger v. Rector & Visitors of University of Virginia and the Equal Access Rights of Religious People,* 18 U.HAW. L. REV. 339 (1996).

Professor Johnson argues that the school district had attempted to marginalize the religious perspective of the church by labeling it as religious. Johnson, *Is God Unconstitutional?, supra* note 5, at 465-67. Although in *Lamb's Chapel,* this attempt to marginalize religious perspectives "failed spectacularly," Johnson argues that the Court has failed to recognize the same type of "viewpoint discrimination" within the public school curriculum. *Id.* at 466-69. Public schools teach subjects on which various religions have perspectives to offer. But the religious perspectives are excluded, not because they are "necessarily false or irrational, but precisely because [they are] religious. The logic implies that [religious] arguments must be excluded regardless of their merits, and that students may hear only" secular viewpoints on subjects taught within schools. *Id.* at 467-68.

Of course, the key distinction is that the curriculum in public schools involves the *government's* speech, while *Lamb's Chapel* involved the *private* speech of individuals who merely sought to use government property. Rosenberger v. Rector & Visitors of University of Virginia, 115 S. Ct. 2510, 2522 (1995). While the government may not discriminate against viewpoints (including religious viewpoints) of private speakers, in its own speech it is free to endorse only certain perspectives without endorsing others. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-4, 804, 807 (2d ed. 1988). And the government in its own speech may *not* endorse religious perspectives. *Rosenberger,* 115 S. Ct. at 2522.

The response to this is to question whether certain subjects are appropriate at all for the public classroom. As Professor Johnson argues: "Excluding religious opinion from the schools was one thing when the schools taught mainly the 'three R's,'" but it is quite another thing "when the schools are actively promoting the progressive viewpoint on sexual behavior to students from traditionalist homes[.]" Johnson, *Is God Unconstitutional?, supra* at 470. When schools teach religiously-contested subject matter such as sexuality and ethics, they encroach on a realm that more properly belongs to the private sphere, the domain of individual families and churches. The solution to a hostile school curriculum is to forbid schools from teaching religiously-contested subject matter.

The difficulty with this is that the line between religiously-contested and non-religiously contested is very difficult, if not impossible, to draw. Virtually every subject beyond "simple technical instruction" is religiously-contested. Baer, *supra* note 17, at 15. Even an apparently uncontroversial area such as a nutrition course that advocated the four food groups would be religiously-contested to a vegetarian Buddhist. Citizens for Parental Rights v. San Mateo County Bd. of Educ., 124 Cal.Rptr. 68, 87 (Cal. Ct. App. 1975). *See also* Kane, *supra* note 15, at 47-48.

If everything in public school curriculum is religiously-contested, one might argue that government should get out of education altogether. Indeed, in the early days of the nation, education of children primarily took place in homes, churches, or religiously-affiliated schools. JOHN W. WHITEHEAD, PARENTS' RIGHTS 71-82 (1985). In fact, "almost all education—primary, secondary, and higher—was under religious auspices." McConnell, *God is Dead, supra* note 4, at 178. While some have argued that the government should get out of education altogether, *see* YUDOF, *supra* note 16, at 17-18 (discussing scholarly criticisms of compulsory education),

The consequence of ignoring, or of only giving a passing mention to, religion is not trivial. As Sir Walter Moberley observes:

> It is a fallacy to suppose that by omitting a subject you teach nothing about it. On the contrary, you teach that it is to be omitted, and it is therefore a matter of secondary importance. And you do this not openly and explicitly, which would invite criticism; you simply take it for granted and thereby insinuate it silently, insidiously, and all but irresistibly.[105]

4. *Nurturing a secular mentality*

The result of a school system that teaches a wide range of "religiously contested" subjects from a solely secular perspective is that students are inculcated into a secular mentality and worldview in which "belief in the sacred or divine is both irrelevant and unnecessary."[106] This worldview may not be a "religion of secular humanism," in the sense of being a coherent, well-defined belief-system; instead it is, in the words of educational commentator Harriet Tyson, "a mixture of philosophies, isms, and ologies: humanism, scientific materialism, behavioral psychological, a pop version of humanistic

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that is not the purpose of this Article. Public education does serve a public function. If the government got out of education altogether, many children might be left with no education at all. Baer, *supra* note 17, at 34. Instead, this Article argues that an educational system that does not provide parents with meaningful alternatives is inimical to the foundational values of the Constitution.

[105] WALTER MOBERLY, THE CRISIS IN THE UNIVERSITY 55-56 (1949), *quoted in* Ingber, *Religion or Ideology, supra* note 44, at 331 n.477 (Sir Moberly argues that the "modern university . . . does what is far more deadly than open rejection [of God]; it ignores Him."). The result is that "[e]ducated people have become more and more attuned to modern science and social science, to the ideas and ideologies found in textbooks . . . . Religion is no longer sustained by the dominant ideas of our public, intellectual lives. Rather, it has, for the most part, become a matter of personal and private faith." Nord, *supra* note 12, AT 447. Or, as Professor McConnell observes:

> One can go through elementary and secondary school today and not be aware that religion has played—and still plays—a major role in history, philosophy, science, and in the ordinary lives of many millions of Americans. I sense the effect in my own elementary school-age children: they wonder how I can think God and Jesus Christ are so important to the workings of nature and history when they never hear about such things in school. A secular school does not necessarily produce atheists, but it produces young adults who inevitably think of religion as extraneous to the real world of intellectual inquiry, if they think of religion at all.

McConnell, *God is Dead, supra* note 4, at 181.

[106] Ingber, *Religion or Ideology, supra* note 44, at 311; Nord, *supra* note 12, at 447-48.

psychology"[107] that shares many of the assumptions and values of secular humanism. As Tyson continues:

> [I]t values objectivity over subjectivity, favors a behaviorist interpretation of reality over any other, and is more comfortable with scientific explanations than with philosophic ones. It celebrates the new and the up-to-date over the old or "irrelevant." . . . In sum, it is a world view not consciously hostile to religion but intrinsically antagonistic to it and to the values it holds dear.[108]

While this kind of official privileging of secular perspectives and ideologies over religious beliefs seems to "prefer those who believe in no religion to those who do believe," absent blatant promotion of clearly religious (humans are god) or irreligious (Christianity is false) ideas, schools are not constitutionally hostile in having this secular worldview. The privileging of secular ideologies only demonstrates how a public school system tends toward creating a climate that is alienating to conservative religious believers.[109]

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[107] BATES, *supra* note 1, at 308-09 (quoting Harriet Tyson, *The Values Vacuum: A Provocative Explanation for Parental Discontent,* 16 RELIGION AND PUBLIC EDUCATION at 383 (1989)).

[108] *Id.*

[109] If public schools are in fact illegitimately excluding religious perspectives on religiously-contested matters, if they are presenting students with a "gap-toothed spectrum" in the "spectrum of competitive answers to . . . ultimate questions," Mitchell, *supra* note 45, at 663, then why not "plug the gaps" by mandating or allowing the equal inclusion of religious perspectives in school curriculum?

The Court has stated that teaching about religion "as part of a secular program of education" does not violate the Establishment Clause. School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 225 (1963); *see also* Sekulow, *supra* note 21, at 1084-87 for discussion of objective teaching of religion in schools. When schools present religious perspectives as ideas that students can "analyze, question, and potentially reject" they are not endorsing those religious beliefs, but merely acting as a "stimulator of analysis and inquiry, creating a marketplace of ideas." Strossen, *supra* note 54, at 358. By allowing differing competing perspectives, ideological and religious, in the classroom, the school acts in its capacity as a "stimulator of analysis and inquiry" and "intellectual discourse," rather than an "inculcative or indoctrinating capacity." *Id.*

In fact, perspectives could even be robustly religious or anti-religious because the purpose is to create a market in ideas, not to endorse a particular perspective. As Dr. Nord argues: "Particular texts and courses need not always be neutral if contending points of view are taught in other texts and courses. What is essential is that the curriculum be neutral." Nord, *supra* note 12, at 454. Strossen, for example, would allow creationism and secular humanism in their unfettered religious forms to be taught in this manner. *Id.* at 357-58. This approach has some support in the case law. For example, in *Grove v. Mead School District No. 354,* 753 F.2d 1528 (9th Cir. 1985), *cert. denied,* 474 U.S. 826 (1985), Judge Canby argued that the inclusion of THE LEARNING TREE—a novel which concededly contained ideas consistent with secular humanism and disparaging toward Christianity—in a Tenth grade literature curriculum was part of a "neutral" program with the secular purpose of exposing students to a wide variety of views and issues. *Id.* at 1540. Milton's PARADISE LOST, Dante's INFERNO, and Bunyan's PILGRIM'S

PROGRESS could be included in a literature program, in spite of the fact these works all unabashedly involve religious advocacy and doctrine. *Id.* at 1540-41. *See also* Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680, 689 (7th Cir. 1994) (holding that school did not endorse particular religions in particular stories in Impressions reading series because series as a whole, which contained a wide variety of cultural and religious stories, did not endorse religion).

There are two chief difficulties with the equal-treatment approach. First, constitutionally *mandating* equal inclusion of religious perspectives (as advocated by Warren Nord, Nord, *supra* note 12, at 454-55) is simply unworkable. Ingber, *Religion or Ideology, supra* note 44, at 238. As a practical matter, "[w]ith only limited resources and time, [schools] cannot possibly provide curricula that encompass the world's enormous mass of information and perspectives." *Id.* This is illustrated in the creation and origins context. Although there may seem to be only two views—the naturalistic evolutionary and Genesis creation view—in reality there are conceivably hundreds of creation stories, from Native American and Hawaiian accounts, to Muslim versions, to pantheistic, monistic, and dualistic versions. Requiring equal treatment of all religious versions would render the schools subject to a lawsuit for every religious version, no matter how obscure, that is left out. Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools,* 1987 U. ILL. L. REV. 15, 51-52 (1987) [hereinafter Ingber, *Socialization*].

As Professor Ingber further argues, "[s]ubtle characteristics such as style and emphasis may undermine any substantive success in achieving balanced presentations." Ingber, *Religion or Ideology, supra* note 44, at 238. And even "equal" time is not really equal when one perspective really does deserve more time. *Id.* at 238 n.32 ("options that students can appreciate only after long-term study are obviously disadvantaged by a smorgasbord vision of neutrality that allocates equal time to all perspectives"). If true equal-treatment is so difficult for even professional educators to achieve, how can such a determination be within judicial competence to adjudicate? Ingber, *Socialization, supra,* at 50-52. Judges simply do not have the educational expertise or time to conduct an intensive, fact-specific inquiry into each allegation of unequal treatment. *Id.* at 51-52.

Second, teaching religious perspectives as part of a marketplace of perspectives "always carries with it an implied relativism that is anything but religiously or ethically neutral." Baer, *supra* note 17, at 22. *See also* Stanley Ingber, *Religious Children and the Inevitable Compulsion of Public Schools,* CASE W. RES. L. REV. 773, 779 (1993) [hereinafter Ingber, *Inevitable Compulsion*] ("[v]alue neutrality itself has a value bias favoring liberal philosophy embodied by the scientific method of inquiry"). For a criticism of the "religious tolerance" inculcated by this kind of deliberate exposure to a variety of cultural and religious perspectives, see Part V.C.1. Furthermore, schools cannot and will not teach all subjects in their capacity as stimulators of analysis. They do not wish to give "equal time" to both advocates of racial equality and racists, or to those preaching "Just Say No" to drugs and those extolling the virtues of getting high. Schools wish to act as value-inculcators when teaching these subjects. In their role as value-inculcators they may not promote explicitly religious values. Yet it is often the very areas that schools attempt to teach values (such as decisionmaking, sexuality, peer pressure, gang violence) that religious parents feel are the most religiously-sensitive. The choice about which subjects to teach from a "value-neutral" approach and which subjects to teach from an explicitly value-laden approach is itself a value choice that communicates a message that certain ideas (secular ones) are worthy enough as truth-claims to be officially endorsed by the state, while others (religious ones) are mere opinions. As Nomi Stolzenberg observe: "[H]aving one's beliefs regarded . . . as subjective opinions—and no more" has "profound . . . psychological effects." Stolzenberg, *supra* note 1, at 627.

This tendency toward hostility is brought into sharper relief and poses a greater danger of constitutional violation, however, when analyzed under the rubric of the principle of coercion of religious conscience.

IV. THE EDUCATIONAL SYSTEM AND LIBERTY OF RELIGIOUS CONSCIENCE

Religious liberty as protected by the non-coercion principle means that individuals are free to worship and practice in accordance with the dictates of their conscience.[110] The Free Exercise Clause of the Constitution guarantees that government may not coerce a believer to violate his conscience without a compelling interest furthered by the least restrictive means.[111] In the context of education, religious liberty means "the right of every person to freely choose his own course" in matters of "religious training, teaching, and observance" "free of any compulsion from the state."[112] The "transmission of religious beliefs . . . is a responsibility and a choice committed to the private sphere"[113]—the sphere of families, churches, and the individual conscience and mind[114]—and that private sphere "is promised freedom to pursue that mission."[115] For purposes of the present discussion, religious liberty means the paramount right of parents to direct the religious education of their children.[116]

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[110] McConnell, *God is Dead, supra* note 4, at 167.

[111] Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990) [hereinafter McConnell, *Free Exercise Revisionism*]. This compelling interest test for free exercise claims has been severely limited. *See* discussion *infra* note 144.

[112] School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 222 (1963).

[113] Lee v. Weisman, 112 S. Ct. 2649, 2656 (1992).

[114] *Schempp*, 374 U.S. at 226.

[115] *Lee*, 112 S. Ct. at 2656.

[116] The right of parents to direct the religious education of their children is a Free Exercise right as set forth in Wisconsin v. Yoder, 406 U.S. 205 (1972), which based its holding on the "fundamental rights and interests . . . protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children" set forth in Pierce v. Society of Sisters. *Id.* at 214. The *Yoder* opinion repeatedly mentions the paramount rights of parents in directing the specifically religious education of their children. For example, the Court characterized the interest of parents in "guid[ing] the religious future and education of their children" as "fundamental," and stated that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id.* at 232. The Court stated that parents' interest in *religious* education was greater than a general parental interest in education of their children, stating that only a reasonableness standard was required for the general interest of parents in educating children. *Id.* at 233. On the other hand:

> [T]he Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than

A. *Seedbeds of Belief-formation: Indoctrination in a Secular Mentality*

The danger of a school system that officially privileges secular values, argues Mary Harter Mitchell, is that schools "control[] the environment of impressionable children" as "seedbeds of belief formation."[117] Local public schools thus "possess exceptional power to influence beliefs on any matters [they] touch[]."[118] While the Court has stated that parents and families have the paramount right to direct the upbringing in religious values of their children, especially during their formative years,[119] children actually spend most of these formative years in public schools[120] gathered as a "captive audience" for the state's teachings for six to eight hours a day.[121]

George Dent, Jr., describes the tremendous power of schools to influence the beliefs of their captive audiences:

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merely a "reasonable relation to some purpose within the competency of the State" is required to sustain the validity of the State's requirement . . .

Id.

The right of parents to direct the upbringing and education of their children, of course, is not a right exclusive to religious parents under the Free Exercise Clause. Pierce v. Society of Sisters was decided as a "substantive due process" case, as were other cases upholding parental rights at the time. *See* Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Farrington v. Tokushige, 273 U.S. 284 (1927).

In more recent cases, the Court in dicta has rooted this liberty in the right to privacy as one of the unenumerated fundamental rights in the penumbra of the 5th and 14th amendments. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973). As a fundamental privacy right, the parents' right to direct the education of their children would only be overcome by state action meeting the rigorous standards of the double pronged strict-scrutiny test. As one of the unenumerated fundamental rights of the penumbra, there is no logical reason why this right of parents should enjoy anything but the same level of protection afforded the other recognized unenumerated rights to abortion and contraceptive use which the Court has already upheld against state intrusion. For general discussion of the fundamental parental right in connection with the right to privacy, *see* WHITEHEAD, *supra* note 42, at 246-57.

Stephen Arons argues that another source of parental rights is found in the First Amendment generally, a right of the "individual consciousness"—the sphere of intellect, conscience and spirit—which encompasses the right of families to shape the beliefs and values of their children free from governmental coercion. Arons, *supra* note 20, at 76.

[117] Mitchell, *supra* note 45, at 663.

[118] *Id.*

[119] Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972).

[120] Dent, *Religious Children, Secular Schools, supra* note 16, at 891.

[121] Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 161-62 (1986), *quoted in* Jay Alan Sekulow et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017, 1020 (1995).

> The atmosphere of the public school intensifies the coercion of its teaching. Most governmental messages must compete with other messages and can be ignored or disbelieved with impunity. In public schools, however, not only must children listen to school doctrine exclusively, but they must learn and accept that doctrine. As Dean Yudof has said: "In some ways, public schools are a communications theorist's dream: the audience is captive and immature; . . . . the messages are labeled as educational (and not as advertising) . . . and a system of rewards and punishments is available to reinforce the messages."[122]

Young children, especially in the years when beliefs are developing, are impressionable—"[t]hey yearn to conform."[123] Peer pressure exerts a strong influence to accept the messages of the school,[124] as does the fact that teachers, especially good teachers, are "role models."[125]

Public schools thus "possess exceptional power to influence beliefs on any matters [they] touch[]."[126] And when schools "touch[] on ultimate questions—the meaning of the universe, the purposes of human life, the sources of ethical duty"—they may "directly influence childrens' beliefs" and risk "weight[ing] students' choices of religious beliefs"[127]—an area that has been

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[122] Dent, *Religious Children, Secular Schools, supra* note 16, at 892 (quoting M. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW AND GOVERNMENT EXPRESSION IN AMERICA 213 (1983)).

[123] *Id.* at 892. The fact that young children are impressionable and thus demand special protection in public schools from the inculcation of religious belief has been recognized in several Supreme Court cases. *See id.* at 892 n.15 (citing cases).

[124] Lee v. Weisman, 112 S. Ct. 2649, 2658-59 (1992).

[125] Edwards v. Aguillard, 482 U.S. 578, 584 (1986). The "subtle coercive pressure" created by the elementary and secondary public classroom environment has been recognized by the Court. Lee v. Weisman, 112 S. Ct. 2649, 2658 (1992) (citing School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring); Edwards v. Aguillard, 482 U.S. 578, 584 (1987); Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226, 261-62 (1990) (Kennedy, J., concurring). In *Lee*, the Court held that a two-minute officially-sponsored prayer at a middle school graduation violated the Establishment Clause because it created a "subtle and indirect" compulsion to participate in the prayer that could "be as a real as any overt compulsion." *Id.* at 2658-59. If a voluntary junior high school graduation ceremony involving a two-minute prayer creates impermissible coercion under the Establishment Clause, *id.* at 2659, then certainly compulsory attendance in classrooms for six to eight hours a day amounts to subtle coercion to accept the beliefs being taught. As Professor Dent argues:

> [T]he broad definition of compulsion is significant, especially because the context is a public school graduation. Attendance at a graduation is not legally mandated; attendance at regular classes is. Participation in the prayer was not required; participation in many other aspects of public schooling is. It should follow, then, that virtually all activity in public schools involves compulsion.

Dent, *God and Caesar, supra* note 1, at 715.

[126] Mitchell, *supra* note 45, at 663.

[127] *Id.*

reserved as the ultimate prerogative and responsibility of parents and families.[128]

A pervasively secular school system has the power to shape and mold in children their deepest beliefs, values, and outlooks during their formative years, providing the answers to the ultimate questions that religious parents feel is their responsibility to provide.[129] Because, as described above, the secular worldview of schools is pervasive—inculcating competing understandings of human nature and ethics even in such apparently non-religious subjects as economics and science—and nurtures a mentality that makes God and the sacred unnecessary and irrelevant, the constitutional requirement of a secular school system has the unavoidable tendency of creating antagonism between the school and the deeply religious parent.

B. De Facto Coercion

According to the Constitution, in a conflict between the state and the parent over who has the right to shape the deepest beliefs, values and outlooks of the child, the parent should win. The Court so held in *Pierce v. Society of Sisters,* stating in oft-quoted language that the "child is not the mere creature of the state," and that parents have the ultimate right and responsibility to "direct the upbringing and education of children under their control."[130] Under *Pierce,* parents have the constitutionally protected right to choose alternative private schooling to keep their children from being "standardiz[ed]" by the state in public schools.[131]

In reality, however, many Americans are unable to avail themselves of this right. The only ones who have a meaningful capacity to exercise their right of

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[128] Kane, *supra* note 15, at 60.

[129] *Id.*

[130] Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925). Stephen Arons argues that *Pierce* stands for a broader right of the "individual consciousness"—the sphere of intellect, conscience and spirit, and the right of families to shape the beliefs and values of their children—to be free from governmental coercion. Arons, *supra* note 20, at 76. This argument falls in line with a classical liberal understanding of the nature of government and individuals that there is a realm of individual human liberty—what John Stuart Mill identifies as "the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects . . . ."—that is "reserved from, rather than subject to, the authority of the state." Kane, *supra* note 15, at 51, 60 (quoting John Stuart Mill, *On Liberty, in* JOHN STUART MILL, THE SIX GREAT HUMANISTIC ESSAYS OF JOHN STUART MILL 137-38 (1963)). Under this conception, families and parents have the primary responsibility and right to direct the "intellectual/spiritual development of individual children," and the State may not intrude into this realm of liberty without compelling justifications such as protecting individuals, others or society from harm. *Id.* at 52-53, 60.

[131] *Pierce,* 268 U.S. at 535.

choice are those who have the financial means to afford private schooling (or the time to invest in home schooling).[132] For the poor, the public school is an unavoidable option—education is compulsory and refusing to send children to school invites criminal liability.[133] In a very real sense, the "educational experience that will 'shape and form'" the minds and spirits of the children of the poor "is set by the state."[134]

C. Parent and State as Adversaries

The public education system thus poses a great danger of infringing on the liberty of parents to direct the religious upbringing of their children. The coercive environment of the classrooms as "seedbeds of belief formation," the fact that curriculum includes religiously-contested subjects that present only secular answers to the "Big Questions" (of who we are, how we ought to live, and "what is worthy of our deepest loyalty and commitment"), and the lack of the meaningful ability to exit for the poor, all combine to create a school system that is fraught with the potential for violating the rights of parents to choose the religious beliefs and values that will shape the minds and spirits of their children.[135] The public education system has an inherent tendency to put the secular state and the deeply religious parent in the position of adversaries that struggle against each other to influence the child's intellectual, moral, and spiritual development.

An educational system that truly protects the religious liberty interests of parents and students will be one that aggressively ensures that parents have the meaningful capacity to avoid "standardization" by choosing alternative instruction for their children. This would be a system that respects pluralism

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[132] Arons, *supra* note 20, at 101.

[133] Lines, 12 J. L. EDUC. 189, 194-97 (1983), *in* YUDOF, *supra* note 16, at 44-46 (1992). Although Wisconsin v. Yoder allowed the Old Order Amish to completely exempt their children from public schooling beyond junior high school, the Court was careful to state that "courts must move with great circumspection . . . when faced with religious claims for exemption from generally applicable education requirements." 406 U.S. 205, 235 (1972). The total exemption was granted based on the unique nature of the Old Order Amish and the Court stated that "probably few other religious groups or sects could make" the showing that the state interests in education were served by the alternative informal "vocational" education which prepared the Amish children for a separated, agrarian way of life. *Id.* at 235-36. Partial exemptions from particular classes or assignments are a different matter and do not require as great a demonstration of the adequacy of proposed alternative modes of instruction. *See infra* Part V.

[134] Kane, *supra* note 15, at 54; Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 161-62 (1986), *quoted in* Jay Alan Sekulow et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017, 1020 (1995).

[135] *See generally* Arons, *supra* note 20.

in matters of conscience and religious teaching. Part V explores accommodations of religious believers within the public schools. Part VI explores a system of educational choice through vouchers as the ideal means of providing parents with the capacity to choose alternative schooling for their children.

V. ACCOMMODATING RELIGIOUS BELIEVERS IN PUBLIC SCHOOLS

If the preceding Part is correct, then educators who are committed to welcoming rather than alienating religious believers in public schools should make every effort to ensure that they are provided with the meaningful capacity to choose alternate instruction for their children. Within the public school system, this means accommodating religious parents and students by allowing students to be excused from religiously offensive classes and assignments. This is apparently widely practiced—either because of statutes, local policy, or individual arrangements between teachers, parents, and students[136]—indicating that respecting the rights of parents is recognized as a sound policy.

Schools, however, have also refused to grant such excusals, resulting in bitter community controversies[137] and litigation.[138] When schools refuse to accommo-

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[136] Dent, *God and Caesar, supra* note 1, at 710. *See, e.g.*, Medeiros v. Kiyosaki, 52 Haw. 436, 442-43, 478 P.2d 314, 317-18 (Haw. 1970) (statutory excusals from sex education curriculum); Citizens for Parental Rights v. San Mateo County Bd. of Educ., 124 Cal.Rptr. 68, 80-81 (Cal. Ct. App. 1975) (statutory excusals from sex education curriculum). In the *Mozert* case, parents and teachers had originally worked out a compromise where students would be excused from class when the religiously offensive Holt readers were used. Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1060 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988). The history of the *Mozert* case is as follows: Mozert v. Hawkins County Pub. Schs., 579 F. Supp. 1051, 1052 (E.D. Tenn. 1984) *and* 582 F. Supp. 201 (E.D. Tenn. 1984), *rev'd*, 765 F.2d 75 (6th Cir. 1985), *on remand*, 647 F. Supp. 1194 (E.D. Tenn. 1986), *rev'd sub nom.*, Mozert v. Hawkins County Bd. of Educ., 927 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988). Dorothy Woosley, a retired elementary school teacher in Honolulu, Hawaii, relates that she often made individual arrangements with various religious parents and students to accommodate their religious convictions. For example, Jehovah's Witness students routinely asked to be excused from Christmas plays and activities. Ms. Woosley would accommodate them by having them do other assignments. Interview with Dorothy Woosley, Retired Elementary School Teacher, in Honolulu, Haw. (April 1996).

[137] For an insightful and lively account of the litigation in Mozert v. Hawkins County Sch. Bd., 827 F.2d 1058 (6th Cir. 1987), *see* STEPHEN BATES, BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS (1993).

[138] The two key cases discussed in this article are Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987) and Ware v. Valley Stream High Sch. Dist., 550 N.E.2d 420 (N.Y. 1989). *See* discussion *infra* Part V.B. and V.C. Other cases are listed by George Dent, Jr., in Dent, *God and Caesar, supra* note 1, at 711 n.30. These cases are: Duro v. Dist. Atty, Second Judicial Dist. of N. Carolina, 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984) (opt-out from compulsory education laws); Menora v. Illinois High School Ass'n, 683

date religious believers, they should be constitutionally compelled to do so under the Free Exercise Clause of the Constitution.[139]

A. The Doctrinal Foundation

The doctrinal foundation for the right of excusal was laid in *Wisconsin v. Yoder*.[140] In *Yoder*, the Court held that parents have the paramount right to direct the religious education of their children, especially during the children's "early and formative years."[141] The Court held that the State of Wisconsin could not infringe on this right by compelling Old Order Amish parents to send their children to public schools beyond the eighth grade where they would be taught secular values contrary to their religious beliefs.[142] Because the state could not show that forcing the Amish children to attend public schools served its interests in educating children and preparing them to live in society, the state had to accommodate the Amish by exempting them from the requirements of

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F.2d 1030 (7th Cir. 1982) (request of Jewish students for exemption from Illinois High School Association rule prohibiting basketball players to wear headgear while playing); Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972) (conscientious objector request to opt-out from mandatory ROTC program); Keller v. Gardner Community Consolidated Grade Sch. Dist., 552 F. Supp. 512 (N.D. Ill. 1982) (excusal from basketball practice for catechism class); Church of God (Worldwide Texas Region) v. Amarillo Indep. Sch. Dist., 511 F. Supp. 613 (N.D. Tex. 1981) (school policy that limited to two days per year any excusals from class for religious holidays), *aff'd*, 679 F.2d 46 (5th Cir. 1982) (per curiam); Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979) (granting opt-out from co-educational physical education classes due to religious objection to exposure to immodest apparel); Davis v. Page, 385 F. Supp. 395 (D. N.H. 1974) (exemption from classes in which audio-visual equipment was used, music classes and health classes). *See also* In Re Currence, 248 N.Y.S.2d 251 (N.Y. Fam. Ct. 1963) (parent's refusal to send her child to school one day a week to receive religious instruction on holy day); Commonwealth v. Renfrew, 126 N.E. 109 (Mass. 1955) (child was periodically kept out of school by Buddhist parents); Commonwealth v. Bey, 70 A.2d 693 (Pa. Super. Ct. 1950) (Muslim parents who refused to send their children to school on Fridays, Muslim holy day).

[139] Such a claim would be a "hydrid" free exercise claim—that is, free exercise claims brought in "conjunction with" the constitutional right of parents to direct and control the upbringing of their children. Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 881-82 (1990). For further discussion, *see infra* note 144.

[140] 406 U.S. 205 (1972).

[141] *Id.* at 213-14.

[142] *Id.* at 210-11, 218. To the Amish, public secondary schools taught "worldly" values that were "in marked variance with Amish values and the Amish way of life." *Id.* at 210-11.

> The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.

Id. at 211.

the compulsory education laws and allowing them to pursue an agrarian education in the Amish way of life.[143]

The *Yoder* analysis is clear. Absent a compelling interest furthered by the least restrictive means, schools must accommodate religious believers by allowing students to be excused from an educational curriculum that teaches "worldly" or secular values contrary to their and their parents' religious beliefs.[144]

B. Mere Exposure: Mozert v. Hawkins County Board of Education

In *Mozert v. Hawkins County Board of Education*,[145] the U.S. Court of Appeals for the Sixth Circuit, when faced with the complaints of religious

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[143] *Id.* at 235-36, 221-22.

[144] Although Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), has severely limited the traditional free exercise test, the traditional test still survives for cases involving "hybrid" parental rights and free exercise claims even under *Smith*. *Id.* at 881-82. The traditional free exercise test employed by *Yoder* and other pre-*Smith* cases entitled individuals to exemptions from otherwise valid laws of general applicability if such laws burdened the exercise of sincere religious beliefs and the burden was not justified by a compelling state interest achieved by the least restrictive means. *Yoder*, 406 U.S. at 214; Sherbert v. Verner, 374 U.S. 398, 406 (1963); Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 718 (1981); Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141 (1987); *see also* McConnell, *Free Exercise Revisionism, supra* note 111, at 1110. In *Smith*, the Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability . . . .'" *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 263 n.3 (1982) (Stevens, J., concurring)). The *Smith* opinion itself carves out an exception to its own rule, declaring that "hybrid" free exercise claims—that is, free exercise claims brought in "conjunction with other constitutional protections"—may still entitle claimants to exemptions from generally applicable laws, specifically mentioning *Yoder* as an example of a hybrid of free exercise and the fundamental parental right to direct the education of their children set forth in *Pierce*. *Smith*, 494 U.S. at 881-82. Up until June 25, 1997, religious individuals could also bring claims under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1994) ("RFRA"), a statute that purported to restore the pre-*Smith* compelling interest test for "laws 'neutral' toward religion" that burdened religious exercise. 42 U.S.C. § 2000bb (a)(2) and (b)(1). The Court declared RFRA unconstitutional in City of Boerne v. Flores, Archbishop of San Antonio, and U.S., 65 U.S.L.W. 4612 (U.S. June 25, 1997). Therefore, while parents can argue for an excusal from religiously offensive classes as a "hybrid" constitutional claim, *id.* at 4613, individual students will have a harder time. Students can, however, argue that required participation in classroom activities such as role-plays of witches' incantations and meditations, violates their free speech/free exercise rights under the *Barnette* case to not be compelled to affirm or deny a belief. West Virginia State Bd. Of Educ. v. Barnette, 319 U.S. 624, 631, 633 (1943), *cited in*, Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1066 (6th Cir. 1987). *See* Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373, 1380 (9th Cir. 1994) (holding that such required participation does not violate the Establishment Clause because the activities are not religious rituals; a compelled expression/free exercise challenge would probably have a better chance of success).

[145] Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987).

parents and students who sought a free exercise exemption from religiously offensive curriculum, reached a very different conclusion from the *Yoder* Court: "[M]ere exposure" to offensive ideas, the Sixth Circuit reasoned, does not constitute a burden on free exercise.[146]

Mozert involved complaints by parents and their elementary and junior high school age children[147] about a reading series published by Holt, Rinehart and Winston (the "Holt readers") in Hawkins County, Tennessee.[148] The complaints about the Holt readers were similar to those directed against the Alabama textbooks in *Smith v. Board of School Commissioners of Mobile County*.[149] The readers promulgated secular humanism, moral relativism, evolution, and other ideas and values contrary to their Christian beliefs.[150] As with the *Smith* textbooks, the Holt readers ignored Christianity: Of the "approximately six hundred stories and poems in the readers, . . . not one depicted Biblical Protestantism."[151] In fact, in some places the readers disparaged Christianity, "imply[ing] that Jesus was illiterate"[152] and "depict[ing] a child who is disrespectful of his mother's Bible study."[153]

Other religions such as "Islam, Buddhism, American Indian religion and nature worship," on the other hand, were portrayed positively and given much more attention.[154] The occult was also a prominent theme, with the teacher's

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[146] *Id.* at 1063-65.

[147] *Id.* at 1060. The plaintiffs consisted of fourteen parents and seventeen elementary age children. *Id.*

[148] *Id.* For a fascinating and lively account of the factual background of the *Mozert* case, including the national controversy and issues concerning public education, religious parents and curriculum raised by the case, see BATES, *supra* note 1.

[149] 827 F.2d 684 (11th Cir. 1987). *See* discussion *supra* Part III.A. and III.B.

[150] *Mozert*, 327 F.2d at 1062-63. For a comprehensive summary of the complaints of the plaintiffs, see Stolzenberg, *supra* note 1, at 595-96.

[151] BATES, *supra* note 1, at 207 (citing testimony of plaintiffs' expert, New York University psychology professor Paul Vitz). Bates further observes that there was one story that dealt with a "narrow aspect of Catholicism, with no mention of Jesus or the Bible." *Id.* One "excerpt of Laura Ingalls Wilder's LITTLE HOUSE IN THE BIG WOODS omitted a prayer." *Id.*

[152] Mozert v. Hawkins County Pub. Schs., 579 F. Supp. 1051, 1052 (E.D. Tenn. 1984). The story actually stated that "Jesus criticized the scribes but he needed them to write down his teachings," implying that Jesus did not know how to write, a statement that is not only obviously "critical of Jesus," but that "many scholars would consider . . . erroneous as well." BATES, *supra* note 1, at 208.

[153] *Mozert*, 579 F. Supp. at 1052. In the story, "The Scribe," "the narrator says that his mother 'has three Bible study certificates and is always giving me lessons from Bible history. I don't exactly go for all the stuff she believes in but sometimes it's interesting." BATES, *supra* note 1, at 208. The teacher's edition, "[a]fter a story about the devil, . . . advised, 'Lead children to an understanding of the lack of logic inherent in the superstitious mind,' implying that Satan doesn't exist." *Id.* at 206.

[154] Mozert v. Hawkins County Bd. of Educ., 827 F.2d at 1080 n.13 (6th Cir. 1987) (Boggs, J., concurring). Forty-four of forty-seven stories dealing with religion portrayed these non-

manual suggesting that children write magic spells and incantations, and instructing teachers to mark as wrong when students answered the question, "Are all witches bad?," with "the fundamentalist answer—yes."[155] The plaintiffs objected to this exposure to a wide variety of non-Christian religions and beliefs[156] as implicitly teaching that "all faiths are equally valid"—a belief inimical to the Christian teaching that "Jesus is the only way to salvation."[157]

Initially, individual schools had allowed some of the religious students to be excused from class to read alternate reading series.[158] However, when the issue was brought before the school board, the board quite abruptly[159] decided that all such accommodations would stop and required that "every student in the public schools . . . attend classes using the Holt series."[160] When some of the students refused to read the Holt series, they were suspended from school.[161] Fourteen parents and seventeen children filed a lawsuit in federal district court alleging that the schools burdened their free exercise of religion and requesting a right to "opt-out" of classes where the Holt readers were used.[162]

The Sixth Circuit Court of Appeals held that the students' "mere exposure" to the offensive curriculum did not burden the plaintiffs' exercise of religion.[163] The students were only required to read, listen to others read, and discuss the material.[164] The schools did not compel them to *do* anything—such as participate in the magic chants and role-plays of witches—prohibited by their religious beliefs,[165] and the school did not compel the students to affirm or deny any belief.[166] Nor were they required to accept the truth of the ideas reflected in the Holt readers, but were free to discard or accept them.[167] Thus, the

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Christian religions. *Id.* BATES, *supra* note 1, at 207-08. In one story, a Chinese girl is shown praying to a horse idol; another, a Navajo folktale, depicts a "non-Christian view of the afterlife that featured evil spirits astride horses." *Id.* at 206-07.

[155] *Id.* at 207. Fundamentalists consider these practices to be Satanic. *Id.*

[156] *Mozert*, 827 F.2d at 1062.

[157] BATES, *supra* note 1, at 206-07. *See* examples and discussion *infra* notes 190-91 and accompanying text.

[158] *Mozert*, 827 F.2d at 1060. Mozert v. Hawkins County Publ. Schs., 647 F. Supp. 1194, 1196 (1986). The plaintiffs had originally petitioned the school board to remove the series. *Id.*

[159] BATES, *supra* note 1, at 85.

[160] *Mozert*, 827 F.2d at 1060.

[161] Mozert v. Hawkins County Public Schools, 647 F.Supp. 1194, 1196 (1986). After a ten day suspension, many of the students "with[drew] from public schools and enrolled in private, Christian schools." *Id.* at 1197.

[162] *Mozert*, 827 F.2d at 1060, 1063.

[163] *Id.* at 1070.

[164] *Id.* at 1064.

[165] *Id.* at 1066.

[166] *Id.*

[167] *Id.* at 1064-69 (noting that students were not disciplined for "disputing assigned materials," and were not required to believe that all religions lead to God).

necessary element of governmental coercion to perform an action prohibited by religious belief, or to affirm or deny a belief, was missing.[168]

In light of *Yoder's* emphasis on the paramount rights of parents to direct the religious education of their children—and that such rights could be infringed upon by compulsory "exposure" to "worldly" values in public schools[169]—*Mozert's* holding is surprising. Indeed, Chief Judge Lively seems to ignore one of the principal contentions of the plaintiffs—that the *parents* had a religious duty to supervise the influences their children were exposed to and that they would be violating this duty by carelessly allowing their children to read and be influenced by spiritually harmful ideas. Passive exposure to ideas might not be "conduct" on the children's part,[170] but for the parents, allowing their children to read or be exposed to negative influences, when it was in their power to allow or disallow such exposure, was certainly conduct.

Such conduct was proscribed by the religion of the fundamentalist parents, for whom raising children in the faith was a sacred trust for which they had to give account to God.[171]

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[168] *Id.* at 1065-66. The mere reading of books that contained offensive ideas would thus fall within the line of cases that say that there is "no legitimate state interest in protecting particular religions from . . . views 'distasteful to them.'" Edwards v. Aguillard, 482 U.S. 578 (1986) (quoting Epperson v. Arkansas, 393 U.S. 97, 107 (1968)); *Mozert*, 827 F.2d at 1068 (stating "governmental actions that merely offend or cast doubt on religious beliefs do not on that account violate free exercise. An actual burden on the profession or exercise of religion is required.") (quoting Grove v. Mead School Dist. No. 354, 753 F.2d 1528 (9th Cir. 1985), *cert. denied*, 474 U.S. 826 (1986)). *See* Ingber, *Inevitable Compulsion*, *supra* note 109, at 787 n.72.

[169] The Court, in concluding that compulsory education for the Amish children would violate their and their parents' religious beliefs, stated:

> [S]econdary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.

Wisconsin v. Yoder, 406 U.S. 205, 218 (1972).

[170] Stolzenberg, *supra* note 1, at 604 (discussing Chief Judge Lively's opinion that a "passive state of exposure" is not conduct).

[171] Both Judge Hull of the district court and Judge Boggs of the Sixth Circuit had no problem in finding that the fundamentalist parents were forbidden by their religion to allow their children to be exposed to the Holt series. Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1075-76 (6th Cir. 1987); Mozert v. Hawkins County Public Schools, 647 F. Supp. 1194, 1200 (E.D. Tenn. 1986). Perhaps underlying Chief Judge Lively's failure to seriously consider a religious prohibition against exposure to ideas was a reluctance to attribute such seemingly illiberal beliefs to the plaintiffs—after all, a "duty not to read ('hear no evil, see no evil')" disagreeable ideas seems tremendously illiberal. Stolzenberg, *supra* note 1, at 603. However, as the Court has stated, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 714 (1981). The key inquiry is whether a religious duty exists, not whether it is reasonable or understandable to others.

The School Board mandate essentially coerced the parents, "under threat of criminal sanction,"[172] to do what was prohibited by their religion—allowing their children to be subjected to an indoctrinating curriculum that had the very real possibility of "undermining" the children's faith.[173] It "effectively required that the student[s] either read the offensive texts or give up their free public education."[174]

On the other hand, the idea that a parent wants to control exposure to negative ideas may not be as illiberal as it seems. Parents, religious and non-religious, seek to control the ideas their children are exposed to all the time. The present debate about V-chips and access to pornography and "indecent" material on the Internet is a perfect example. Parents want to control the child's exposure to violent and sexually explicit material on the Internet or television because they know their children, especially younger children, may not be mature enough to properly evaluate the images and ideas they are being exposed to, and because the children may indeed be influenced to accept ideas about violence and the denigration of women that the parents believe to be both morally repugnant and detrimental to the well-being of their children.

To the fundamentalist parents, the ideas in the Holt series were morally repugnant and detrimental to the spiritual well-being of their children. Being taught occult ideas and practices (which the fundamentalists considered to be "Satanic") or that Jesus was illiterate, BATES, *supra* note 1, at 207-08, might lead the children to embrace ideas that were detrimental to their eternal well-being. In the coercive environment of the school classroom, there was a real possibility that the children's "choices of religious beliefs" would be subtly influenced—especially given the fact that the Holt series apparently repeatedly and in many ways sought to inculcate these secular values and beliefs. *Mozert*, 827 F.2d at 1074. It is not surprising that the deeply religious parents wanted to shield their young children from exposure, at least until they were old enough to make independent and critical judgments about what they were reading.

[172] *Yoder*, 406 U.S. at 218. After the School Board resolution was issued on November 10, 1983, "school officials at Church Hill Middle School told seven of the student-plaintiffs that they would no longer be allowed to use an alternative reader." *Mozert*, 647 F. Supp. at 1196. The seven "refused, on religious grounds, to read the Holt series or attend the reading classes in which the Holt series was used." *Id.* As a result, they were initially suspended from school for three days, and then, on November 22, 1983, for ten days. *Id.* For further background on the suspensions issued by schools, see BATES, *supra* note 1, at 97-99.

[173] Wisconsin v. Yoder, 406 U.S. 205, 218 (1972).

[174] *Mozert*, 647 F. Supp. at 1200. Conditioning the receipt of a free public education on the foregoing of one's constitutional right to direct the education of one's children is the exact kind of pressure to "modify his behavior or violate his beliefs" that constituted a burden in Sherbert v. Verner and its progeny. Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 717-18 (1981) (discussing Sherbert v. Verner, 374 U.S. 398, 404 (1963)). In Sherbert v. Verner, the Court held that a Seventh-Day Adventist could not be denied unemployment compensation benefits because she refused to work on Saturdays. *Sherbert*, 374 U.S. at 399-401. The government required her to violate her religious conviction that Saturday was the Sabbath in order to receive unemployment compensation benefits. *Id.* at 399-401. This governmental pressure to abandon her religious beliefs in order to receive benefits was violative of the Free Exercise Clause. *Id.* at 404. *See also* Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 718 (1981); Hobbie v. Unemployment Appeals Comm'n

C. Compelling State Interests

Once a burden on free exercise is found, the State must show that it has a compelling interest in requiring the religious student to use the offending curriculum, and that such a requirement is the least restrictive means of achieving its interest.[175] Courts have generally acknowledged that the State's interest in educating children is compelling.[176] Two key interests served by education are 1) inculcating the "fundamental values" that are necessary for students to be citizens in a "democratic political system;"[177] and 2) equipping students with the basic skills necessary to be self-sufficient in modern society.[178]

The basic message of those who would assert a compelling interest in teaching children values and skills against the religious convictions of their parents is that there are times when "the state—rather than parents— ultimately

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of Florida, 480 U.S. 136, 141 (1987); Stolzenberg, *supra* note 1, at 595 n.72 (summarizing scholarly arguments concerning the "unconstitutional conditions" doctrine embodied in *Sherbert*).

For some of the plaintiffs, the school board requirement did not merely exert tremendous pressure on them to violate their religious beliefs, but in a practical way legally coerced them to do so because they were unable to afford sending their children to private schools. For example, Plaintiff Vicki Frost, when asked why she did not simply transfer her children to a Christian school, replied, "[I]f he would like to contribute four hundred dollars a month, I would be glad to do that, but I just did not have the money to put all four of our children in a private school." BATES, *supra* note 1, at 97. One student, after attempting private school, "returned to school because his family was unable to afford alternate schooling." *Mozert*, 827 F.2d at 1060.

[175] Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Thomas v. Review Bd. of Indiana Empl. Sec. Div., 450 U.S. 707, 718 (1981).

[176] *Yoder*, 406 U.S. at 221 (1972); Duro v. Dist. Atty, Sec. Judicial Dist. of North. Carolina, 712 F.2d 96, 99 (4th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984) (compelling interest in compulsory education); Ware v. Valley Stream High Sch. Dist., 545 N.Y.S.2d 316, 320 (N.Y. App. Div. 1989), *aff'd as modified*, 550 N.E.2d 420 (1989) (compelling state interest in education that protects the public health); Fleischfresser v. Directors of Sch. Dist. 200, 15 F.2d 680, 690 (7th Cir. 1994) (compelling interest in providing quality education, including teaching reading and "imagination and creativity" to children).

[177] Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982) (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)).

[178] These two governmental interests were accepted by the Court in *Yoder* as compelling. As the Court stated:

> The State advances two primary arguments in support of its system of compulsory education. It notes . . . that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions.

Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

should decide what is best for children."[179] This section argues that in a system that respects religious liberty—particularly the paramount rights of parents to direct the religious education of their children—there are very few instances where the State rather than the parent should decide what values the children are exposed to. The asserted interests are either not compelling or can be served by means that do not intrude on religious exercise rights.

1. Fundamental values

Are some values such as tolerance, equality, and rational deliberation so fundamental to the American democratic system that children must be educated in them, no matter how strenuous the religious objections of the parents? The Court has stated that "public schools are vitally important 'in the preparation of individuals for participation as citizens, and as vehicles for inculcating fundamental values necessary to the maintenance of a democratic political system.'"[180] This section explores two of these asserted democratic values: tolerance and critical thinking.

Tolerance of divergent religious views. "[T]olerance of divergent political and religious views" has been recognized by the Court as a fundamental value that children must learn in order to be citizens in a democratic society that is diverse and heterogeneous.[181] Yet, it was the inculcation of "tolerance" in the Holt series—through exposing children to a variety of different religions (for example, a Chinese girl praying to a horse idol and Navajo folktales[182]) that the fundamentalist Christians objected to in *Mozert.* As a matter of religious conviction, testified plaintiff Vicki Frost, she could not "be tolerant in that we accept other religious views on an equal basis with ours."[183] Does the State have a compelling interest in teaching tolerance to children like those of Vicki Frost?[184] It depends on what is meant by "tolerance."

In the Sixth Circuit's *Mozert* opinion, Chief Judge Lively made an important distinction between "civil" and "religious" tolerance.[185] Civil tolerance is a requirement that citizens respect the legal and civil rights of others to believe

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[179] Ingber, *Religion or Ideology, supra* note 44, at 298.

[180] Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982) (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)).

[181] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

[182] BATES, *supra* note 1, at 206-07.

[183] Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1069 (6th Cir. 1987).

[184] In dicta, the Seventh Circuit stated that the state has a compelling interest in teaching "tolerance of divergent political religious views" such that the Impressions series, which exposed children to a wide variety of cultural and religious beliefs, would be upheld against a Free Exercise challenge, even if the Christian parents and students were burdened by such curricula. Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680, 690 n.10 (7th Cir. 1994).

[185] *Mozert,* 827 F.2d at 1069.

and practice as they wish in American society. In Judge Lively's words, it is the "recognition that in a pluralistic society we must 'live and let live.'"[186] The teaching of civil tolerance arguably serves a compelling interest in preparing students for citizenship because it teaches them to respect what is protected by the Constitution—the rights of individual citizens to believe and think, to worship and practice free from physical harm and governmental coercion. Citizens may no more seek to have the government force their religious opponents to recant, than they may seek to burn down the houses of their religious opponents.

Religious tolerance, on the other hand, is the idea that citizens must respect the *equal value* of all other religions, i.e., that "all religions lead to God."[187] Schools have no business, much less a compelling interest in, teaching religious tolerance. To teach religious tolerance in its blatant form—to teach as truth that all faiths are equally valid—would violate the Establishment Clause because the belief that all roads to God is as much a religious belief as the belief that only one road leads to God.[188]

The problem, observes Stephen Bates, is that educators often confuse religious and civil tolerance, believing that their duty to inculcate fundamental values includes teaching, as one National Education Association publication stated, "a respect for the . . . *validity* of divergent religious beliefs."[189] The Holt series in *Mozert* also implied this in places, as exemplified by the following example from a dramatization of THE DIARY OF ANNE FRANK:

> [Anne to her friend] "I wish you had a religion, Peter." "No, thanks! Not me!" he replies. Anne responds: "Oh, I don't mean you have to be Orthodox, or believe in heaven and hell and purgatory and things. I just mean some religion, it doesn't matter what. Just to believe in something!"[190]

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[186] *Id.*

[187] *Id.* at 1068-69.

[188] Unitarian-Universalism apparently teaches this. McConnell, *Religious Freedom, supra* note 95, at 124 n.50.

[189] BATES, *supra* note 1, at 313 (quoting NEA, "Phyllis Schlafly's 'Bill of Student Rights,'" March 1986, p.2) (emphasis added).

[190] *Id.* at 207. Another story in the eighth grade reader included a poem describing a Hindu fable. Mozert v. Hawkins County Publ. Schs., 582 F. Supp. 201, 202 (E.D. Tenn. 1984). The poem, entitled *The Blind Men and the Elephant,* ended:

> And so these men of Indostan
> Disputed loud and long,
> Each in his own opinion
> Exceeding stiff and strong,
> Though each was partly in the right
> And all were in the wrong!

Schools often teach a "softened" religious tolerance—one that never actually states that all religions and beliefs are equally valid, but nevertheless implies it by exposing school children to a wide variety of religious and cultural beliefs and practices presented in a positive light. "Multicultural" education seems to attempt to do this, as did the Holt series[191] and the more recent "Impressions" series, a widely used elementary school reader that featured readings and activities from Hawaiian creation stories, Aztec religious poetry, astrology, and witchcraft and sorcery.[192] The implied message of these programs is a mushy, feel-good diversity that there is good in all religions and that children should therefore respect and appreciate those who belong to faiths other than their own.

Teaching children religious tolerance—whether "blatant" or "softened"—not only fails to serve a compelling interest in teaching children to be citizens, it is also arguably antithetical to true citizenship. Free speech doctrine supplies an analogy. The First Amendment respects the rights of the Ku Klux Klan, flat earth advocates, and holocaust revisionists to speak, free from governmental

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Moral
So oft in theologic wars,
The disputants, I ween,
Rail on in utter ignorance
Of what each other mean,
And prate about an Elephant
Not one of them has seen!

Id. As the District Court stated: "The [*Mozert*] Plaintiffs correctly reach the obvious conclusion that this poem means that each religion described God from its own limited vantage point, based on its incomplete revelation, and that all are only partly right and partly wrong." *Id.*

[191] Judge Hull in his second *Mozert* opinion acknowledged that the Holt readers did "have [a] philosophical viewpoint" that "aimed at fostering a broad tolerance for all of man's diversity, in his races, religions and cultures. They intentionally expose the readers to a variety of religious beliefs, without attempting to suggest that one is better than another." *Id.* at 201-02. The Judge believed that the readers were "well calculated to equip today's children to face our increasingly complex and diverse society with sophistication and tolerance." *Id.* at 203.

[192] Brown v. Woodland Joint Unified Sch. Dist., No. S-91-0032WBS/PAN, 1992 WL 361696, at *9, *14 (E.D. Cal. Apr. 2, 1992), *aff'd*, 27 F.3d 1373 (9th Cir. 1994), *available in*, WESTLAW, ALLFEDS DBASE; Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680, 683 (7th Cir. 1994). As with the Holt series in *Mozert*, the Impressions curriculum also seemed to be heavily biased in favor of non-Western religions, and in fact, the plaintiffs in both the Ninth Circuit and Seventh Circuit cases alleged that the use of the Impressions series unconstitutionally established the religions of Neo-Paganism and Witchcraft. Brown v. Woodland Joint Unified Sch. Dist., No. S-91-0032WBS/PAN, 1992 WL 361696, at *1 (E.D. Cal. Apr. 2, 1992), *aff'd*, 27 F.3d 1373 (9th Cir. 1994), *available in*, WESTLAW, ALLFEDS DBASE; *Fleischfresser*, 15 F.3d at 687. The plaintiffs lost in both cases. The Seventh Circuit held that the "primary . . . effect of the use of the reading series at issue is not to endorse these religions, but simply to educate the children by improving their reading skills and to develop imagination and creativity." *Fleischfresser*, 15 F.3d at 689. The Ninth Circuit held similarly. Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373, 1379-82 (9th Cir. 1994).

censorship.[193] Before the *law*, there is an "equality of status in the field of ideas."[194] *Individuals*, however, need *not* accept the equal validity of such ideas as moral- and truth-claims.

While individuals must tolerate—perhaps even respect—the civil rights of those with whom they disagree to speak, they are not required to respect the validity of their ideas; and they are certainly not required to refrain from trying to persuade others to change their beliefs. In fact, the First Amendment was meant to protect the rights of citizens to vigorously contend for their viewpoints in the marketplace of ideas to the end that truth might be discovered "out of a multitude of tongues."[195]

A school would be teaching proper First Amendment doctrine, as well as enabling students to be good citizens, by teaching students to respect, or at least to tolerate, the legal rights of others to speak, *without* having to accept the truth or equal validity of what they say. On the other hand, a school would contravene the purpose of teaching good citizenship in our constitutional system by teaching students that they must respect all ideas—moral, scientific, political, or otherwise—as having equal validity. To teach this kind of "tolerance" discourages those who disagree with each other from engaging in robust debate—the very debate that the "civil tolerance" imposed by the First Amendment was designed not only to protect but to encourage, to the end that truth might be discovered.

Schools should teach tolerance in the religion context in the same way. Students should be taught to respect the civil and legal rights of others to practice their religion *without* having to accept the equal validity or status as truth-claims of what others profess. While the *law* respects "all religious opinions and sects" as equal,[196] "*citizens* aren't obliged to follow suit."[197] Citizens need not accept the validity of other's religious beliefs, for example, that Jesus is the only way to salvation, or that there are many ways to salvation, or that there is no such thing as salvation.

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[193] As long as such statements constitute "mere advocacy" and do not pose a clear and present danger that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

[194] Police Dep't of Chicago v. Mosley, 409 U.S. 92, 96 (1972), *quoted in* Lehman v. City of Shaker Heights, 418 U.S. 298, 316 (1974).

[195] Keyishian v. Board of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967) (quoting United States v. Associated Press, D.C., 52 F. Supp. 362, 372 (1943)); Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting), *in* DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 601 (1993); *see also* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM & MARY L. REV. 189, 198 (1984).

[196] School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 215 (1963) (citation omitted).

[197] BATES, *supra* note 1, at 317.

While citizens are required to tolerate, and perhaps even respect, the civil rights of other citizens to believe and practice their religion—whether they be native American believers, secular rationalists, Hare Krishnas, or evangelical Christians—they certainly are not required to accept the equal validity of others' beliefs, and they certainly are not required to refrain from persuading others to change their beliefs. The First Amendment protects the right of religious believers to engage in vigorous persuasion and advocacy no less than it protects the rights of political, ideological, and scientific speakers to advocate their beliefs.[198] As Justice Brennan has stated, "religious ideas, no less than any other, may be the subject of debate which is 'uninhibited, robust, and wide-open . . . .'"[199]

Teaching students to affirm the validity of others' religious beliefs contravenes true citizenship no less than teaching students to affirm the equal validity of others' scientific, political, or philosophical ideas. It discourages the dialogue and debate that the First Amendment was designed to protect and encourage—to the end that truth be discovered.

Thus, teaching religious tolerance—softened or blatant—contravenes rather than serves the purpose of preparing students to be citizens in a pluralistic society. In seeking to teach children to respect diversity and pluralism by focusing on the "good" aspects of various religions, schools end up trivializing differences that to many religious believers are extremely weighty.[200] Trivializing religious differences in the name of respecting them is antithetical to a basic premise of the Religion Clauses of the Constitution—that religious differences (rather than uniformity) will characterize our society because of the paramount importance the Constitution places on religious conscience to be free from governmental coercion.[201]

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[198] Sekulow, *supra* note 21, at 1018. As Professor McConnell has argued, "[P]roselytize . . . is nothing but an ugly word for persuade, which is just exactly what the Free Speech Clause is designed to protect." United States Supreme Court Official Transcript at 53, Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510 (1995) (No. 94-329). *See also* Andrew A. Cheng, Note, *Rosenberger v. Rector & Visitors of University of Virginia and the Equal Access Rights of Religious People,* 18 U. HAW. L. REV. 339 (1996).

[199] McDaniel v. Paty, 435 U.S. 618, 640 (1978) (Brennan, J., concurring) (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

[200] BATES, *supra* note 1, at 317. It is important whether there is "no divine purpose or providence for the human species," Ingber, *Religion or Ideology, supra* note 444, at 318 (1989) (quoting HUMANIST MANIFESTO II 16 (1973)), or human beings are created to love God and their neighbors, MARK 12:29-31; it is important whether at death humans face the Judgment or human existence is extinguished, whether there are many ways to salvation or only one.

[201] McConnell, *Religious Freedom, supra* note 95, at 168-69. Professor McConnell argues that the "Religion Clauses . . . guarantee a pluralistic republic in which citizens are free to exercise their religious differences without hindrance from the state (unless necessary to important purposes of civil government), whether that hindrance is for or against religion." *Id.* at 168.

The pluralism contemplated by the Constitution is not the ignoring of fundamental religious differences in a heterogeneous populace. Instead, it is the "civil engagement of our differences and disagreements about what is most importantly true."[202] Education that prepares children to be citizens would teach them that, while respecting the civil and legal rights of others to believe and practice according to the dictates of their conscience,[203] they do not need to accept the validity of what others believe; indeed, they are free to "believe that [their] faith is valid and . . . all others are heretical"[204] and also guaranteed the right to vigorously attempt to persuade others of the truth of their beliefs—to the end that, by "the civil engagement of our differences," truth might be discovered.

Critical thinking. A democratic political system is based on "deliberation and dialogue about the good life for individuals and the nation as a whole . . ."[205] Therefore, children need to be taught how to think critically and rationally in order to have the capacity to engage in dialogue and the democratic process.[206] They need to be taught the "cultural equipment" to make their own judgments about the "good life" rather than uncritically accepting authority.[207] Critical thinking, the argument goes, is only taught by exposing children to complex and controversial problems and to diverse viewpoints that are different from their own.

Judge Cornelia Kennedy in her concurring opinion in *Mozert* argued that the State had a compelling interest in teaching critical thinking to the fundamentalist Christian children. The Holt series, by exposing children to "complex and controversial subjects," taught the children to "think critically . . . and to develop their own ideas and . . . judgments . . . ."[208] The State's interest in teaching critical thinking could be achieved by less restrictive means because a substitute reader would have to contain the same controversial material deemed offensive by the fundamentalist parents.[209]

Is teaching critical thinking to religious children an interest so compelling that without it, as Suzanna Sherry argues, the children "will never become citizens who can fully participate in republican dialogue and deliberation"?[210] It is highly doubtful.

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[202] BATES, *supra* note 1, at 317 (quoting *Putting First Things First,* FIRST THINGS, Mar. 1990, at 8).

[203] McConnell, *God is Dead, supra* note 4, at 167.

[204] BATES, *supra* note 1, at 317.

[205] Sherry, *supra* note 13, at 172.

[206] *Id.*

[207] *Id.* (quoting BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 117 (1980).

[208] Mozert v. Hawkins County Sch. Bd., 827 F.2d 1058, 1070-71 (6th Cir. 1987) (Kennedy, J., concurring).

[209] *Mozert,* 827 F.2d at 1071.

[210] Sherry, *supra* note 13, at 175.

In *Yoder*, the Court, while acknowledging that the State's interest in "prepar[ing] citizens to participate effectively and intelligently in our open political system" was compelling, ultimately held that this interest was served by only a minimal education.[211] The Court was satisfied that the communitarian education[212] into the Amish "life of 'goodness,' rather than a life of intellect" adequately served the State's interests in preparing their children to "fulfill the social and political responsibilities of citizenship," albeit in their own distinct community.[213]

Once the Court allows that "counter-hegemonic" education such as the Amish agrarian education is sufficient to prepare children for American citizenship, "it seems hard, if not impossible, for the very same state to say that it has a 'compelling state interest' justifying the burden placed on religious students by disallowing them from opting out of certain aspects of the public

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[211] Wisconsin v. Yoder, 406 U.S. 205, 221-22 (1972).

[212] Professor Stolzenberg describes communitarianism and the Court's communitarian approach in *Yoder* as follows:

> Communitarianism is a loosely defined philosophy that values particular ways of life and subcommunities and simultaneously challenges the neutral pretenses of the liberal state. Communitarians reject the dichotomies between reason and affect and between free will and coercion. They believe that affective mechanisms of acculturation are what creates personhood, which is a prerequisite to being able to make choices. Therefore choice is necessarily bounded. "Constitutive" cultural contexts—local communities which shape self-identity and endow it with values and attachments—are the building blocks of communitarian thought. Overarching structures that interfere with cultural transmission are their foil. *Yoder* captures this outlook in its reliance on the concept and value of the Amish "way of life," and in its depiction of the critical-scientific apparatus of modern life as merely one among many competing cultures.

Stolzenberg, *supra* note 1, at 648-49.

[213] *Yoder*, 406 U.S. at 211, 225-26. As the Court stated:

> Insofar as the State's claim rests on the view that a brief additional period of formal education is imperative to enable the Amish to participate effectively and intelligently in our democratic process, it must fall. The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief.

Id. at 225.

Even if some of the Amish children left the community on growing up, the Court was unwilling to conclude that the agrarian education provided by the Amish was inadequate to prepare them for modern society. *Id.* at 224-25. Indeed, the Court noted that "expert educators" had agreed that the Amish community provided an "ideal vocational education," giving their children "practical agricultural training and habits of industry and self-reliance"—qualities very helpful for living in modern society. *Id.*

school curriculum."[214] Apparently, what the Court views as necessary for intelligent and effective citizenship is not the critical thinking education envisioned by Professor Sherry, who argues that children would not be adequately prepared for citizenship unless they are taught to "question authority"—whether parental, biblical or other.[215]

2. *Equipping children to live in society*

The Court in *Yoder* also accepted as compelling the State's interest in educating "individuals to be self-reliant and self-sufficient participants in society."[216] At a basic level, this interest is not controversial. Not many would dispute that the State has an interest in teaching children basic skills such as reading and writing that are necessary for them to avoid "becoming wards of the state."[217] A religious parent who believes reading is forbidden by his religion should be refused an exemption.

Preparing students to live in society, however, can be interpreted more broadly to include preparing students to make choices about complex issues of sexuality, AIDS, drug use, peer pressure, and gang violence in modern society. The complex issues facing young people are pandemic and choices made in these areas have literally life and death consequences.[218] And with dysfunction in families so widespread, the burden seems to fall on the public schools to

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[214] Levinson, *supra* note 37, at 1011. Although Professor Levinson was referring to the private schools in *Pierce* as "counter-hegemonic" schools, the term aptly describes the alternative agrarian education of the Amish.

[215] Sherry, *supra* note 13, at 175. For discussion of critical thinking in public school curriculum, *see* Stephen L. Carter, *Evolution, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L. J. 977 (1987); GUTMANN, *supra* note 13, at 50-52; PHILLIP E. JOHNSON, REASON IN THE BALANCE 155-71 (1995); Sherry, *supra* at 172-75; Stolzenberg, *supra* note 1. *See also infra* Part VI.A.2.

[216] Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

[217] Dent, *Religious Children, Secular Schools, supra* note 16, at 905-06. Dent argues:

> At a minimum, citizens must be able to read, write, and perform basic tasks so that they can understand routine notices, complete common forms (such as those required for a driver's license or job application), and find jobs, rather than becoming wards of the state. The state also has a strong interest in guaranteeing that some citizens master more refined skills, such as advanced medicine and science and foreign languages; a modern nation needs citizens with such skills to maintain its economic, technological, and military capabilities. Providing education in these fields is rarely controversial because the training tends to be technical and, more important, is optional.

Id.

[218] *See, e.g.*, WILLIAM J. BENNETT, INDEX OF LEADING CULTURAL INDICATORS, Vol. I (joint publication of the Heritage Foundation and Empower America 1993) (compiling results of studies showing in the last twenty to thirty years an increase in the rates of juvenile crime, teen pregnancy, birth, and abortion, teen suicide, and child abuse).

prepare children to face these issues, resulting in AIDS-awareness, safe sex, and other school programs. Often, education of children is seen as the only real solution to these problems. If young children are taught self-esteem, to "just say no," to know the facts about how AIDS is transmitted, the problems can be nipped in the bud.[219]

The government's interest in preparing students to deal with such complex societal problems has been held by courts to be compelling.[220] However, the means used to advance these interests—AIDS-awareness, sex education classes, condom distribution programs—can be very intrusive into the religious exercise rights of students and parents. This section argues that there are often less restrictive means of achieving the state's interests, especially when parents or students provide an alternative program (such as a religious sex education program) that achieves the government's interest in combating these social ills as effectively as the school's program.

In *Ware v. Valley Stream High School District,* parents of approximately thirty-five students of the Plymouth Brethren religion sought a complete exemption from the AIDS education program (consisting of a total of twenty-two classes) in New York's Valley Stream High School District.[221] The Supreme Court, Appellate Division, while conceding that the program burdened plaintiffs' free exercise because it compelled them to violate a religious precept that they remain "innocent" as to the "details of evil,"[222] nevertheless held that educating the children about AIDS and protecting the public health were compelling interests that justified infringing on their religious rights.[223]

The Court of Appeals of New York, however, reversed the Appellate Division. While agreeing that the "State has a compelling interest in

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[219] *See, e.g.*, C. Everett Koop, *Teaching Children About AIDS, in* CONTROVERSIES IN AMERICAN PUBLIC POLICY 92 (John A. Hird ed., 1995) (arguing that education in sexuality and AIDS is an urgent necessity to stem the tide of AIDS); George W. Read, *Prohibition, "Harm Reduction" Describe Hawaii Drug Policy,* THE HONOLULU ADVERTISER, May 12, 1996, at B1, B4 (arguing that educating children is the solution to drug problem).

[220] Ware v. Valley Stream High Sch. Dist., 545 N.Y.S.2d 316, 320 (N.Y. App. Div. 1989), *aff'd as modified,* 550 N.E.2d 420 (1989) (compelling state interest in education and education to protect the public health); Ware v. Valley Stream High Sch. Dist., 550 N.E.2d 420, 429 (N.Y. 1989) (characterizing "controlling AIDS" as a "public health concern of the highest order").

[221] Ware v. Valley Stream High Sch. Dist., 550 N.E.2d 420, 422 (N.Y. 1989). New York City regulations allowed parents to request an exemption from a portion of the curriculum entitled "Prevention" if they provided a written request for exemption and gave assurances that the student would be instructed at home. *Id.* The parents had applied for a complete exemption, but were granted only an exemption for the "Prevention" aspect of the curriculum because the regulations did not authorize any further exemptions. *Id.*

[222] *Id.* at 434.

[223] *Ware,* 545 N.Y.S.2d at 320.

controlling AIDS," and "in educating its youth about AIDS,"[224] it was not convinced that compelling the Brethren children to attend the classes was necessary to achieve these interests.[225] The court remanded the case for two factual determinations related to this issue: First, were the Brethren truly preparing their children for a separate, insular existence (like the Amish)? If they were not, and instead preparing their children to live in modern society, they might have to attend the State's classes.[226] Second, was the Brethren's alternative home and church AIDS prevention program an adequate substitute that could achieve the State's interest in AIDS education and prevention?[227] To show the adequacy of the alternative program, the Brethren would need to demonstrate that it was "the functional equivalent of the AIDS curriculum—giving due regard to the physical as well as moral concerns."[228]

The second issue will be explored first. The basic analysis is actually quite favorable to religious parents: If parents can provide an alternative means of instruction that serves the State's interest in preventing AIDS—whether it be in church, religious organization, or home— then the State must accommodate the parents because compelling students to attend the public school classes is not the least intrusive means of achieving its objectives. This can be a very agreeable resolution for some religious parents, who often share the same alarm and concern for the crises of teen pregnancy and sexually transmitted diseases that young people face, but differ strongly with the State about both the causes and cures.[229]

The problem with the *Ware* framework is its requirement that the proposed alternative must be the "functional equivalent" of the State-sponsored program. The court was apparently concerned that the Brethren teach adequate clinical information about the AIDS virus and how it was transmitted, rather than moral and spiritual instruction alone.[230] This kind of requirement can be very

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[224] *Ware*, 550 N.E.2d at 429.

[225] *Id.* The court was also not convinced that the Brethren had made the necessary showing of a burden on their free exercise and remanded the case for factual determinations as to whether exposure to the AIDS-awareness classes would cause the extreme injury to the Brethren that threatened the Amish. *Id.* at 426-29. If the Brethren were truly an isolated and separated group like the Amish, then the injury posed by exposure to the program would be real. *Id.* at 427-29. On the other hand, if the Brethren "in their daily lives are so thoroughly integrated into the larger society—and its evils—the State requirement may in fact impose no burden, or only [a] limited burden." *Id.* at 428.

[226] *Id.* at 430.

[227] *Id.*

[228] *Id.*

[229] *See, e.g.*, FOCUS ON THE FAMILY, QUICK FACTS ON "SAFE SEX" (1994) [hereinafter QUICK FACTS] (addressing the alarming epidemic of AIDS among teenagers and proposing abstinence-based education rather than "safe sex" programs).

[230] *Ware*, 550 N.E.2d at 430. The State argued that the Brethren's alternative method of instruction was not suitable because it provided only "moral instruction which [was] not an

intrusive—especially in light of the fact that some would advocate such clinical information to include "factually correct family planning information," including "where and how . . . [to] obtain contraception,"[231] or explicit details about correct condom use.[232]

No doubt a certain amount of basic clinical information is needed, but the question is one of degree. The Brethren, while not necessarily disavowing the need for clinical information, argued that their *moral* instruction—teaching members to refrain from "all sexual activity outside of marriage and to avoid

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adequate substitute for clinical information." *Id.* The court was interested to know what kind of information the Brethren really did teach their children about the AIDS virus. *Id.* However, the court did appear willing to consider the validity of the parents' contention that their moral and spiritual instruction was "singularly" successful in preventing the transmission of the HIV virus among their congregations. *Id.*

[231] Sharon Pomeranz, *Condoms Overturned on Appeal: Teens Stripped of Their Rights*, 4 AM. U. J. GENDER & L. 216, 244-45 (1995). The author argues for "expanded sex and health education" as follows:

> Teenagers have complicated decisions to make while they learn about themselves and their changing bodies. The more information and support that adolescents have, the better equipped they are to experiment with intimate relationships. With or without proper parental support and guidance, teenagers make choices about their sexuality, choices that often have serious consequences . . . . [E]xpanded sex and health education classes in the public school system [are needed] as a means of supplementing teenagers' knowledge about pregnancy, AIDS, venereal diseases and birth control.

Id. at 219.

[232] Safe sex advocates argue that more detailed information about correct condom use is required because of widespread improper use. QUICK FACTS, *supra* note 229, at 11. For example, the Center for Disease Control states that condoms are only effective if used "consistently and correctly," which means following eight steps:

> **Consistently** means:
>
> 1) Using a condom "with each act of intercourse."
>
> 2) Using it "from start to finish."
>
> **Correctly** means at least five things:
>
> 1) Using a **new** condom for each act of intercourse. . . .
>
> 2) Putting on the condom as soon as erection occurs and before any sexual contact.
>
> 3) Holding the tip of the condom while unrolling it (into place), leaving space at the end of the condom, yet ensuring that no air is trapped in the condom's tip.
>
> 4) Adequate lubrication is important but use only water-based lubricants. . . . Oil-based lubricants . . . can weaken the condom.
>
> 5) Withdrawing from the partner immediately after ejaculation, holding the condom firmly to keep it from slipping off.
>
> 6) Also, the condom must have been properly stored. It must be fresh, as well as stored at a reasonable temperature. A man's wallet or a car glove compartment is an unacceptable, but likely, place to find condoms.

QUICK FACTS, *supra* note 229, at 11-12 (quoting CONDOMS AND THEIR USE IN PREVENTING HIV INFECTION AND OTHER STDS, A REPORT BY THE CENTERS FOR DISEASE CONTROL (July 30, 1993)). Clinical information of this nature is simply not necessary for students who are not involved in sexual activity and who do not intend to begin sexual activity until marriage.

all illegal drugs"—was a "strong AIDS-prevention program" that was "singularly successful in preventing [church] members from either contracting the disease themselves or transmitting it to others."[233] If parents offered as an alternative a strong spiritually and morally based program that provided only basic (and not detailed) clinical information, and such a program had demonstrated positive results, this would certainly show that there is a less restrictive alternative to the state-sponsored program.[234]

The adequacy of a morally based program as a less intrusive alternative is demonstrated further by the apparent ineffectiveness of public education programs in combating STDs and teen pregnancy.[235] The practice of "unsafe sex" among American teenagers is on the rise, in spite of the fact that they are "absorbing the messages of the AIDS educational campaigns."[236] For example, a Planned Parenthood affiliate publication reports that a study of "10 exemplary knowledge-based sex education programs in the United States" revealed that "although the young people in the programs learned a great deal, their knowledge gains did not lead to behavioral changes."[237] In fact, in a study of seven "sex education programs providing easy access to contraceptives," "six of the seven programs gave evidence of *increases* in sexual activity."[238] Apparently, giving students an abundance of clinical information does not guarantee that they will use that information properly. As the dissent in *Ware*

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[233] *Ware*, 550 N.E.2d at 430.

[234] *Id.* at 430. For examples of morally based abstinence programs that apparently have had such positive results, see *infra* note 240.

[235] For survey of various studies that show that sex education programs offered in public schools have not been successful, *see* QUICK FACTS, *supra* note 229, at 4-6. The pamphlet cites a study of the Alan Guttmacher Institute, a research affiliate of Planned Parenthood, that concludes "there is no 'compelling evidence that sex education programs are effective' in reducing teen sexual activity." *Id.* at 5 (citing Jacqueline R. Kasun, *Condom Nation: Government Sex Education Program Promotes Teen Pregnancy*, POLICY REVIEW, Spring 1994, at 79. 80). *See infra* notes 236-38 and accompanying text for further examples. *See also* Barbara Dafoe Whitehead, *The Failure of Sex Education*, THE ATLANTIC MONTHLY, Oct. 1994, at 55 (examining the message and methods of comprehensive sex education and surveying studies that show ineffectiveness of such programs in preventing teenager sexual behavior) and William E. Dannemeyer & Michael G. Franc, *The Failure of AIDS-Prevention Education, in* CONTROVERSIES IN AMERICAN PUBLIC POLICY 97-109 (John A. Hird ed., 1995) (arguing that "education-only" strategy of AIDS prevention is a failure and citing studies showing that impartation of knowledge about HIV transmission did not have significant impact on behavior of certain groups).

[236] Karl J. Sanders, Comment, *Kids and Condoms: Constitutional Challenges to the Distribution of Condoms in Public Schools*, 61 U. CIN. L. REV. 1479, 1507 n.160 (1993).

[237] Marion Howard and Judith Blamey McCabe, *Helping Teenagers Postpone Sexual Involvement*, FAMILY PLANNING PERSPECTIVES, Vol. 22, No.1, Jan./Feb. 1990, at 21-26, *cited in* QUICK FACTS, *supra* note 229, at 6.

[238] QUICK FACTS, *supra* note 229, at 5 (citing Kasun, *supra* note 236, at 80).

aptly stated, "knowledge is not the equivalent of a serum that would ensure immunity."[239]

Even if statistical evidence did demonstrate that public school AIDS and sex education programs had an overwhelmingly positive impact on changing people's behavior, moral and spiritual training might still be an adequate alternative if it could be shown that such a program had an as good or better success rate, as apparently is the case with abstinence-based programs such as *Sex Respect* and *Best Friends*.[240]

In light of these facts, the first question asked by the *Ware* court—whether the Brethren were preparing their children for an isolated existence like the Amish—becomes irrelevant. The assumption underlying such an inquiry is that the more a religious group seeks to prepare its children for modern society, the more the State's programs are needed because religious instruction alone, without the advantages of secular knowledge, is simply inadequate.[241] As the

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[239] *Ware*, 550 N.E.2d at 435 (Titone, J., dissenting).

[240] QUICK FACTS, *supra* note 229, at 14. The *Sex Respect* program was offered in 26 public schools and participants had a "five percent pregnancy rate after two years . . . in the program as opposed to a nine percent rate in the student control group not enrolled in the program." *Id.* (citing Craig Carmichael, *Concerted Effort: One Student's Stand on Sex Education Policy*, OUTLOOK, Spring 1994, at 26). *Best Friends* is a "peer-based abstinence program in Washington, D.C.," and "reports that only one girl in 400 became pregnant in their program, while 20 to 70 pregnancies are common for the same group size." *Id.* (citing Larry Witham, *As Washington Pushes "Safe Sex," Others Preach Abstinence*, THE WASHINGTON TIMES, Oct. 3, 1993, at A-4).

[241] In Duro v. Dist. Atty, Second Judicial Dist. of N. Carolina, 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984), the U.S. Fourth Circuit Court of Appeals applied this reasoning in denying Pentecostal parents' claim to remove their children from public schools to educate them at home because of the "secular humanism" taught in the public schools. *Id.* at 97. The Duros also "object[ed] to the use of physicians and refuse[] medical attention for all physical ailments because [they] believe[] the Lord will heal any problem." *Id.* In distinguishing *Yoder*, the court reasoned that the Amish in *Yoder* carried on a separate existence for 300 years as a "successful, self-sufficient, segment of American society" and had thus demonstrated their ability to prepare their children to be self-sufficient citizens in society—albeit in their self-contained agrarian communities. *Id.* at 98. The Duros, on the other hand, sought to raise their children "to be fully integrated and live normally in the modern world upon reaching the age of 18" while exempting them from public schooling. *Id.* According to the court:

> Duro has not demonstrated that home instruction will prepare his children to be self-sufficient participants in our modern society or enable them to participate intelligently in our political system, which, as the Supreme Court stated, is a compelling interest of the state.

Id. at 99.

The court held "that the welfare of the children is paramount and that their future well-being mandates attendance at a public or nonpublic school." *Id.*

While an interest in protecting the physical health of the children may certainly have been compelling, compelling the children to attend public schools was not the least intrusive

above discussion demonstrates, however, it may be the state's secular messages that are inadequate, and perhaps even detrimental, to preparing children for the complex moral and social problems of modern society.

Accommodating religious parents and students thus represents not only a respect for the rights of individual autonomy, but also perhaps a recognition of the possible value of religious approaches to pressing societal problems.[242] As Judge Titone, the dissenting judge in *Ware,* commented:

> [T]he continued existence of our pluralistic society depends not only upon our commitment to tolerating minority viewpoints, but also upon our willingness to *accommodate* them. Further, I believe that we jeopardize an important element of our social structure when we too readily displace the moral and spiritual guidance that may be derived from family and church with the secular and purportedly value-neutral instruction that our public schools are equipped to provide. While I share the abhorrence of ignorance that characterizes much of modern western culture, I cannot overlook the fact that our contemporary faith in the power of secular education has not immunized us from such social ills as rampant drug abuse, an inordinately high drop-out rate, family dissolution and spiritual demoralization, as well as socially transmitted disease such as AIDS. Accordingly, like the *Yoder* court . . . I am most reluctant to assume that today's prevailing culture, which places its faith in objective knowledge, is "right" while plaintiffs and others like them, who place their faith in moral and spiritual guidance, are "wrong."[243]

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alternative. The court noted that North Carolina had required private religious schools to maintain "disease immunization records," and to be subject to other "health and safety" regulations. *Id.* at 98. The same type of requirement could have been required of the parents even as they educated their children at home. In this way, the State could ensure that the children received the proper health and safety care without coercing the children to be subjected to the secular humanist values in public schools that the parents felt were so objectionable.

All fifty states have made home schooling a legal alternative to public schooling (although with varying degrees of regulation), disagreeing with the Fourth Circuit about the adequacy of home education in preparing children to live in modern society. David Sharp, *Your Kids' Education is at Stake,* USA WEEKEND, Mar. 14-16, 1997, at 4, 5 (charting requirements in all 50 states for home schools, as provided by the Home School Legal Defense Association). *See also* WHITEHEAD, *supra* note 42, at 381-401 (summarizing statutory requirements for home education in each state).

[242] *See* John H. Garvey, *The Real Reason for Religious Freedom,* FIRST THINGS, Mar. 1997, at 13. Professor Garvey argues that the protection of individual autonomy is inadequate as the value underlying the Constitution's protection of religious liberty. *Id.* at 13-15. Instead, he argues, "[t]he best reasons for protecting religious freedom rest on the assumption that religion is a good thing." *Id.* at 16.

[243] *Ware,* 550 N.E.2d at 435 (citation and footnote omitted).

VI. RELIGIOUS LIBERTY AND EDUCATIONAL CHOICE

The ideal solution to an educational system that has an inherent tendency to infringe on the rights of religious parents to direct the education of their children is to provide them with a meaningful capacity to choose alternate instruction in private (or home) schools.[244] For many parents, the right to opt out of particular courses or assignments in public schools that are pervasively secular is not enough. To them, all areas of life are an integrated whole, and the artificial separation of religious conviction from other areas of life and knowledge in public schools is the very thing they find lacking.[245] For these parents, the right to direct the religious education of their children means the right to send their children to schools where the entire curriculum reflects a worldview sympathetic with their own. The only way to protect the rights of parents is to provide them with the meaningful capacity to choose schooling outside the public educational system. This can be achieved by an educational choice system where parents are given a voucher (perhaps in an amount equal to the per-pupil allotment given to the public school in their district) that they can spend on the private or public school of their choice.[246]

An educational choice system would rectify the de facto coercion experienced by many lower income religious parents, for whom the secular public schools—with their tremendous power to influence the basic spiritual and intellectual beliefs of children—are the only option.[247] It would also embody the religious pluralism contemplated by the Constitution better than the present system.[248]

To truly preserve the rights of parents to choose the deepest values and beliefs that their children will learn, however, the voucher system must do two things: 1) it must not restrict the schools parents can choose for their children according to the content of their curriculum,[249] and 2) it must allow parents to select schools where religious and secular educational missions are thoroughly integrated.[250] To say that allowing these two characteristics in a voucher system is controversial is a gross understatement.

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[244] This Article focuses primarily on private religious schools as participants in voucher programs. Home schools, however, have been found by some courts to be "private schools" within various state statutes. *See* discussion WHITEHEAD, *supra* note 42, at 295-96.

[245] This is evidenced by the mission statements of many private religious schools which attempt to achieve a curriculum where all subjects reflect the worldview of their particular religion. *See* examples discussed *infra* note 332.

[246] McConnell, *Multiculturalism and Choice, supra* note 103, at 126.

[247] *See supra* notes 130-34 and accompanying text.

[248] *See* McConnell, *Multiculturalism and Choice, supra* note 103.

[249] *Id.* at 126 ("schools must have the autonomy necessary to create distinctive curricula").

[250] James W. Skillen, *Educational Freedom with Justice, in* THE SCHOOL-CHOICE CONTROVERSY: WHAT IS CONSTITUTIONAL? 67, 82 (James W. Skillen ed., 1993).

A. Education as a Marketplace of Ideas

To give parents the true ability to choose schools that teach their children values and beliefs alternative to those taught in public schools, an educational choice system would not restrict the curricular content of the participating schools.[251] A system that places extensive restrictions on curricular content would be nothing more than an extension of the public school system, the very system that parents are trying to avoid.[252]

An educational choice program is a pluralistic system that, instead of seeking to create a common culture and common set of values, deliberately encourages a diversity of religious, ideological, cultural, and ethnic approaches to education.[253] It is a system that creates a market in ideas.[254]

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[251] McConnell, *Multiculturalism and Choice, supra* note 103, at 126.

[252] Michael Heise, *Public Funds, Private Schools, and the Court: Legal Issues and Policy Consequences,* 25 TEX. TECH. L. REV. 137, 137 (1993). Extensive regulations and conditions imposed by the State on schools participating in an educational choice system would also provide a further argument to exclude "pervasively religious" schools from participating in a voucher program. Under the "state action doctrine," "when a private organization performs a public function, the organization may be considered the equivalent of a public entity." Frank R. Kemerer et al., *Vouchers and Private School Autonomy,* 21 J. L. EDUC. 601, 610 (1992). The more regulations the state imposes on private schools as a condition of participating in a voucher program, the more the private schools become like "state actor[s]." *Id.* at 610-13 (discussing tests from major cases for finding state action). When private schools become state actors, they would be precluded from teaching religious doctrine because public entities are not allowed to teach religion.

[253] *See generally* McConnell, *Multiculturalism and Choice, supra* note 103.

[254] JOHN COONS & STEPHEN SUGARMAN, EDUCATION BY CHOICE: A CASE FOR FAMILY CONTROL 100 (1978). Subjecting schools to the competition of the market may also have the effect of improving the overall quality of education, as argued by prominent choice advocates such as Milton Friedman, Stephen Sugarman, and John Chubb and Terry Moe, who argue that educational success depends on making schools autonomous and freeing them from the dysfunctions of bureaucracy. Stephen D. Sugarman, *Using Private Schools to Promote Public Values,* 1991 U. CHI. LEGAL F. 171, 172-75 (1991). This Article's primary focus is the educational market that gives religious and other parents the ability to select the values and worldviews—the ideas—that will be taught to their children. Besides fundamentalist Christians and the Catholic church, there are many other voices for choice; in fact the movement for educational choice has brought together an unlikely collection of allies, from liberal policy scholars of the Brookings Institute to business-oriented conservatives, to urban educators and African-American parents, to state governors. Kevin J. Dougherty and Lizabeth Sostre, *Minerva and the Market: The Sources of the Movement for School Choice, in* THE CHOICE CONTROVERSY 24, 26-35 (Peter W. Cookson, Jr., ed., 1992). Not surprisingly the problems these groups seek to address are widely disparate, resulting in proposals that differ widely. *Id.* at 37-39. *See also* Sugarman, *supra,* at 172. The model of education as a market in ideas is one that serves basic First Amendment values. The ideal of the common school carries with it the danger of "homogenizing" children in a certain set of officially prescribed values in

1. Risks of the market

There are two primary risks to such an educational market. First, it contravenes the ideal of a public "common" education, an education that inculcates democratic values—the civic republican virtues that will enable students to be citizens in society—and ensures that children are provided with a basic quality education.[255] In a market-based educational system, as in other

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contravention of these First Amendment values. COONS AND SUGARMAN, *supra,* at 100. As Coons and Sugarman argue:

> When the official line is officially compelled, it both preempts the expression of competing ideologies and, by implication, labels them deviant. Thus, those who challenge the majoritarian values of the public school fight a discouraging and unfair battle. While financially supporting the public establishment they must assemble additional private resources to pay for their own conflicting message. Being addressed to children, that message must catch them after the public has consumed their primary energies in formal instruction; it must then offset a conflicting message that has been delivered with all the sacerdotal pomp of a large institution; and it must convince the child that his holding values different from other children is not socially deviant. Can there be doubt that one effect of public education as presently structured is to chill the expression of minority views?

Id. at 100-01.

An educational market, where parents are allowed to choose schools the philosophical or religious orientation they wish to raise their children in, would counteract the monopoly that public schools have on the hearts and minds of the nation's children. As Coons and Sugarman argue, encouraging free and unconstrained expression of ideas, especially counter-majoritarian ideas, is a "free society's primary defense against totalitarianism from within or without." *Id.* at 100.

[255] Present-day public education is based on the ideal of the "common school." Mary Jane Guy, *The American Common Schools: An Institution at Risk,* 21 J. L. EDUC. 569, 571 (1992). The common school serves to teach "common values"—including "non-sectarian" moral values and values necessary to nurture civic responsibility—to prepare an educated citizenry necessary for the maintenance of a democratic society. McConnell, *Multiculturalism and Choice, supra* note 103, at 134-36; Guy, *supra,* at 583. The common school model is thus centered in a Republican notion of virtue-centered civic humanism that emphasizes the strong *public* interest that education serves. Guy, *supra,* at 576-80. The ideal reflected a commitment that an "educated and enlightened citizenry was . . . essential to the survival of the republic." *Id.* at 581. Therefore, the state must ensure that citizens have at least basic knowledge and skills, as well as a common set of republican virtues that are fundamental to a democratic political system. *See* AMY STUART WELLS, TIME TO CHOOSE: AMERICA AT THE CROSSROADS OF SCHOOL CHOICE POLICY 7-13 (1993); Henry M. Levin, *The Theory of Choice Applied to Education, in* CHOICE AND CONTROL IN AMERICAN EDUCATION VOLUME 1: THE THEORY OF CHOICE AND CONTROL IN EDUCATION 247, 251 (William H. Clune and John F. Witte, eds., 1990); Sherry, *supra* note 13, at 157-82. The U.S. Supreme Court has affirmed this perspective in several cases, stating that: "[P]ublic schools are vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.'" Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v.

markets, individuals choose particular and selfish interests,[256] and some will make bad, or even "evil," choices, sending their children to racist and religiously intolerant schools.[257] This argument was used effectively in Oregon, where "[t]elevision advertisements opposing . . . educational choice . . . featured classrooms in which students and teachers huddled in Ku Klux Klan robes."[258] Other parents will send their children to schools that churn out quick and easy diplomas, deceived by promises of easy educational advancement.

The second risk of an educational market is closely related to the first. A pluralistic educational system, instead of promoting unity among a heterogenous people as does the "common school," would sharpen the ethnic, cultural, religious, and ideological divisions in society.[259] Educational choice

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Pico, 457 U.S. 853, 864 (1982) (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

[256] Guy, *supra* note 255, at 569-70, 578-79, 581.

[257] McConnell, *Multiculturalism and Choice, supra* note 103, at 127-28.

[258] *Id.* at 127-28. Thus, the fundamental error of a public-funded educational market in ideas is mistaking education for a private rather than public function. In First Amendment doctrine, government may not suppress *private* expression in the marketplace of ideas, even expression that is unpopular, untrue, or counter-democratic. The paradigm of this is protecting the right of communists and Neo-Nazis to speak. Public schools, on the other hand, are *not* a forum for the expression of private ideas. *See, e.g.*, Settle v. Dickson Cty Sch. Bd., 53 F.3d 152 (6th Cir. 1995) (upholding broad discretion of teachers to regulate student speech in class assignments), *cert. denied*, 116 S. Ct. 518 (1995). They are not a market in the true sense where debate is "uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Public schools do not wish to and need not advocate racial segregation or totalitarianism because these ideas undermine the foundational principles of the American political system. The State selects certain values and viewpoints and not others to promote. When the State is the speaker it is free to endorse certain messages without having to endorse competing views. TRIBE, *supra* note 45, at § 12-4, 807; Sullivan, *supra* note 90, at 206-07. It selects values that are fundamental for students to learn that our democratic system may continue in the next generation. These values include tolerance and "respect for the dignity persons." GUTMANN, *supra* note 13, at 72. Creating a choice system that enables parents to choose whatever ideological school they want, including racist, neo-Nazi schools and other schools that are inimical to democratic principles, is antithetical to the idea of *public* education.

[259] McConnell, *Multiculturalism and Choice, supra* note 103, at 128. Born in the early 1800s as a response to the influx of non-Protestant, European immigrants, the common school served the ideal of unifying a diverse and heterogeneous populace around a common American culture. *Id.* at 134-36; Guy, *supra* note 255, at 583. The Court has affirmed this assimilative function of schools to "promot[e] cohesion among a heterogeneous democratic people." Illinois ex rel. McCollum v. Board of Educ. of School Dist. No. 71, 333 U.S. 203, 216 (1948) (Frankfurter, J., concurring); *see also* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1068 (6th Cir. 1987) (citing Ambach v. Norwick, 441 U.S. 68, 77 (1979) ("public schools [are] an 'assimilative force' that brings together 'diverse and conflicting elements' in our society 'on a broad but common ground.'")). The historical reality is that the movement for inculcating a common "Americanism" was "tinged with nativism and anti-Catholic prejudice." McConnell, *Multiculturalism and Choice, supra* note 103, at 135. McConnell continues:

would allow respective particularistic sub-groups to gather in ghettos, separate enclaves,[260] never having to interact with their neighbors.[261] The rich metaphor for this is "balkanization," derived from the region in Europe which is now

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> Some argued it was necessary to confine funding to public schools because a pluralistic funding system would "drive the children of foreigners, and especially of Roman Catholics, into clans by themselves, where ignorance and prejudice respecting the native population, and a spirit remote from the American, and hostile to the Protestant, will be fostered in them."

Id. at 135-36 (quoting CHARLES L. GLENN, JR., THE MYTH OF THE COMMON SCHOOL 224 (1987)). *See also* Edward Larson, *The "Blaine Amendment" in State Constitutions, in* THE SCHOOL-CHOICE CONTROVERSY: WHAT IS CONSTITUTIONAL? 35-50 (James W. Skillen ed., 1993).

In addition, the common schools, as envisioned by one of their leading proponents, Horace Mann, sought to inculcate "non-sectarian" moral values which represented the "'common core' of American religion." BATES, *supra* note 1, at 41-43. The result was, of course, far from non-sectarian and instead schools taught a "watered-down piety closely resembling liberal Protestantism." McConnell, *Multiculturalism and Choice, supra* note 103, at 138. This attempt to assimilate these Catholic and Jewish immigrants into a common Americanism ended up driving them further from the public schools. *Id.*

[260] Guy, *supra* note 255, at 569.

[261] GUTMANN, *supra* note 13, at 31. Amy Gutmann offers a strong argument: if in the midst of the anti-Catholic religious bigotry of the 19th century, states abandoned public common schools and chose a system of subsidizing private schools, religious intolerance would be perpetuated. As Gutmann explains:

> Protestant parents would have sent their children to Protestant schools, Catholic parents to Catholic schools. The Protestant majority would have continued to educate their children to be disrespectful if not intolerant of Catholics. The religious prejudices of Protestant parents would have been visited on their children, and the social, economic, and political effects of those prejudices would have persisted, probably with considerably less public protest, to this very day.

Id. at 31.

A different angle to this argument is advanced by Henry Levin. He argues that the public education process itself provides lessons in the tolerance and diversity necessary for democratic government. Citizens are taught to tolerate diverse views by not only being exposed to them in their neighbors, but through the process of "discourse among those views, and the acceptance of a mechanism for reconciling the debate." Levin, *supra* note 255, at 268. When parents choose to send their children to schools that teach values that are their own, they avoid the exposure to diverse views that teaches tolerance of diversity. *See also* Diane Ravitch, *Multiculturalism: E Pluribus Plures, The American Scholar,* 337, 339, 343, 347 (Summer 1990), *in* YUDOF, *supra* note 16, at 238-39 (warning against extremes of particularist multiculturalism).

Thus, ideological ghettoes are created which both exacerbate our differences and defeat the critical reflection and dialogue that comes from interaction with diverse viewpoints. Common schools serve the *public* interest in promoting harmony and commonality, an interest that overrides *individualized* interests of the sub-community in perpetuating particularistic cultural, ethnic or religious traditions.

epitomized by the former Yugoslavia, a land marked by a history of bloody ethnic, religious and political strife.[262]

2. *Weighing the risks of the market*

No doubt the risks of market-dysfunction in an educational choice system are real.[263] However, to many religious parents, especially those who have lesser financial means, the present system is not a happy alternative. The benefits of a pluralistic educational system—a respect for rights of parents to direct the education of their children, a recognition of the diverse nature of American society—may outweigh the risks. In weighing the risks, the following factors should be considered.

Accepted risks of the present market. First, American society has already accepted the risks of an educational market in that *Pierce v. Society of Sisters* protects the constitutional right of parents to choose alternative private schooling.[264] True, it is a "partial" market because only those with sufficient financial resources can avail themselves of it. However, to the extent that this nation already allows, indeed perhaps values, private schools and the market they represent, it is disingenuous to argue that extending access to that market to the poor through a system of educational vouchers poses too great a danger of market failure.[265]

Consumer protection measures. Second, while it is true that some of the worst nightmares of market-dysfunction have been seen in private schools (racist schools, racist schools in the name of religion, home schools that might not provide an adequate education),[266] the better response to such dysfunction is to regulate the market—to "incorporate consumer protection measures"—not

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[262] Guy, *supra* note 255, at 598.

[263] McConnell, *Multiculturalism and Choice, supra* note 103, at 127.

[264] Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925). *Pierce* arose out of the State of Oregon's attempt to compel its students to attend public schools. *Id.* at 530. This compulsion was held unconstitutional partly under a Fourteenth Amendment "substantive due process" right of parental liberty. *Id.*

[265] John E. Coons, *As Arrows in the Hand, in* CHOICE AND CONTROL IN AMERICAN EDUCATION VOLUME 1: THE THEORY OF CHOICE AND CONTROL IN EDUCATION 319 (William H. Clune and John F. Witte, eds., 1990); *see also,* Sherry, *supra* note 13, at 205-06; Coons, *supra,* at 320. Indeed, it is patronizing and paternalistic, amounting to a message that only those who can afford private education—often, the rich who send their children to "elite private academies"—have the wisdom to choose schools that "nourish the 'core values' of the republic," while the poor, "[l]eft to their own devices . . . would choose against the public interest." *Id.* at 322.

[266] *See* YUDOF, *supra* note 16, at 77-102 (discussing the issue of discrimination in private schools).

to shut it down.[267] In the educational market, the state can do this by enacting regulations that ensure that minimum standards are achieved[268] and that the private schools do not depart too far from democratic principles such as equality and non-discrimination.

Currently, federal statutes prohibit private schools from racial discrimination in admissions, as well as other types of discrimination.[269] States also typically regulate private and home schools, requiring the teaching of certain subjects, minimum hours of instruction, and teacher certification.[270] Courts have found these kinds of regulations justified by the State's compelling interest in "preparing children for democratic citizenship and for becoming self-reliant and

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[267] Sugarman, *supra* note 254, at 179.

[268] Michael McConnell suggests that the best way to ensure compliance with academic standards is "to use standardized testing to ensure that schools are producing positive results, rather than to institute particular requirements regarding curricular materials, staff, or educational plant, other than those pertaining to health and safety." McConnell, *Multiculturalism and Choice, supra* note 103, at 126 n.3.

[269] 42 U.S.C. § 1981 prohibits racial discrimination in the making and enforcing of contracts. In *Runyon v. McCrary,* the Court held that a private racially segregationist school that refused to admit black students violated this statute and that the statute was a reasonable regulation of private schools. Runyon v. McCrary, 427 U.S. 160 (1976). Other Federal statutes include prohibitions against discriminating on the basis of "race, color, religion, sex, or national origin" in employment. Title VII of 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1988). Title VII has an exception for hiring in religious schools. Title VII of 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(e)(2)(1988). *See also* Kemerer, *supra,* at 605; Heise, *supra* note 252, at 144-45.

An important issue is whether religious schools would be exempt from some of these non-discrimination statutes if they did participate in a voucher program. Kemerer, *supra,* at 605 n.13. Allowing exemption might defeat the ability of the State to meet its interests in ensuring non-discrimination, while *dis*allowing exemptions would contravene a basic purpose of the Free Exercise Clause, which is to protect the autonomy of religious groups from governmental interference. *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,* 81 COLUM. L. REV. 1373, 1374-78, 1388-92, 1398-1401 (1981), *in* YUDOF, *supra* note 16, at 79-84. It seems that religious schools should be able to discriminate on the basis of religion in hiring and perhaps even admissions, because this goes to the heart of their free exercise and freedom of association rights. Religious (and other) schools *probably* should be allowed to discriminate on the basis of gender and have exclusively boy and girl schools in a voucher system, for the reason that gender is not a "suspect class" in constitutional doctrine. However, the State might be able to forbid schools from discriminating on the basis of race because it seems that racial non-discrimination is very high on the hierarchy of values in our society. Race is a suspect class and the State may have a compelling interest in overriding even a religious free exercise claim of autonomy to discriminate on the basis of race. This is especially true if the private school is receiving government money (although indirectly) through vouchers. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (compelling state interest in racial nondiscrimination justified denying nonprofit tax treatment to racially discriminatory religious university).

[270] Kemerer, *supra* note 252, at 602-06. *See also* Lines, 12 J. L. EDUC. 189, 194-97 *in* YUDOF, *supra* note 16, at 44-46 (discussing statutory regulation of private and other non-public schools in the states).

self-sufficient."[271] States may also certainly regulate private schools to ensure the health, safety, and welfare of its citizens.[272]

Thus, the better and less intrusive way for the State to achieve its interests and combat market-failure is to regulate the market, not to close it down and take over the functions of the failed entities. As Stephen Sugarman argues, in spite of problems in the grocery market or the medical and legal service industry, "[m]ost people in this country . . . would not want the government to take over the grocery trade, or the provision of architectural, legal, or medical services."[273] The benefits of providing consumers with choice outweigh the risks; and risks can be minimized through government intervention.

The practical likelihood of balkanization. The third factor in weighing the risks of pluralism is that the practical likelihood of a massive out-migration to ideological and particularistic schools envisioned by the worst-case balkanization scenario is very small. Instead, it seems that most American families would still choose to remain within the public school system, with a "significant minority" who, empowered with the capacity to choose, will exercise that choice to send their children to ideological and cultural schools.[274] As Michael McConnell predicts:

> There will be more religious schools [including those] from religious traditions at odds with mainstream American culture (fundamentalist and evangelical schools, Catholic schools, Islamic schools, Orthodox and Conservative Jewish schools, Mormon schools, Hindu schools). There will be more schools from an identifiable ideological perspective (feminist schools, progressive schools). And there will be some ethnic or racial schools, including Hispanic schools, some Asian schools, and . . . Afrocentric schools.[275]

Thus, the practical effect of a choice system would be to benefit the significant minority that truly cares and feels that ideological indoctrination is not a good thing, while leaving the public education system intact for those who support or at least are not offended by the majoritarian values taught in public schools. If in fact families and students did use a choice system to immediately fracture into a balkanized patchwork of cultural, religious, and ethnic schools, it might be an indicator not that common schools are needed, but that common

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[271] Kemerer, *supra* note 252, at 604 (discussing a Christian school's challenge to regulations as violative of First Amendment freedoms in State v. Faith Baptist Church, 301 N.W.2d 571 (Neb. 1981), *appeal dismissed,* 454 U.S. 803 (1981)). Kemerer notes that most cases challenging such regulations as violative of First Amendment freedoms have been lost. Kemerer, *supra,* at 603.

[272] Prince v. Massachussetts, 321 U.S. 158 (1944).

[273] Sugarman, *supra* note 254, at 179.

[274] McConnell, *Multiculturalism and Choice, supra* note 103, at 127; Sugarman, *supra* note 254, at 179.

[275] McConnell, *Multiculturalism and Choice, supra* note 103, at 127.

schools are failing—that their message is so alienating that most people, if given the choice, would leave them.

Private schools in the public interest. Finally, in weighing the risks that educational choice will contravene the purpose of educating children for democratic citizenship, it must be observed that private schools can, in some cases, serve the public interest in educating children in democratic values as well as public schools.[276] In fact, some would argue that private schools do a *better* job than public schools, citing studies of Catholic schools in inner city areas that have produced better academic achievement and succeeded in racial integration where state-mandated integration has failed.[277]

On the other hand, public schools themselves do not have a good track record in furthering democratic ideals and providing adequate education.[278] Although schools have made democratic progress, John Coons argues, "[t]o put it plainly democracy has been one of the chief casualties of the school system."[279] Coons chides those who view public schools as the home of democratic values as having a rosy picture of public schools:

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[276] For example, in Pierce v. Society of Sisters, the Court noted that there was nothing in the records "to indicate that [the private schools in that case] have failed to discharge their obligations to . . . the State" of teaching basic skills, patriotism, and citizenship. Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

[277] Sherry, *supra* note 13, at 201 (discussing JAMES S. COLEMAN, THOMAS HOFFER, AND SALLY KILGORE, HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED 178-79 (1982)); Derek Neal, *Measuring Catholic School Performance*, THE PUBLIC INTEREST, 81 (Spring 1997). Professor Neal cautions, however, that "we have no idea how the quality of Catholic or other private schools might change if full-scale voucher plans dramatically increased the demand for their services." *Id.* at 81.

James Coleman offers a fascinating sociological argument for parochial school success. He demonstrates that the rise in dysfunctional families and the increasing disconnected nature of neighborhoods decreases "social capital"—"social relations [that] generate obligations, trust, and norms, all of which function as resources upon which an individual can draw in time of need." James S. Coleman, *Changes in the Family and Implications for the Common School*, 1991 U. CHI. LEGAL F. 153, 163 (1991). Social capital is a significant factor in children's educational achievement. *Id.* Public schools can no longer "draw on the social capital of the neighborhood, as [they] could when parents worked in the same neighborhoods in which the family lived." *Id.* at 167. Research seems to indicate, however, that Catholic and other religious schools do well even with children from dysfunctional families. *Id.* at 161-63. The reason, Professor Coleman proposes, is that religious schools provide a community with "extensive social capital," making up for deficiencies *within* particular (say single-parent) families with a network of relationships with other parents, the religious community and the school itself. *Id.* at 166.

[278] The apparent widespread failure of public schools to provide quality, and sometimes even adequate, education is one of the chief reasons behind the school choice movement. For example, the voucher programs in Cleveland, Ohio, and Milwaukee, Wisconsin were both implemented to rectify the dismal academic performance among public school students in those cities. *See* discussion *infra* note 330 and accompanying text.

[279] Coons, *supra* note 265, at 320-21.

> Gone in this revisionist tale is the history of separate but equal education; gone are the religious compulsion of the dissenter and the exclusion of aliens; gone is the *Serrano* problem and class segregation.[280]

Furthermore, as argued in Part V, the so-called democratic values taught in public schools can be antithetical to the true democracy envisioned by the Constitution. A pluralistic educational system may well serve true democratic values better. For example, allowing religious citizens to opt-out of a system that has the tendency toward indoctrination in fundamental matters of the spirit is a tremendous exhibition of tolerance for their beliefs even if such beliefs appear "intolerant" to the wider society.[281] The result may be a surprising multiplier effect of tolerance:

> In a system driven by choice . . . ideological competitors . . . will have experienced tolerance for their views. They will wish to preserve that system of tolerance by supporting the larger society that made it possible.[282]

A pluralistic educational model provides a portrait of a land where different religious (as well as ethnic, racial, cultural, and ideological) groups have the right to exist, free from governmental coercion and standardization. This seems to embody of the civil tolerance envisioned by the Constitution.

Critical thinking is also a value that public schools may not be the best institutions to teach. While critics argue that private schools will circumvent critical thinking because they will only present one-sided and biased presentations of controversial issues (for example, Catholic and fundamentalist schools teaching abortion and evolution),[283] public schools do not have the most even-handed presentation. If evangelical schools do not present a balanced and uncaricatured picture of evolution, public schools do not even present the creationist position.[284] Systematically ignoring religious perspectives on religiously-contested matters such as evolution, abortion, the family and

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[280] *Id.* at 320.

[281] Sugarman, *supra* note 254, at 182-83.

[282] Coons, *supra* note 265, at 324.

[283] Levin, *supra* note 255, at 268. Levin argues:

> It would be unrealistic to expect that Catholic schools will expose their students to both sides of the abortion issue; that evangelical schools would provide a disinterested comparison of creation and evolution; . . . that leftist schools would provide a balanced presentation of the positive and negative aspects of capitalism; or that white academies would explore different views towards race in the U.S. Their curriculum and faculty would be selected in order to make them efficient competitors in a differentiated market for students in which the views of parents would be reinforced and others excluded or derided.

Id.

[284] *See* discussion *supra* note 95.

sexuality does not promote "critical thinking"; it denies students "the intellectual and imaginative resources" needed to make reasoned decisions about these weighty and serious matters.[285]

Private schools, on the other hand, may in fact serve the public interest in teaching critical thinking better because they may recognize the moral seriousness of subjects such as abortion, euthanasia, and the changing definition of the family.[286] Evangelical and Catholic groups, for example, because they feel they are engaged in a "culture war," may approach these subjects in a way that is designed to rigorously refute arguments of opponents, something that may only be done by seriously grappling with opposing arguments. Public schools may actually contravene critical thinking because they sometimes refuse to confront controversial moral and societal issues. The result, argues Steven Arons, is a public school system characterized by "a characterless bureaucratic order bent on denying values, and overly tolerant of emptiness. Driven perhaps by a fear of value conflict, the schools have created a confused and confusing consensus."[287] Beholden to the political process and fearful of avoiding controversy, public schools may simply end up advocating a "value-less, culture-less, rootless, and religion-less" program.[288] A value-less approach denigrates and marginalizes religious believers who feel that certain issues *are* worth debating and discussing.[289] Such an approach seems to be the very antithesis of critical

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[285] Nord, *supra* note 12, at 439.

[286] Terence Ball, *What's Wrong with "Values,"* NEW OXFORD REVIEW, May 1996, at 6-7.

[287] Stephen Arons, *Pluralism, Equal Liberty, and Public Education, in* A BLUEPRINT FOR EDUCATIONAL REFORM 6-7 (1984), *cited in* Jeffrey Kane, *Choice: The Fundamentals Revisited, in* THE CHOICE CONTROVERSY 46, 49 (Peter W. Cookson, Jr., ed., 1992).

[288] McConnell, *Multiculturalism and Choice, supra* note 103, at 150.

[289] Ball, *supra* note 286, at 6. Professor Ball laments the "language of 'values.'" By dividing the world into facts and subjective values, and putting into the latter category "personal preferences or tastes, unexamined prejudices, individual aims, and group goals, . . . religious convictions and moral principles," the language of values precludes robust and hardy "moral and political discourse." *Id.* at 6, 8. Ball, who describes himself as a person "wholly secular in outlook," contrasts his discussions with "tolerant secular types who talk the language of 'values,'" and religious people, whom he would expect to be narrow-minded and intolerant:

> My discussions about morally charged subjects—euthanasia, abortion, capital punishment, pacifism, you name it—have invariably been both morally and intellectually more satisfying with those who eschew the language of "values" than with those who embrace it. And, on reflection, the reason is not hard to find: A recourse to "values" is the shortest of all routes of retreat. I cannot begin to count the times that conversations about serious matters have ended, all too abruptly, with, "Well, I suppose our values differ," or some such shifty locution. And in the world created, maintained, and legitimized by the language of values, this is as far as the conversation *can* go. People who talk the language of values, and disagree, are doomed not only to differ but to remain strangers and aliens in each other's company.

thinking.

3. Embracing the risks of pluralism

Although the risks of an educational system that permits ideological diversity are real, they are worth taking. An educational market will affirm and protect the religious liberty rights of parents to make choices in the most intimate of matters—the "spiritual and intellectual" education of their children.[290] Refusing to expand the ability of parents to fully choose exacerbates the problem of an educational system that has an inherent tendency to infringe on those religious exercise rights. It communicates a message of intolerance that is alienating to minority religious groups, a result antithetical to true democracy and constitutional principles. Allowing educational choice, on the other hand, embodies the pluralism envisioned by the Constitution, communicating a message of tolerance for the right of religious believers to hold different views

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Id. at 7. On the other hand, Ball's conversations with "religiously-minded people of many persuasions—Muslims, Catholics, fundamentalist Protestants—have, without exception, been richer and certainly much longer in duration and less abrupt in conclusion." *Id.* Ball continues:

> These exchanges have much more grit—more texture and nuance—than the "You-have-your-values-and-I-have-mine" gambit allows. There is in their world no readily available avenue of escape or retreat, and no wish to do so either. I sense in them instead an appreciation of the moral weight and seriousness of the issues at hand. What I bring away from these encounters is a shared sense that moral questions are *communal* issues in need of communication—of extended discourse, debate, discussion, of talking *and* listening.

Id.

This type of thinking seems to be widespread, and one might argue that this kind of trivializing and marginalization of religious conviction is occurring in the educational system because the entire constitutional system is rooted in the distinction between the world of facts (the public and secular sphere) and the world of values (the private and religious sphere). *See generally* Gedicks, *supra* note 95. The "reality," however, is that the boundary line between fact and value is not clear and distinct but blurry and the subject of constant dispute. *Id.* at 694. Stanley Fish argues that the "opposition between reason and belief [is] a false one" because "reason or rationality itself rests on belief." Stanley Fish, *Liberalism Doesn't Exist*, 1987 DUKE L.J. 997, 997-98 (1987). Fish continues: "[R]easons always come from somewhere, and the somewhere they come from is precisely the realm to which they are (rhetorically) opposed, the realm of particular (angled, partisan, biased) assumptions and agendas." *Id.* at 998.

Professor Johnson argues that "[t]he rationality of any moral code"—or any ideology, religion, theory, or idea—"is linked to a picture of reality that contains both fact and value elements." Johnson, *Is God Unconstitutional?*, *supra* note 5, at 473. The problem with public education and present-day political discourse is that by labeling a position as "religious" or "moral"—i.e., as something within the realm of "values"—it is easy to exclude it from serious discussion without confronting the merits of the position. *Id.* at 463. Ignoring morally charged subjects, or excluding an entire category of perspectives on such subjects (the perspectives of various religions), hardly teaches children to think critically. *See* discussion *supra* notes 91-105 and accompanying text.

[290] Kane, *supra* note 15, at 47-48.

and creating a portrait of an America that protects the civil and legal rights of a variety of religious, ethnic, and cultural traditions and values. The dangers of the market can be regulated with consumer protection measures, as is currently done with private schools; and as is true with the present system, the existence of the private school market and the right to choose alternative schooling is too valuable to say that the dangers of the market warrant having no market at all.

B. *The Funding of Pervasively Sectarian Schools*

For a voucher program to truly protect the religious liberty rights of parents to direct the education of their children, it must allow parents to select schools where religious and secular educational missions are thoroughly integrated.

Government funding of schools where the religious and secular functions are so "inextricably intertwined," however, is the very thing that the Court has stated is absolutely prohibited by the Establishment Clause.[291] This prohibi-

[291] This is the rule set forth in the "parochial school aid" cases, the long line of Establishment Clause cases invalidating various state programs that have attempted to provide benefits to nonpublic religious schools in one form or another. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985); Meek v. Pittenger, 421 U.S. 349 (1975). The strict prohibition against government financial benefit to religious schools is based on a historical interpretation of the Establishment Clause adopted in Everson v. Board of Educ. of Ewing Tp., 330 U.S. 1, 8-16 (1947). In that case, Justice Black articulated the strict "no-financial-aid" rule as follows:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

Everson, 330 U.S. at 15-16.

The Establishment Clause does not absolutely prohibit all financial aid to religious institutions, however. Mueller v. Allen, 463 U.S. 388, 393 (1983). The Court has upheld public aid to religious institutions in certain limited situations, including if 1) the religious and secular functions of the organization can be clearly separated and the aid is restricted to the secular functions, Board of Educ. of Cent. School Dist. No. 1 v. Allen, 392 U.S. 236, 244-49 (1968) (upholding loan of books to parochial schools based on recognition that religious schools offer both "religious instruction and secular education"); Roemer v. Board of Pub. Works of Md., 426 U.S. 736, 755 (1976) (plurality opinion) ("If secular activities [of a religious institution] can be separated out, they alone may be funded."); 2) the aid is provided as part of a forum for the communication of ideas, Widmar v. Vincent, 454 U.S. 263, 270-75 (1981), Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 248-53 (1990) (plurality), Lamb's Chapel v. Center Moriches Union Free Sch. Dist, 113 S. Ct. 2141, 2148 (1993), and Rosenberger v. Rector & Visitors of University of Virginia, 115 S. Ct. 2510, 2521-24 (1995) (plurality); or 3) the aid is "indirect." Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986), Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993);

tion works severe hardship on the parent who desires to educate his child at a private religious school yet is unable to do so because of limited financial resources. As Michael McConnell argues:

> Without aid to private [religious] schools . . . the only way that parents can escape state "standardization" is by forfeiting their entitlement to a free education for their children—that is, by paying twice: once for everyone else's schools (through property taxes) and once for their own. By taxing everyone, but subsidizing only those who use secular schools, the government creates a powerful disincentive for parents to exercise their constitutionally protected option to send their children to parochial schools.[292]

A more equitable distribution of public funds would allow citizens to use their tax money to choose private religious (and non-religious) schools, in addition to attending public schools.[293]

The U.S. Supreme Court has issued cases that provide the foundation for this kind of equitable distribution. However, there are still significant barriers to the implementation of a voucher system that includes religious schools.

1. The indirect aid cases

The most significant precedents that would support a voucher system that includes religious schools are the Court's "indirect aid" cases.[294] The basic teaching of these cases is that the government does not impermissibly "aid" religion when it provides benefits to individual citizens, who then as a result of

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Mueller v. Allen, 463 U.S. 388, 393 (1983). For further discussion of the "no-aid" rule, *see* Cheng, *supra* note 104, at 369-82.

[292] McConnell, *Religious Freedom*, *supra* note 95, at 132. Or, as James Skillen argues: "[G]overnments do not have a right, on the one hand, to mandate the education of all children, and then, on the other hand, to discriminate financially against those taxpaying citizens who choose religiously qualified schools for their children's education." Skillen, *supra* note 250, at 82.

[293] Skillen, *supra* note 250, at 81-82.

[294] In addition, the Court has been eroding the strict prohibition against government aid to religious institutions, the most notable instance being its recent opinion in Agostini v. Felton, 65 U.S.L.W. 4524 (U.S. June 23, 1997) which held that the provision of publicly-financed remedial education teachers to students in religious schools did not violate the Establishment Clause. *Id.* at 4532. The Court stated that Establishment Clause doctrine had "significant[ly] change[d]" and reversed Aguilar v. Felton, 473 U.S. 402 (1985), the case that had declared such aid unconstitutional just twelve years earlier, as well as portions of its companion case, School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985). Agostini v. Felton, 65 U.S.L.W. 4524, 4533 (U.S. June 23, 1997). Because *Agostini* was decided when this article was being completed for publication, an analysis of that case is not included in this Article.

their genuinely independent and private choices, expend those benefits on religious institutions, even if such institutions are "pervasively religious."[295]

In *Mueller v. Allen*,[296] the Court upheld a Minnesota statute that allowed citizens to take tax deductions for tuition and other expenses spent at private or public schools.[297] The Court held that the statute did not advance religion because the benefit provided to religious schools was indirect, occurring only "as a result of numerous, private choices of individual parents of school-age children."[298] In addition, the benefits were neutrally available to a "broad spectrum of citizens," religious and non-religious, without regard to their religious affiliation.[299]

The *Mueller* principle was affirmed in 1986 in *Witters v. Washington Department of Services for the Blind*,[300] where the Court upheld the State of Washington's provision of vocational rehabilitation assistance to a blind student who wanted to use the funds to attend a Christian college to "become a pastor, missionary, or youth director."[301] The Court reasoned that any aid flowing to "religious institutions does so only as a result of the genuinely independent and private choices of aid recipients."[302] The indirect benefit to the religious college was in principle the same as a State "issu[ing] a paycheck

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[295] Mueller v. Allen, 463 U.S. 388, 392-403 (1983); Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462, 2466-69 (1993); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 483, 485-89 (1986). For further discussion of the "indirect aid" principle and cases, *see* McConnell, *Multiculturalism and Choice*, *supra* note 103, at 143-49. All three "indirect aid" cases discussed in this section involved "pervasively sectarian" religious schools. In *Zobrest*, the parties stipulated that the Catholic high school attended by James Zobrest was one where "[t]he two functions of secular education and advancement of religious values or beliefs are inextricably intertwined[.]" *Zobrest*, 113 S. Ct. at 2464 n.1. *Witters* involved a blind student's desire to attend Inland Empire School of the Bible to study to become a minister or missionary. *Witters*, 474 U.S. at 483. *Mueller* involved parochial elementary and high schools. *Mueller*, 463 U.S. at 406-07, 411.

[296] 463 U.S. 388 (1983).

[297] *Id.* at 391. Minnesota state taxpayers were allowed to deduct from gross income expenses paid for "tuition, textbooks and transportation" on behalf of "dependents attending elementary or secondary schools." *Id.*

[298] *Id.* at 399. The Court also held found that the legislation had a valid secular purpose —to "defray the cost of education expenses incurred by parents" and to "assure the financial health of private schools, both sectarian and nonsectarian," while at the same time relieving the burden on public schools of educating students, *id.* at 395—and that there was no impermissible entanglement with religion. *Id.* at 403.

[299] *Id.* at 397-99. In addition, the benefits were available "'without regard to the . . . public-nonpublic nature of the institution benefited.'" *Id.* at 398 (quoting Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 782 n.38 (1973)). For further discussion see *infra* note 318.

[300] 474 U.S. 481 (1986)

[301] *Id.* at 483.

[302] *Id.* at 488.

to one of its employees, who . . . then donate[s] all or part of that paycheck to a religious institution."[303]

Finally, in 1993, in *Zobrest v. Catalina Foothills Sch. Dist.*,[304] the Court held that the provision of a government-paid interpreter for a deaf student who attended a Catholic high school did not violate the Establishment Clause. The same benefit was provided to a "broad class of citizens defined without reference to religion" and the choice of the religious school was a result of the private choice of the student and parents.[305] Again, the financial benefit to religion was only "attenuated."[306]

Under these precedents, a voucher program that distributes funds to parents who then use them to pay tuition at religious schools does not violate the Establishment Clause. As long as the government aid is distributed evenhandedly, to a broad array of individual citizens without regard to their religious or non-religious status, it would provide no financial incentive to attend a particularly religious school.[307] The aid to religious schools would be indirect, the "result of numerous, private choices of individual parents of school-age children."[308]

2. *Barriers to equal distribution*

One barrier to voucher systems that include religious schools is the Court's opinion in *Committee for Public Education and Religious Liberty v. Nyquist*.[309] Although *Nyquist* is older than the three indirect aid cases, it has not been overruled, and it seems directly "on point" with regard to voucher programs. *Nyquist* involved a New York state statute that gave modest tuition reimbursements and tax deductions to lower income families for students sent to nonpublic schools, including religious schools.[310] The Court held that the

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[303] *Id.* at 486-87.

[304] 113 S. Ct. 2462 (1993).

[305] *Id.* at 2466-68.

[306] *Id.* at 2466.

[307] *Witters*, 474 U.S. at 488.

[308] Mueller v. Allen, 463 U.S. 388, 399 (1983).

[309] 413 U.S. 756 (1973).

[310] The purpose of the statute was to encourage a pluralistic educational system by encouraging "healthy competitive and diverse alternative[s] to public education [that are] . . . vital to a state and nation that . . . value[s] . . . individual differences." *Nyquist*, 413 U.S. at 764 (quoting N.Y. Laws 1972, c. 414, s1, amending N.Y. Educ. Law, Art. 12 S 559 (1).4(2)). The statute especially recognized that for low-income families, "the right to select among alternative educational systems 'is diminished or even denied . . .'" *Id.* at 764-65 (quoting N.Y. Laws 1972, c. 414, s1, amending N.Y. Educ. Law, Art. 12 S 559 (1).4(2)). Accordingly, for families with annual taxable incomes less than $5,000 who sent their children to nonpublic schools, including religious schools, the statute provided for very modest reimbursements of $50 for each grade school child and $100 for each high school student. *Id.* at 764. The reimbursement was

plan had the primary effect of providing financial aid to pervasively sectarian schools.[311] Unlike other programs upheld by the Court, the New York statute did not specifically restrict aid to only secular educational functions,[312] and because most of the private schools in the state were religious (85%),[313] the actual "effect of the aid [was] unmistakably to provide desired financial support for . . . sectarian institutions."[314] The Court rejected any argument that the aid

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not allowed to exceed 50% of the actual tuition. *Id.* For those who did not qualify for reimbursements, tax credits were granted for each dependent child sent to a nonpublic school. *Id.* at 765-67. The statute allowed the taxpayer to subtract a certain sum from adjusted gross income for state income tax purposes for each child sent to a nonpublic school. The amount of deduction diminished as the adjusted gross income rose. *Id.*

[311] The Court held that the New York Statute violated the Establishment Clause under the second prong of the *Lemon* test. *Id.* at 772-73. The test asks whether a law 1) has "a clearly secular legislative purpose," 2) has a "primary effect that neither advances nor inhibits religion," and 3) "avoid[s] excessive government entanglement with religion." *Id.* The Court accepted as valid secular purposes the New York law's stated interests in promoting "pluralism and diversity among its public and nonpublic schools." *Id.* at 773. Because the Court decided the case under the second prong, it did not reach the entanglement prong. *Id.* at 794. Nevertheless, the Court warned that this type of program has a "grave potential for entanglement" in that it would occasion "political strife over aid to religion." *Id.* Competing religious sects have sought civil dominance, resulting in "considerable civil strife, 'generated in large part' by competing efforts to gain or maintain the support of government." *Id.* at 795-96 (quoting Everson v. Board of Educ. of Ewing Tp., 330 U.S. at 8-9 (1947)). Although the statute provided for modest benefits initially, large constituencies would lobby aggressively for increased benefits, resulting in divisive political conflict. *Id.* at 797-98.

[312] *Id.* at 782-83. The Court was distinguishing two cases in which the Court upheld forms of aid to religious schools. In Everson v. Board of Educ. of Ewing Tp., the Court upheld the provision of bus fare to students attending parochial schools because, like services such as "police and fire protection, sewage disposal, highways, and sidewalks for parochial schools," these services were commonly provided to all citizens and so "'separate and so indisputably marked off from the religious function' that they may fairly be viewed as reflections of a neutral posture toward religious institutions." *Id.* at 781-82 (discussing Everson v. Board. of Educ. of Ewing Tp., 330 U.S. 1, 17-18 (1947)). In Board of Educ. v. Allen, a State statute authorized the loan of secular textbooks to nonpublic schools, but did not authorize the loan of religious books. *Id.* at 782 (discussing Board of Educ. v. Allen, 392 U.S. 236, 244-45 (1968)).

[313] *Id.* at 768. 85% of the nonpublic schools in the state were religious. *Id.* The court observed that schools that would benefit from the program would likely include schools that

> (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach.

Id. at 767-68.

[314] *Id.* at 783.

was only indirect,[315] and characterized the program as an "ingenius plan[] for channeling state aid to sectarian schools."[316]

While *Nyquist* has undoubtedly been weakened by the indirect aid cases, it still has "bite." *Nyquist* involved an indirect aid program that benefited *only* private schools.[317] The Court in *Mueller, Witters,* and *Zobrest* distinguished *Nyquist* on the grounds that in all three of those cases, *both* private and public institutions could be benefited.[318] Furthermore, under *Nyquist,* if a majority of the nonpublic schools in a voucher program were religious, the court may find a "religious gerrymander,"[319] interpreting the "real" effect of the statute as providing "desired financial support for . . . sectarian institutions."[320] The

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[315] *Id.* at 785-86.

[316] *Id.* at 785. *See also* Sloan v. Lemon, 413 U.S. 825 (1973) (striking down similar "indirect aid" program in Pennsylvania).

[317] *Nyquist,* 413 U.S. at 765-64; Mueller v. Allen, 463 U.S. 388, 398 (1983).

[318] *Mueller,* 463 U.S. at 398-99; Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 488 (1986), Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462, 2467 (1993). The *Nyquist* opinion itself provides for this distinction in an important footnote that reserves the question of whether public assistance provided "without regard to the . . . public-nonpublic nature of the institution benefited"—such as the G.I. Bill, 38 U.S.C. § 1651—would violate the Establishment Clause. *Nyquist,* 413 U.S. at 782 n.38. This distinction is superficial, especially as applied to the tax deduction program in *Mueller,* the program that most resembles a voucher program. As the dissent in *Mueller* argued, while tax deductions for "gym clothes, pencils, and notebooks" were available to parents who sent their children to both public and private schools, deductions for tuition were *not* available to the public school families. *Mueller,* 463 U.S. at 408-09. The "bulk of the tax benefits" were thus enjoyed by parents whose children attended nonpublic schools, most of which chose to send their children to religious schools. *Id.* at 409.

[319] Church of Lukumi Babalu Aye, v. City of Hialeah, 113 S. Ct. 2217, 2227-28 (1993) (analyzing disparate impact of facially neutral law as involving a "religious gerrymander"); United States Supreme Court Official Transcript at 12, Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510 (1995) (No. 94-329) (argument by petitioner's attorney that parochial aid cases were decided on basis of disproportionate benefit for religious schools).

[320] *Nyquist,* 413 U.S. at 783. On the other hand, the *Mueller* Court and the majority in *Witters,* without expressly overruling *Nyquist,* rejected the "religious gerrymander" approach, holding that the key inquiry is whether the aid is "neutrally available" to recipients, not whether most of the beneficiaries are religious based on statistical analysis. *Mueller,* 463 U.S. at 401. As Professor McConnell points out, the actual majority opinion in *Witters* is represented by Justice Powell's concurrence, which rejected as a factor disproportionate benefits to religious schools and "expressed the controlling principle as follows: 'state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate'" the Establishment Clause. McConnell, *Multiculturalism and Choice, supra* note 103, at 145 (quoting *Witters,* 474 U.S. at 490-91; *id.* at 490 (White, J., concurring); *id.* at 493 (O'Connor, J., concurring)). Justice Marshall's opinion in *Witters* had specifically distinguished *Nyquist* on grounds that *Nyquist* involved a situation where a majority of schools were religious, whereas in *Witters,* a large portion of the vocational rehabilitation choices were not religious. *Witters,* 474 U.S. at 488. The fact that a majority of beneficiaries were not religious but instead represented a diverse array of perspectives was a factor in upholding the governmental provision of building space and other benefits to religious groups in Widmar v. Vincent, 454 U.S. 263,

problem with this is that statistically most private schools in the nation are religious (81%) and most students who go to private schools go to religious ones (84%).[321]

Perhaps an even more significant barrier than *Nyquist* to equal distribution of educational resources is the "far stricter" dictates of many state constitutions.[322] Many state constitutions have provisions that specifically prohibit the appropriation of public money to religious activities and religious schools.[323] An example of one of the strictest[324] is the Washington State Constitution which provides in Art. I, Sec. 11 that:

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274 (1981), Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 275 (1990) (plurality), and Rosenberger v. Rector & Visitors of University of Virginia, 115 S. Ct. 2510, 2527 (1995) (O'Connor, J., concurring).

In *Mueller*, the taxpayers who challenged the tax relief program argued that the Court needed to consider the actual impact of the program. In 1978-79, 96% of children attending private schools in the state went to religious schools. Mueller v. Allen, 463 U.S. 388, 401 (1983). The actual "effect" of the program would be to aid sectarian instruction. *Id.* at 400-01. The Court refused to decide the case based on statistical evidence, stating, "we would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Id.* at 401. The Court recently affirmed the *Mueller* approach in Agostini v. Felton, 65 U.S.L.W. 4524, 4531 (U.S. June 23, 1997) (declining to invalidate aid program to students based on the number of religious students benefited).

[321] Heise, *supra* note 252, at 139.

[322] Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1121 (Wash. 1989) (quoting Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 489 (1986)). State constitutions are a "font of individual liberties" that can provide separate and, in some cases, greater protections than the federal constitution. Eugene C. Bjorklun, *Implementing the Equal Access Act and State Constitutional Provisions*, 74 EDUC. L. REP. 1, *1, 74 WELR 1 (1992) (quoting William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977)). For discussion of state establishment clause provisions, including how various state courts have interpreted these provisions to provide or not to provide stricter protections than the federal constitution, *see* Linda S. Wendtland, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625 (1985).

[323] Bjorklun, *supra* note 322, at *5. For example, Montana, Colorado, Idaho, Illinois, Missouri, Nebraska, South Dakota, Wyoming and Nevada prohibit direct and indirect appropriation of public funds for sectarian purposes. *Id.* Connecticut, North Carolina and Wyoming require that funds appropriated for education be used exclusively for public schools. *Id.* New York, Massachusetts and Minnesota ban the use of public money in schools where denominational tenets are taught. *Id. See also* Wendtland, *supra* note 322, at 631-34 (analyzing state constitutional provisions that prohibit aid to nonpublic sectarian schools, as well as other types of state "establishment clause" provisions).

[324] Larson, *supra* note 259, at 45. Three states, Arizona, Utah and Oklahoma, have provisions similar to Washington's constitution. Bjorklun, *supra* note 322, at *5.

> No public money or property shall be appropriated or *applied to* any religious worship exercise or *instruction*, or the support of any religious establishment.[325]

Applying these provisions, the Washington Supreme Court in *Witters* on remand from the U.S. Supreme Court held that the provision of aid to the blind student who sought to attend a Christian college was unconstitutional.[326] The court reasoned that the state constitution, unlike the U.S. Constitution, prohibited "the *application* of public funds to religious instruction."[327] Thus, even if government aid to religion is indirect, resulting from the genuinely private choice of a Washington state citizen, it is an unconstitutional benefit to religion.[328]

3. A tale of two cities

Two cities—Cleveland, Ohio, and Milwaukee, Wisconsin—have attempted to implement voucher programs that include religious schools.[329] Both programs were implemented in response to very real crises in the public school systems—high drop-out rates (14.4% of high school students in Milwaukee), low graduation rates, and extremely poor academic performance.[330] Both

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[325] Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1121 (Wash. 1989) (quoting WASH. CONST. art. I, § 11).

[326] *Id.* at 1121-22.

[327] *Id.* at 1122.

[328] The Hawai'i State Supreme Court has reached a similar conclusion based on the Hawai'i constitutional provision which provides that no public funds shall be "appropriated for the support or benefit of any sectarian or private educational institution." HAW. CONST. art. X, § 1. In Spears v. Honda, 51 Haw. 1, 12, 449 P.2d 130 (1968), the Hawai'i Supreme Court held that a bus transportation subsidy given to private sectarian and non-sectarian school students violated this constitutional prohibition. *Id.* at 5-13, 449 P.2d at 133-39. The court reasoned that the Constitutional Convention of 1950 rejected an indirect aid theory, termed the "child benefit" argument, that the bus subsidy benefited the school children themselves, not the nonpublic educational institutions that they attended. *Id.* at 5-9, 449 P.2d at 133-38. The court reasoned that the subsidy program "does 'build up, strengthen and make successful'" the nonpublic schools by "induc[ing] attendance at nonpublic schools, where the school children are exposed to a curriculum that, in many cases, if not generally, promotes the special interests and biases of the nonpublic group that controls the school" and by paying funds to transportation "carriers owned by nonpublic schools or agents thereof." *Id.* at 13, 449 P.2d at 137-38.

[329] Jackson v. Benson, No. 95 CV 1982, No. 95 CV 1997, No. 96 CV 1889, slip op. (Wis., Jan. 15, 1997); Gatton v. Goff, No. 96 CVH-01-721, slip op. (Ohio, July 31, 1996).

[330] Gatton v. Goff, No. 96 CVH-01-721, slip op. at 2 (Ohio, July 31, 1996). Jackson v. Benson, No. 95 CV 1982, No. 95 CV 1997, No. 96 CV 1889, slip op. at 4-5 (Wis., Jan. 15, 1997). In 1989, in Milwaukee, "of those who did graduate within six years in 1989, more than one third did so with a 'D' average." *Id.* at 5.

favored low income families in their distribution of assistance.[331] Both allowed parents to send their children to "pervasively religious" schools, but made sure that the payment was made primarily to the parents and not the schools.[332] Significantly, the Cleveland program also gave parents the option of expending their voucher at *public* schools in districts adjoining the Cleveland district.[333]

When both programs were challenged in their respective state courts, however, two very different opinions were handed down. The Milwaukee program was held to be an unconstitutional violation of the Wisconsin State establishment clause in January of 1997. The circuit court, holding pursuant to prior Wisconsin cases that the "no benefit" and "compelled support" clauses

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[331] The Milwaukee program was only available to a certain percentage of the student population based on the level of income of the student's family. Jackson v. Benson, No. 95 CV 1982, No. 95 CV 1997, No. 96 CV 1889, slip op. at 5-6 (Wis., Jan. 15, 1997). The Cleveland program gave greater scholarships to families with less income and required that participating schools not charge low-income families tuition in excess of 10% of the scholarships they received. Gatton v. Goff, No. 96 CVH-01-721, slip op. at 4 (Ohio, July 31, 1996).

[332] In Milwaukee, the checks are made payable to the parents, but sent to the school. The parents then restrictively endorse the checks to the school. Jackson v. Benson, No. 95 CV 1982, No. 95 CV 1997, No. 96 CV 1889, slip op. at 7 (Wis., Jan. 15, 1997). The Cleveland program is essentially the same for private schools but if the parent elects to send her child to a public school in an adjacent district, the check is made payable to the school. Gatton v. Goff, No. 96CVH-01-721, slip op. at 5 (Ohio, July 31, 1996).

The *Jackson* court noted that in the 1995-96 school year, of the 122 participating private schools, 89 were sectarian and 33 nonsectarian. Jackson v. Benson, No. 95 CV 1982, No. 95 CV 1997, No. 96 CV 1889, slip op. at 10 (Wis., Jan. 15, 1997). The court also extensively quoted from the mission statements and literature of many of the participating religious schools, noting that religious and secular missions were thoroughly integrated. *Id.* at 10-13. For example, at The Lutheran Chapel of The Cross Church and School, "[r]eligion is not only taught as a subject, but ou[r] teachers have been trained to integrate God's Word across the curriculum . . . . Our curriculum offerings place Christ as the focal point for all study." *Id.* at 11-12 (quoting parties' Agreed Upon Statement of Facts). The Clara Muhammad School sought to "foster within each student the principle of submissions to the will of Allah (God) as the essential element in achieving human excellence." *Id.* at 11.

Similarly, in Cleveland, the majority of the scholarships would be used by students at religious schools. Gatton v. Goff, No. 96 CVH-01-721, slip op. at 9-10 (Ohio, July 31, 1996). The Cleveland program imposed few content-based requirements on participating schools, requiring that they "meet all state minimum standards for chartered nonpublic schools." *Id.* at 3. The program also required that participating schools "not discriminate on the basis of race, religion, or ethnic background" and "not advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." *Id.*

[333] Gatton v. Goff, No. 96 CVH-01-721, slip op. at 4-5 (Ohio, July 31, 1996).

of the Wisconsin constitution[334] provided stricter restrictions than the federal constitution,[335] rejected the indirect aid theory and stated:

> It can hardly be said that [the program] . . . does not [provide] direct aid to the sectarian schools. Although the U.S. Supreme Court has chosen to turn its head and ignore the real impact of such aid, this court refuses to accept that myth. Millions of dollars would be directed to religious institutions that are pervasively sectarian with a clear mission to indoctrinate Wisconsin students with their religious beliefs . . . . [T]he state cannot do indirectly what it cannot do directly.[336]

The program, however, was constitutionally valid as to non-religious private schools under the "public purpose" clause of the Wisconsin Constitution.[337]

The Ohio Court of Common Pleas reached a different conclusion regarding the Cleveland voucher ("scholarship") program in July of 1996.[338] Following the indirect aid cases, the court was "persuaded that the nonpublic sectarian schools participating in the scholarship program are benefited only indirectly and purely as the result of the 'genuinely independent and private choices of aid

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[334] WIS. CONST., art. I, § 18, *cited in* Jackson v. Benson, No. 95 CV 1982, No. 95 CV 1997, No. 96 CV 1889, slip op. at 15 (Wis., Jan. 15, 1997). The "compelled support" clause states: "[No] person [shall] be compelled to attend, erect or support any place of worship, or to maintain any ministry without consent;" and the "no benefit" clause states that "[no] money [shall] be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." *Id.*

[335] Jackson v. Benson, No. 95 CV 1982, No. 95 CV 1997, No. 96 CV 1889, slip op. at 26 (Wis., Jan. 15, 1997).

[336] *Id.* at 28. The court used the *Lemon* test from federal Establishment Clause doctrine (although interpreted in a stricter manner under the Wisconsin state anti-establishment clauses). *Id.* at 15-16. The Milwaukee Choice Program was held violative of the second prong of *Lemon* in that it had the primary effect of advancing religion under three criteria set forth by the court:

> 1) [Did] the legislation provide aid to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religion mission or it funds a specifically religious activity in an otherwise substantially secular setting[?]
> 2) [Did] the legislation provide for *direct* governmental aid to a sectarian institution[?]
> 3) Who are the primary beneficiaries of this funding[?]

Id. at 16 (footnotes and citation omitted). The court found that the program violated all three of these criteria. As for the third inquiry, even though parents would benefit from the voucher program, the court simply stated that the primary beneficiaries of the funding were the religious schools because the aid "provide[d] an inducement to the parents to send their children to the religious schools" which comprised "89% of the private schools in the city of Milwaukee . . . . Millions of dollars would pour into their coffers, greatly enriching their ability to fulfill their religious missions." *Id.* at 29.

[337] *Id.* at 45-46.

[338] The Ohio Court of Appeals overruled the lower court's opinion on May 1, 1997 while this Article was in the final stages of being completed for publication.

recipients.'"[339] The court noted that there was "no authority for the proposition" that the Ohio establishment clauses "provide[d] greater protections than the Establishment Clause of the First Amendment."[340] Significant to the court's analysis was the fact that parents could expend the scholarships at both private schools *and* public schools in districts adjoining the Cleveland district.[341]

The rulings of both Ohio and Wisconsin courts have been appealed. The two opinions, however, represent the different approaches that courts may take. If state precedent provides for stricter protections in a state constitution, the voucher program will likely be struck down. If the state constitutional protections are more or less the same as federal protections, on the other hand, the court may apply the indirect aid cases to uphold the program. This is especially true if the particular program tries to avoid being squeezed into the mold of *Nyquist* by providing for benefits to those who attend both public and private schools.

VII. CONCLUSION

What kind of educational system best serves the foundational principles of a constitutional system that claims to cherish religious liberty—especially the liberty of parents to educate their children in religious values and beliefs free from governmental coercion?

The traditional answer has been a public education curriculum that is free from religious teaching. By confining instruction to only secular subjects, schools can remain "neutral" toward religion and avoid infringing on the liberty of religious parents by leaving religious teaching to the private sphere of home and church. As this Article has demonstrated, however, the present educational system that is based on these principles has an inherent tendency to be hostile toward traditional religious believers.

The public school curriculum teaches religiously-contested matters from a solely secular perspective. Secular ideological answers to the "Big Questions" are privileged, while religious ones marginalized, resulting in the nurturing of a secular mentality and worldview in children "which is indifferent at best, but often hostile in fact, to religious ways of making sense of the world."[342] While the teaching of secular ideologies in schools does not amount to a violation of

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[339] Gatton v. Goff, No. 96 CVH-01-721, slip op. at 27 (Ohio, July 31, 1996) (quoting Witters v. Wash. Dept. of Servs for the Blind, 474 U.S. 481, 488 (1986)). Like *Jackson*, the *Gatton* case was decided under the "primary effects" prong of *Lemon*. The parties did not argue that the program had an invalid religious purpose of aiding religious schools. *Id.* at 15.

[340] *Id.* at 30.

[341] *Id.* at 25.

[342] Nord, *supra* note 12, at 447.

the Establishment Clause, it does encroach on a domain that has traditionally been reserved for families—the shaping and directing of the fundamental beliefs and values of children. Because of the strong power of the classroom environment to influence the development of these basic beliefs in children, the present system has an inherent tendency to place parents and the public school in the position of adversaries. And because education is compulsory and the state refuses to fund private religious schooling, for many parents, this state of affairs is inevitable. This situation is antithetical to a constitutional system that claims to protect the paramount rights of parents to instill religious values and teaching in their children, free from coercive "standardization" by the state.

The only way to rectify this inherent tendency towards hostility is to provide parents with the meaningful capacity to choose alternative instruction for their children. Within the public schools, this means a constitutional right to "opt out" of religiously offensive classes and assignments. Contrary to the teaching of *Mozert*, coercing children to learn material that the parents' religious convictions require that they keep the children from learning does constitute a burden on their free exercise of religion. Once a burden is found, very little educational interests justify imposing the burden. The State's interests in teaching fundamental values and preparing children for society are either not compelling or can be served by less intrusive alternatives.

The ideal means of protecting the religious liberty of parents is to provide them with a meaningful capacity to choose alternate schooling with a system of educational vouchers. An educational choice system is far from non-controversial. As this Article has argued, however, the benefits of educational pluralism outweigh the risks. The risks of market-dysfunction can be addressed by regulation that ensures students are provided with basic and adequate education that does not depart too far from democratic values, and a pluralistic educational system may serve the core values of the American constitutional system better than the present system.

The chief barrier to educational choice is the notion that the Constitution strictly forbids government monetary support of religious teaching. The "indirect aid" cases, however, have eroded this barrier, holding that when government aid goes to religious schools "as a result of the genuinely independent and private choices of" individual citizens,[343] and the aid is neutrally available to a broad range of beneficiaries both religious and non-religious, there is no violation of the Establishment Clause.

To hold that the Constitution requires denying parents the capacity to choose alternative religious education—as may be the approach of state courts such as the *Jackson* court—has the practical effect of leaving many parents with no option but to send their children to public schools, where the "educational

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[343] Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 488 (1986).

experience that will 'shape and form'" their spiritual and intellectual beliefs "is set by the state."[344] This result is inimical to the most fundamental principles of a Constitution which guarantees, at a minimum, the "right of every person to freely choose his own course with reference" to "religious training, teaching, and observance" "free of any compulsion from the State."[345]

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[344] Kane, *supra* note 15, at 54.

[345] School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 222 (1963).

Should The Right To Die Be Protected? Physician Assisted Suicide And Its Potential Effect On Hawai'i

I. INTRODUCTION

> As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, . . . [b]ut there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like . . . .[1]

In 1854, John Stuart Mill asserted an absolute right to privacy where others are not harmed,[2] forming the implicit basis of the concept of privacy found within the United States Constitution.[3] However, the United States Supreme Court has not followed Mill's philosophy in the absolute.[4] There are some areas where the Court will retain jurisdiction, even where the conduct does not adversely affect others.[5] For instance, the Court does not allow consenting adults to practice homosexual sodomy within the privacy of the home,[6] prohibits the use of illegal drugs within the privacy of the home,[7] and prohibits an individual from destroying his draft card in any circumstance.[8] However, the Court has recognized the right to personal autonomy in such areas as child

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[1] JOHN STUART MILL, UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 177 (E.P. Dutton & Co., Inc. 1951) (1854).

[2] *Id.*

[3] *See* Amy L. Wax, *The Two Parent Family in the Liberal State: The Case for Selective Subsidies*, 1 MICH. J. RACE & L. 491, 522 (1996) (arguing that the Supreme Court's jurisprudence in the area of privacy "appears to have been influenced—if not actively informed—by some version of Mill's idea of the division between self-regarding and public conduct."); Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 491 (1983) (arguing that the problems with Mill's philosophy are minor when compared with the implicit policies of the Supreme Court).

[4] *See* Bowers v. Hardwick, 478 U.S. 186, 195-96 (1986) (holding that there is no fundamental privacy right to practice homosexual sodomy).

[5] *See infra* notes 6-8 and accompanying text.

[6] Bowers v. Hardwick, 478 U.S. 186, 195-96 (1986).

[7] Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 890 (1990).

[8] *See* United States v. O'Brien, 391 U.S. 367, 382 (1968) (holding that a statute prohibiting the destruction of a draft card in any situation is constitutional).

rearing,[9] birth control,[10] abortion,[11] and the right to die.[12] Recent developments in the area of physician assisted suicide have once again raised questions as to exactly how far the Constitution protects an individual's privacy right,[13] and whether Mill's philosophy should control.

Dr. Jack Kevorkian, a staunch public proponent and practitioner of assisted suicide, is a prime example of both the benefits and the potential danger of physician assisted suicide. While some may call him an "angel of mercy,"[14] others call him "a crackpot who has no respect for human life."[15] He has helped a number of people in unbearable pain,[16] but he has also made some very questionable decisions. For instance, Judith Curren flew to Michigan with

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[9] *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (holding that parents have a liberty interest in child rearing).

[10] *See, e.g.*, Carey v. Population Services Int'l, 431 U.S. 678, 685-86 (1977) (holding that minors have a privacy interest in obtaining contraceptives); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding that unmarried persons have a privacy right to use contraceptives); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (holding that married persons have a protected privacy right to use contraceptives).

[11] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 163 (1972) (holding that a woman's right to terminate her pregnancy falls within a privacy right); Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 901 (1992) (affirming *Roe* in terms of finding a privacy right).

[12] *See, e.g.*, Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 278 (1990) (holding that there is a liberty interest in refusing unwanted medical treatment).

[13] *See* Compassion in Dying v. State of Wash., 79 F.3d 790, 837 (9th Cir.) (striking down a statute banning assisted suicide), *cert. granted sub nom.* Washington v. Glucksberg, 117 S. Ct. 37 (1996); Quill v. Vacco, 80 F.3d 716, 724 (2d Cir.) (striking down a statute banning assisted suicide), *cert. granted*, 117 S. Ct. 36 (1996). The United States Supreme Court will hear these two cases in the 1996-97 term. Washington v. Glucksberg, 117 S. Ct 37 (1996); Vacco v. Quill, 117 S. Ct. 36 (1996).

[14] *See* Bill Hutchinson & Mark Mueller, *Her Final Hours Suicide Patient Begged Kevorkian To Let Her Die*, BOSTON HERALD, Aug. 21, 1996, at 1. One advocate sees him "as a loving person who is willing to risk his own self to help people out of their misery . . . ." Julia Prodis, *Suicide Doctor Emotional, Surprised Over Notoriety*, L.A. DAILY NEWS, Apr. 24, 1994, at U3.

[15] *See* Sheryl McCarthy, *A Case That Could Stop Kevorkian Cold*, NEWSDAY, Aug. 22, 1996, at A52. Additionally, former Surgeon General C. Everett Koop referred to Kevorkian as a "serial killer." Michael Vitez, *Friend of Kevorkian Struggles with Decision*, BUFFALO NEWS, Jan. 15, 1997, at A8. An anti-abortion advocate referred to him as "[S]atan himself," and thinks that "50 years from now when everyone can look at it more clearly and see the effects of what he's done, he will not go down as a hero, he'll go down as Hitler." Prodis, *supra* note 14, at U3.

[16] *See* Simon Pristel, *Grateful Mother Says Kevorkian Was a Godsend For Her Son*, BOSTON HERALD, Aug. 21, 1996, at 008; Bill Hutchinson & Mark Mueller, *supra* note 14, at 1; Lisa Zagaroli, *Michigan Doctor Backs Kevorkian's Crusade*, DETROIT NEWS, Jul. 30, 1996, at A1; Mantosh Singh Devji, *The Ailing Should Die on Their Own Terms*, ARIZONA REPUBLIC, Mar. 24, 1996, at H3.

her husband to obtain assistance in committing suicide from Dr. Kevorkian.[17] She was depressed, overweight, but not terminally ill.[18] Although she had chronic fatigue syndrome, she may have benefited from proper psychiatric care.[19] After the suicide, Dr. Kevorkian was "startled" to learn that Judith Curren was a victim of spousal abuse at the hands of her husband,[20] who also consulted with Kevorkian about the suicide.[21] However, Dr. Kevorkian still shows an almost arrogant contempt of the law,[22] referring to the Justices of the Supreme Court as "nine religious kooks."[23]

Dr. Kevorkian may advocate Mill's philosophy of personal autonomy, but he follows his own rules in his own fashion, creating an enormous potential for abuse and mistake. However, with the introduction of new technologies and diseases, in some instances death can become a very painful, and therefore personal experience.[24] Physician assisted suicide serves the legitimate purpose of providing suffering patients a means to end their pain.[25]

Although Kevorkian has assisted patients without regard to any established legal standard,[26] this article centers on the narrow issue of whether a mentally competent, terminally ill adult has a constitutional right to determine the time and manner of his death.[27] Part II provides necessary background information

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[17] Ann E. Dolan, *Abuse History Eyed in Suicide Probe Prosecutors Turn to Kevorkian*, BOSTON HERALD, Aug. 19, 1996, at 1.

[18] McCarthy, *supra* note 15, at A52.

[19] *Id.*

[20] *Kevorkian "Startled" By Abuse Reports; Woman Who Committed Suicide Had Accused Her Husband Of Assault*, N.Y. TIMES, Aug. 18, 1996, at A60. Kevorkian later said that he might not have helped her had he known of the abuse. *Domestic-Abuse Allegations Surround Latest Kevorkian Suicide*, SAN DIEGO UNION-TRIB., Aug. 16, 1996, at A11.

[21] McCarthy, *supra* note 15, at A52.

[22] Kevorkian has yet to be convicted, even after numerous prosecution attempts. *New Prosecutor Cites Futility, Drops Case Against Kevorkian*, DALLAS MORNING NEWS, Jan. 11, 1997, at 1A.

[23] *Kevorkian Scorns Court as a Forum On Suicide*, BOSTON GLOBE, Jan. 6, 1997, at A7.

[24] *See* Jeremy A. Sitcoff, *Death With Dignity: AIDS and a Call for Legislation Securing the Right to Assisted Suicide*, 29 J. MARSHALL L. REV. 677, 710 (1996) (noting that the "horrible and painful physical and emotional suffering associated with assisted suicide" provides "compelling arguments in favor" of assisted suicide).

[25] *See* Sitcoff, *Death with Dignity*, *supra* note 24, at 710 (arguing that the decision to seek assisted suicide is "ultimately a rational choice . . . .").

[26] *See Kevorkian Aids Woman's Suicide Shortly After Police Detain Him; Illinois Resident Suffered from Lou Gehrig's Disease*, BALTIMORE SUN, Oct. 18, 1996, at 12A; Jim Irwin, *Kevorkian Aids 36th Amid Dispute On 35*, FRESNO BEE, Aug. 21, 1996, at A4; *Kevorkian Accused of Carelessness*, TIMES UNION, Aug. 20, 1996, at A5; Thomas Maier, *Autopsies Challenge Mission of Kevorkian*, TIMES UNION, Aug. 12, 1996, at A1.

[27] The Ninth and Second Circuits addressed this issue, and found a constitutionally protected right for mentally competent, terminally ill patients to self administer lethal medication. Compassion in Dying v. State of Wash., 79 F.3d 790, 837 (9th Cir.), *cert. granted*

on the issue of assisted suicide. Part III evaluates the constitutionality of physician assisted suicide under the Fourteenth Amendment Due Process Clause. Part IV discusses physician assisted suicide under Hawai'i law. Finally, Part V concludes that assisted suicide is not an absolute or fundamental right, but invokes constitutional protection which must be recognized by the courts.

II. BACKGROUND

Physician assisted suicide encompasses acts where the physician merely provides the means for the patient to self administer the lethal agent,[28] at the patient's request.[29] As such, physician assisted suicide specifically involves aiding, rather than causing, a person to commit suicide.[30] Aiding and causing are two distinct forms of action.[31] Aiding entails self administration of lethal procedures by the patient, while causing entails administration of lethal procedures by the physician.[32]

Assisted suicide may encompass a broad category of patients,[33] but this article evaluates the constitutional interests of the narrow category of terminally ill, mentally competent adults. Although some critics assert that the phrase "terminally ill" is overly vague,[34] the term can be legally defined for the purposes of constitutional analysis.[35] A common definition restricts the group to those determined to have less than 6 months to live.[36] Similarly, the term "mental

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sub nom. Washington v. Glucksberg, 117 S. Ct. 37 (1996); Quill v. Vacco, 80 F.3d 716, 727 (2d Cir.), *cert. granted*, 117 S. Ct. 36 (1996).

[28] *Compassion in Dying*, 79 F.3d at 832; *Quill*, 80 F.3d at 730.

[29] *Compassion in Dying*, 79 F.3d at 797; *Quill*, 80 F.3d at 730-31. If the physician makes the decision, then the practice is commonly referred to as "euthanasia." *Compassion in Dying*, 79 F.3d at 832 n.120; *Quill*, 80 F.3d at 730 n.3.

[30] *Compassion in Dying*, 79 F.3d at 797; *Quill*, 80 F.3d at 731. *See also infra* part IV.A. If the physician administers the medication, the practice is commonly called physician-aid-in-dying. *Compassion in Dying*, 79 F.3d at 832 n.119.

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

[32] *See infra* part IV.A; Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 328 (1985).

[33] Yale Kamisar, *Against Assisted Suicide—Even a Very Limited Form*, 72 U. DET. MERCY L. REV. 735, 752 (1995) [hereinafter Kamisar, *Against Assisted Suicide*] (explaining that in the Netherlands, "the practice has been extended to the terminally ill, chronically ill, and even the psychologically distressed.").

[34] *Compassion in Dying*, 49 F.3d at 593.

[35] *Compassion in Dying*, 79 F.3d at 831. *See also* Quill v. Vacco, 80 F.3d 716, 731 n.4 (2d Cir.), *cert. granted*, 117 S. Ct. 36 (1996).

[36] *Compassion in Dying*, 79 F.3d at 796 n.4; Lee v. State of Or., 891 F. Supp. 1429, 1432 (D. Or. 1995).

competence" can be defined.[37] A statute in Oregon legalizing assisted suicide requires that a patient have the "ability to make and communicate health care decisions to health care providers, including communication through persons familiar with the patient's manner of communicating if those persons are available."[38] As discussed in Part I, physician assisted suicide is subject to abuse,[39] and therefore cannot be permitted without limitation. For the purposes of constitutional analysis, these terms serve as valid definitional limits on the issue of whether assisted suicide invokes the protections of the Fourteenth Amendment's Due Process Clause.[40]

III. DUE PROCESS

The Due Process Clause states that no state may "deprive any person of life, liberty, or property, without due process of law . . . ."[41] To determine whether the Due Process Clause protects the practice of physician assisted suicide, three questions must be answered. The first is whether there is a liberty interest in the right to determine the time and manner of one's death; the second is whether a balancing test is appropriate, and the third is how the relevant interests of the state are balanced against the privacy interest of the patient.

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[37] Courts have developed several tests to determine mental competency. Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, 28 HOUS. L. REV. 15, 24 (1991). These tests include such factors as the patient's ability to make and express a decision, to understand the information disclosed about the treatment and alternatives to treatment, to rationally manipulate the available information, to appreciate the consequences of the decision, and to make a reasonable decision. *Id. See also* 41 AM. JUR. 2D *Incompetent Persons* § 1 (Interim Topic 1995) (listing cases which refer to tests to determine mental competency).

[38] OR. REV. STAT. 127.800 § 1.01 (1996).

[39] *See* Yale Kamisar, *The Reasons So Many People Support Physician-Assisted Suicide—And Why These Reasons Are Not Convincing*, 12 Issues L. & Med. 113, 114-18 (1996) [hereinafter Kamisar, *Reasons So Many People Support Physician-Assisted Suicide*].

[40] Interestingly, courts have not ruled that patients need to show suffering to receive assistance in suicide. *See Compassion in Dying*, 79 F.3d at 837; Quill v. Vacco, 80 F.3d 716, 727 (2d Cir.), *cert. granted*, 117 S. Ct. 36 (1996). Courts have only required that the patient be terminally ill. *Compassion in Dying*, 79 F.3d at 837; *Quill*, 80 F.3d at 731. While the requirement of terminal illness may decrease the state's interest in preserving life, the requirement of suffering would increase the individual's interest in requesting assistance in suicide. *See infra* part III.C. One journal discussed the possibility of instituting an "unbearable suffering" requirement in right to die legislation. Charles H. Baron et al., *A Model State Act to Authorize and Regulate Physician-Assisted Suicide*, 33 HARV. J. ON LEGIS. 1, 10 (1996).

[41] U.S. CONST. amend. XIV, § 1.

A. Liberty Interest

In the landmark case *Griswold v. Connecticut*,[42] the Supreme Court determined that there are privacy rights not specifically mentioned in the Constitution.[43] The Supreme Court determined that these privacy rights emanate from penumbras created by certain guarantees in the Bill of Rights.[44] Later, the Court found a right to privacy in the "liberty" portion of the Due Process Clause of the Fourteenth Amendment,[45] which provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[46] The privacy interest found in physician assisted suicide is very similar to the privacy interests found in two recent Supreme Court cases: *Cruzan v. Director, Missouri Department of Health*,[47] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[48]

1. *Cruzan*

In *Cruzan*, the Supreme Court found a constitutionally protected liberty interest in refusing unwanted medical treatment.[49] *Cruzan* involved the constitutionality of a right to withdraw artificial feeding and hydration equipment of a patient in a persistent vegetative state.[50] The Court held that the right to refuse unwanted medical treatment included removal of food and water received via artificial means, even though such removal would undoubtedly lead to death.[51] Factually, the conduct described in *Cruzan* and the conduct involved in physician assisted suicide are very similar. Both involve physician involvement which leads to the patient's certain death.[52] Thus, the Supreme Court has "necessarily recognize[d] a liberty interest in hastening one's own death."[53]

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[42] 381 U.S. 479, 483 (1965) (holding that there is a privacy interest in the right of married couples to use contraceptives).

[43] *Id.*

[44] *Id.* at 483.

[45] *See* Roe v. Wade, 410 U.S. 113, 153 (1972) (holding that a woman has a right to privacy in obtaining an abortion based on the Fourteenth Amendment).

[46] U.S. CONST. amend. XIV, § 1.

[47] 497 U.S. 261 (1990).

[48] 505 U.S. 833 (1992).

[49] 497 U.S. at 278.

[50] *Id.* at 266

[51] *Id.* at 267-68, 283.

[52] In fact, physician assisted suicide may actually involve more intrusive conduct by the physician. Physician assisted suicide entails merely aiding in a person's death, while withdrawal of nutrition and hydration entails causing a person's death. *See infra* part IV.A.

[53] Compassion in Dying v. State of Wash., 79 F.3d 790, 816 (9th Cir.), *cert. granted sub nom.* Washington v. Glucksberg, 117 S. Ct. 37 (1996).

Although the facts in *Cruzan* seem to justify physician assisted suicide, the Supreme Court's reasoning may be inapplicable. In *Cruzan*, the Supreme Court found a liberty interest in refusing unwanted medical treatment using the informed consent doctrine.[54] At common law, "even the touching of one person by another without consent was a battery, unless there was some legal justification."[55] Based on this right to bodily integrity, the Court reasoned that the "logical corollary of the doctrine of informed consent is that the patient generally possesses the right . . . to refuse treatment."[56]

The informed consent doctrine provides the patient with the right to refuse treatment, while assisted suicide necessarily entails the opposite, a right to receive treatment. Although factually similar, physician assisted suicide is legally distinguishable. Nevertheless, there is still a strong analogy between assisting suicide and refusing treatment. Both invoke the same result: physicians perform actions which will doubtlessly hasten the patient's death.[57] The only factual characteristic that distinguishes the two cases has to do with the differences between the active and passive roles taken by physicians. In the case of withdrawal of life support, the physician takes a passive role by allowing the patient to die naturally. In physician assisted suicide, the physician takes an active role by prescribing lethal medication for the patient to ingest, evoking the same result. In *Cruzan*, Justice Scalia discussed the artificiality of the active/passive distinction:

> It would not make much sense to say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide; or that one may not intentionally lock oneself into a cold storage locker, but may refrain from coming indoors when the temperature drops below freezing.[58]

2. *Casey*

In *Casey*, the Supreme Court decided the constitutionality of a Pennsylvania statute which placed restrictions on a woman's right to obtain an abortion.[59] The statute required informed consent prior to the abortion procedure.[60] Informed consent entailed a twenty four hour waiting period after receiving certain negative

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[54] *See* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 269 (1990) (holding that the informed consent doctrine necessarily entails a privacy right in refusing medical treatment).

[55] *Id.* (citing W. PAGE KEETON ET AL., PROSSER and KEETON ON LAW OF TORTS § 9, at 39-42 (5th ed. 1984)).

[56] *Id.*

[57] Compassion in Dying v. State of Wash., 79 F.3d 790, 815 (9th Cir.), *cert. granted sub nom.* Washington v. Glucksberg, 117 S. Ct. 37 (1996).

[58] *Cruzan*, 497 U.S. at 296 (Scalia, J., concurring).

[59] Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992).

[60] PA. CONS. STAT. § 3205 (1990).

information about abortions.[61] For a minor to obtain an abortion, the statute required the informed consent of the minor's parents,[62] with a provision for judicial bypass if the parents did not consent.[63] With certain exceptions, the statute required that a married woman obtain a signed statement indicating that she notified her husband of the intended abortion.[64] The statute exempted compliance with these requirements in the event of a medical emergency.[65] The Court upheld the constitutional validity of the 24 hour waiting period[66] and parental consent portions of the statute, but struck down the constitutionality of the spousal notification portion.[68]

In so ruling, the Supreme Court found a liberty interest in matters "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."[69] The Court determined that such choices are central to the liberty protected by the Fourteenth Amendment.[70] Similarly, the decision to end one's life during a debilitating illness is one of "the most intimate and personal choices that a person may make."[71] In comparing the right to privacy in physician assisted suicide and the right to privacy in abortion, it is consistent to find a liberty interest in determining the time and manner of one's death when one is afflicted with a terminal illness.

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[61] *Id.* § 3206.

[62] *Id.*

[63] *Id.*

[64] *Id.* § 3209. A married woman need not obtain a written statement indicating that her husband was notified of the intended abortion if she obtains a signed statement from her physician stating that:

> (1) [h]er spouse is not the father of the child; (2) [h]er spouse, after diligent effort, could not be located; (3) [t]he pregnancy is a result of spousal sexual assault as described in § 3128 (relating to spousal sexual assault), which has been reported to a law enforcement agency having the requisite jurisdiction; (4) [t]he woman has reason to believe that the furnishing of notice to her spouse is likely to result in the infliction of bodily injury upon her by her spouse or by another individual.

Id.

[65] PA. CONS. STAT. § 3203 (1990).

[66] Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 886-87 (1992).

[67] *Id.* at 899.

[68] *Id.* at 895.

[69] *Id.* at 851.

[70] *Id.*

[71] Compassion in Dying v. State of Wash., 79 F.3d 790, 813-14 (9th Cir.), *cert. granted sub nom.* Washington v. Glucksberg, 117 S. Ct. 37 (1996). In *Casey*, the Supreme Court reasoned that the "liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." 505 U.S. at 852. In *Compassion in Dying*, the Ninth Circuit observed that the suffering of the terminally ill patient is an experience unique to the human condition, and thus unique to the law, because the pain of dying is an experience that only the patient must bear. 79 F.3d at 834.

Hence, *Cruzan* shows that the Supreme Court has recognized a right to allow a patient to knowingly terminate his life under some circumstances.[72] *Casey* shows that the Court has recognized a valid liberty interest in being free from state intrusion where the physical pain must be endured by the individual alone in a wholly personal and private manner.[73] Thus, recent precedent supports the finding of a liberty interest in the context of physician assisted suicide.

B. *Appropriate Test*

Assuming a valid liberty interest, the next question is which test should be utilized. The Supreme Court has traditionally used either a rational basis or a strict scrutiny analysis for Due Process issues.[74] Under a rational basis analysis, the burden is on the individual to show that the restriction is not rationally related to some permissible state objective.[75] In contrast, the burden is on the state to show that the restriction is narrowly drawn to further some compelling state interest in a strict scrutiny analysis.[76] The Supreme Court applies the strict scrutiny test to fundamental privacy rights,[77] and the rational basis test to non-fundamental privacy rights.[78]

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[72] *See* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 278-79, 284 (1990) (holding that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment).

[73] *See* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 851-52 (1992) (holding that a woman has a privacy right to terminate her pregnancy, because a mother that carries a baby "is subject to anxieties, to physical constraints, to pain that only she must bear . . . .").

[74] *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 279 (1978) (subjecting a school's race based admissions policy to strict scrutiny).

[75] *See, e.g.*, Federal Communications Comm'n v. Beach Communications, Inc., 508 U.S. 307, 314-15 (1993) (holding a cable act to rational basis review); Barnes v. Glenn Theatre, Inc., 501 U.S. 560, 580 (1991) (Scalia, J., concurring) (arguing that morality is a sufficient rational basis to prohibit nude dancing). This test is traditionally used with economic due process, and is generally applied very leniently toward the government. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (holding that "legislative bodies have broad scope to experiment with economic problems . . . ."); Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) (holding that courts may not "strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.").

[76] Carey v. Population Services Int'l, 431 U.S. 678, 686 (1977) (holding that the state must show a compelling interest when infringes upon the fundamental decision of whether to bear a child); Roe v. Wade, 410 U.S. 113, 155 (1972) (holding that where fundamental rights are involved, the state needs to show a compelling interest).

[77] *Carey*, 431 U.S. at 686 (concerning the use of contraceptives); *Roe*, 410 U.S. at 155 (concerning the right to terminate a pregnancy).

[78] *Beach Communications*, 508 U.S. at 313; *Barnes*, 501 U.S. at 580 (1991) (Scalia, J., concurring) (holding that statute limiting nude dancing is subject to rational basis review); Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (holding that a homosexual's right to practice sodomy is subject to rational basis review).

The two-tier system of review is largely outcome determinative in that the result of the analysis is dictated by the test used.[79] Rational basis severely favors the government,[80] while strict scrutiny severely favors the individual.[81] Accordingly, the Supreme Court has explicitly developed a three-tier system of review in the right to vote context.[82] Under this three-tier system, strict scrutiny review is used for severely burdensome restrictions, and a rational basis review is used for minimally burdensome restrictions.[83] A balancing test is used when the government imposes moderately burdensome restrictions involving particularly legitimate objectives on the part of both the individual and the government.[84] The Court utilized this three-tier system because the right to vote is so vital,[85] and it would be unfair to restrict review to a construction which disproportionately favors one side when both the government and the individual have strong interests to protect.[86] In the case of physician assisted suicide, there are very strong interests on both sides of the issue,[87] and thus a balancing test is proper.

Although physician assisted suicide would not warrant finding a fundamental right,[88] it does warrant finding a liberty interest.[89] The Supreme Court has applied a balancing test to situations which involve non-fundamental liberty interests. In *Youngberg v. Romeo*,[90] the Court determined that the liberty interest in an

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[79] *See* Dandridge v. Williams, 397 U.S. 471, 520 (1970). Justice Marshall wrote the first critique of the two-tier approach (rational basis v. strict scrutiny). *Id.* Justice Marshall criticized the arbitrary nature of the two-tier system, and proposed a balancing test. *Id.* In Burdick v. Takushi, Justice White discussed the unfairness of using only the strict scrutiny and rational basis analyses. 504 U.S. 428, 433 (1992).

[80] *See* Railway Express v. New York, 336 U.S. 106, 109 (1949) (upholding a New York City regulation prohibiting advertising on certain vehicles). The Supreme Court has ruled that the individual may only prevail under the rational basis standard where the governmental regulation is "palpably false." *Id.* Additionally, the Court ruled that it is not for the judiciary to look to the wisdom, fairness or logic of legislative choices when using a rational basis standard. *Beach Communications*, 508 U.S. at 313.

[81] *See* Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (characterizing the strict scrutiny test as "strict in theory, but fatal in fact.").

[82] *Anderson v. Celebrezze*, 460 U.S. 780, 787-89 (1983) (striking down a statute mandating an early filing deadline for independent candidates).

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *See infra* part III.C.

[88] Both the Ninth and Second Circuits have declined to find a fundamental right in the context of assisted suicide. Compassion in Dying v. State of Wash., 79 F.3d 790, 803-04 (9th Cir.), *cert. granted sub nom.* Washington v. Glucksberg, 117 S. Ct. 37 (1996); Quill v. Vacco, 80 F.3d 716, 725 (2d Cir.), *cert. granted*, 117 S. Ct. 36 (1996). However, the Ninth Circuit did find a liberty interest. *Compassion in Dying*, 79 F.3d at 812.

[89] *Compassion in Dying*, 79 F.3d at 81.

[90] 457 U.S. 307, 309 (1982).

individual's freedom from bodily restraint outweighed the state's interests in preventing violence.[91] In *Mills v. Rodgers*,[92] the Court found a constitutionally protected liberty interest in the right of an involuntarily committed mental patient to refuse treatment by anti-psychotic drugs.[93] The Court declared that it would be appropriate to weigh the liberty interest of the individual against the interests of the state.[94] Additionally, in *Babbitt v. Planned Parenthood of Central and Northern Arizona*, the Supreme Court affirmed the judgment of the Ninth Circuit Court, which used a balancing test in the abortion context.[95]

Most importantly, courts have generally used a balancing test for right to die issues. In 1976, the New Jersey Supreme Court used a balancing test to determine that a person in a persistent vegetative state had a privacy right to terminate all extraordinary medical procedures.[96] In 1977, the Supreme Court of Massachusetts used a balancing test to determine that a terminally ill person had a right to refuse medical treatment.[97] In 1983, the Washington Supreme Court used a balancing test to determine that a woman's privacy interests outweighed the state interests in continuing medical treatment.[98] In 1990, the Supreme Court used a balancing test to determine whether a surrogate could assert a person's right to refuse artificial hydration and nutrition.[99] Finally, in 1996, the Ninth Circuit determined that a balancing test is appropriate for the issue of physician assisted suicide.[100]

C. *Balancing the Interests*

The third and final question is whether the liberty interest in determining the time and manner of one's death outweighs the aggregate interests of the state in

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[91] *Id.* at 324.

[92] 457 U.S. 291 (1982).

[93] *Id.* at 302-03.

[94] *Id.* at 304.

[95] 479 U.S. 925 (1986) (mem.), *aff'g*, 789 F.2d 1348 (9th Cir. 1986).

[96] *In re* Quinlan, 355 A.2d 647, 664 (N.J. 1976), *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

[97] Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 425-26 (Mass. 1977).

[98] *In re* Coyler, 660 P.2d 738, 743 (Wash. 1983).

[99] Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 278-79 (1990).

[100] 79 F.3d 790, 799 (9th Cir.), *cert. granted sub nom.* Washington v. Glucksberg, 117 S. Ct. 37 (1996). As the majority in *Compassion in Dying* explained:

> We see the evolution in the Court's approach more as a recognition of the artificiality of the current classification system than as a fundamental change in the Court's practical approach to specific issues. So long as the liberty interest is an important one, the state must shoulder the burden of justifying any significant limitations it seeks to impose.

Id. at 804.

preventing assisted suicide. The state can assert many interests: preserving life,[101] preventing suicide,[102] avoiding undue influence from third parties,[103] protecting the poor and minorities from exploitation,[104] protecting children,[105] protecting the integrity of the medical profession,[106] avoiding the slippery slope,[107] and morality.[108] However, each interest is substantially diminished in the context of a mentally competent, terminally ill adult wishing to receive assistance in suicide.[109]

1. Preserving life

The state has a valid interest in preserving life.[110] However, in the case of a terminally ill patient, the state's interest is minimal.[111] The patient will only live a short while longer.[112] Further, patients with terminal diseases tend to suffer quite

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[101] *Compassion in Dying*, 79 F.3d at 816; Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 281-82 (1990); Gray v. Romeo, 697 F. Supp. 580, 588 (D.R.I. 1988).

[102] *Compassion in Dying*, 79 F.3d at 816; *Gray*, 697 F. Supp. at 588; *In re* Conroy, 486 A.2d 1209, 1224 (N.J. 1985).

[103] *Compassion in Dying*, 79 F.3d at 816; James Bopp, Jr. & Richard E. Coleson, *The Constitutional Case Against Permitting Physician-Assisted Suicide For Competent Adults with "Terminal Conditions"*, 11 ISSUES L. MED. 239, 246 (1995).

[104] *Compassion in Dying*, 79 F.3d at 825; Kamisar, *Against Assisted Suicide*, *supra* note 33, at 738.

[105] *In re* President and Directors of Georgetown College, 331 F.2d 1000, 1008 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964). *See also* Gray v. Romeo, 697 F. Supp. 580, 588 (D.R.I. 1988) (holding that the state has an interest in protecting innocent third parties from the emotional consequences of suicide); Holmes v. Silver Cross Hosp. of Joliet, Ill., 340 F. Supp. 125, 130 (N.D. Ill. 1972) (recognizing that the status of the dependents of a person refusing medical treatment due to religious reasons may influence the court's decision as to whether that person may so refuse).

[106] *Compassion in Dying*, 79 F.3d at 816; *Gray*, 697 F. Supp. at 588-89; *In re* Conroy, 486 A.2d 1209, 1224-25 (N.J. 1985).

[107] *Compassion in Dying*, 79 F.3d at 816-17; *see generally*, Yale Kamisar, *When is there a Constitutional "Right to Die"? When is there no Constitutional "Right to Live"?*, 25 GA. L. REV. 1203 (1991) (exhaustively developing the slippery slope argument) [hereinafter Kamisar, *When is there a Constitutional "Right to Live"?*].

[108] *See generally* Matthew Previn, *Assisted Suicide and Religion: Conflicting Conceptions of the Sanctity of Human Life*, 4 GEO. L.J. 589, 589 (1996) (explaining that morality does have legal significance).

[109] *See Compassion in Dying*, 79 F.3d at 837 (holding that the state interests are at a low point in the context of a terminally ill, mentally competent patient wishing to receive assistance in suicide).

[110] *Compassion in Dying*, 79 F.3d at 816; Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 281-82 (1990); Gray v. Romeo, 697 F. Supp. 580, 588 (D.R.I. 1988).

[111] *See Compassion in Dying*, 79 F.3d at 820 (holding that the state's interest in life diminishes significantly in the case of terminally ill patient).

[112] *Id.*

intensely.[113] Hence, the state's interest diminishes to nearly nothing for a life wrought in agony,[114] with only a few months to live.[115]

In *Cruzan*, The Supreme Court held that "a state may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life . . . ."[116] Thus, the Supreme Court determined that the state's interest in preserving a life deemed enjoyable is just as strong as the interest in a life deemed wretched and miserable. However, the position that the state has an unqualified interest in the preservation of any life is erroneous.[117] Quality of life and potential span of life are distinguishable. Quality of life is much harder to measure because it is subjective, while a more objective determination can be made for an individual's potential span of life.

When taken in context, the Supreme Court may not have wanted to define Nancy Cruzan's quality of life because such a determination is nearly impossible. Nancy Cruzan was in a persistent vegetative state. There were no allegations that she was in a constant state of pain. There was no way to obtain such evidence.[118] The Court noted that the state need not "make judgments"[119] about the quality of her life, and may "simply assert"[120] an unqualified interest. However, mentally competent patients seeking assistance in suicide can provide substantial evidence

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[113] *See* Compassion in Dying v. State of Wash., 850 F. Supp. 1454, 1456-57 (W.D. Wash. 1994) (graphically describing the suffering of the terminally ill plaintiffs), *rev'd*, 49 F.3d 586 (9th. Cir. 1995), *rev'd*, 79 F.3d 790 (9th Cir.), *cert. granted sub nom.* Washington v. Glucksberg, 117 S. Ct. 37 (1996); *see also infra* note 121.

[114] *See* Compassion in Dying v. State of Wash., 79 F.3d 790, 820 (9th Cir.), *cert. granted sub nom.* Washington v. Glucksberg, 117 S. Ct. 37 (1996) (holding that state's interest in preserving life is weakened when the terminally ill patients are suffering intensely); *In re* Severns, 425 A.2d 156, 158-59 (Del. Ch. 1980) (holding that "interest of the State in the preservation of human life is diminished in importance by the concomitant rise in the right of an individual, expressed through a guardian, to decline to be kept alive as a veritable vegetable."); *In re* Quackenbush, 383 A.2d 785, 789 (N.J. Super. Ct. 1978) (holding that the state has a lesser interest in preserving the life of a person without vibrant health).

[115] *Compassion in Dying*, 79 F.3d at 820; *In re* Farrel, 529 A.2d 404, 411 (N.J. 1987); Rasmussen v. Fleming, 741 P.2d 674, 683-83 (Ariz. 1987); Foody v. Manchester Memorial Hosp., 482 A.2d 713, 718-19 (Conn. Super. Ct. 1984).

[116] Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 282 (1990).

[117] In *Roe* and *Casey*, the Supreme Court found that the state interest in life increases or decreases as the potentiality of life increases or decreases. Roe v. Wade, 410 U.S. 113, 162-63 (1973); Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 868 (1992). Because the Supreme Court recognizes a decreased interest in the potentiality of human life, the Court should also recognize a decreased interest in the potential span of human life.

[118] *See Cruzan*, 497 U.S. at 266 (1990).

[119] *Id.* at 282.

[120] *Id.*

of human suffering.[121] Unlike patients in a persistent vegetative state, a more objective determination can be found. Thus, because the patient can make such a showing, the state's interest in preserving life must be analyzed in a substantially diminished form.[122]

2. *Prevention of suicide*

Another interest is in the prevention of suicide.[123] Although this category may seem identical to the state's interest in the preservation of life, it is actually a separate concern.[124] Psychologically or clinically depressed persons may wish to commit suicide, even though the depression or loneliness could be cured.[125] The interest in preventing suicide stems from a concern that people with treatable disorders may end up committing suicide.[126]

A person afflicted solely with clinical depression would not fit under the definition of terminally ill, because mere depression is not terminal.[127] Further, if a terminally ill adult has been diagnosed with an illness which will end his life within six months, the effectiveness of treatment for desperation, depression or loneliness is questionable because the depression usually stems from the illness itself.[128] Unlike a romantically devastated youth or a struggling alcoholic adult,

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[121] In *Compassion in Dying*, terminally ill patients provided such evidence. 850 F. Supp. 1454, 1456-57 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th. Cir. 1995), *rev'd*, 79 F.3d 790 (9th Cir.), *cert. granted sub nom.* Washington v. Glucksberg, 117 S. Ct. 37 (1996). One patient suffered from cancer which had spread throughout her skeleton, and experienced "constant pain, which bec[ame] especially sharp and severe when she move[d]." *Id.* at 1456. She also "suffer[ed] from swollen legs, bed sores, poor appetite, nausea and vomiting, impaired vision, incontinence of bowel, and general weakness." *Id.* Another patient suffered from AIDS, experiencing two bouts of pneumonia, severe skin and sinus infections, grand mal seizures, extreme fatigue, and a degenerative eye disease. *Id.*

Patients in Quill v. Vacco showed similar degrees of suffering. 80 F.3d 716, 720-21 (2d Cir.), *cert. granted*, 117 S. Ct. 36 (1996). The first patient suffered from a large cancerous tumor wrapped around her carotid artery in her neck, metastasizing her plural cavity, making any movement in the area extremely painful. *Id.* at 720. The second patient suffered from AIDS, causing severe fevers, diarrhea, lesions on the brain, and a degenerative eye disease. *Id.*

[122] *See Compassion in Dying*, 79 F.3d at 820 (holding that the state's interest in life is substantially diminished if the person it seeks to protect is terminally ill).

[123] *Id.*

[124] *Id.*; Gray v. Romeo, 697 F. Supp. 580, 588 (D.R.I. 1988); *In re* Conroy, 486 A.2d 1209, 1224 (N.J. 1985).

[125] *Compassion in Dying*, 79 F.3d at 820.

[126] *Id.*

[127] Although depression may cause suicide, one cannot die from depression alone. *See* CHARLES T. HALL, SOCIAL SECURITY DISABILITY PRACTICE § 7.37 (1996) (noting that depression is not fatal).

[128] *See* Julia Pugliese, Note, *Don't Ask—Don't Tell: The Secret Practice of Physician-Assisted Suicide*, 44 HASTINGS L.J. 1291, 1317 (1993) (arguing that the decision to commit

neither time nor treatment can cure a terminally ill patient.[129] Thus, the state's interest in preventing suicide is not applicable to the terminally ill.

3. Avoiding undue influence from family members

The state has an interest in protecting the terminally ill from pressure to commit suicide due to financial concerns.[130] Families may exert this pressure inadvertently,[131] or patients may decide for themselves that "it is better for them to die before their health care expenses consume the life savings they planned to leave for their families, or, worse yet, burden their families with debts they may never be able to satisfy."[132] Thus, the state interest in preventing financially motivated suicides involves not only the intentional influence by family members,[133] but also the unfortunate feelings of the terminally ill.[134]

However, the state's interest diminishes as the person enters the terminal stage of his life. The family will be less likely to pressure the terminally ill into dying because they know that the end is near. Also, the patient knows that he will not overly burden the family because he has only a short period to live. More importantly, the state is permitted to require the physician or other non-interested parties to make a determination on whether the patient is voluntarily requesting aid in suicide.[135]

4. Protecting the poor and minorities

The state has an interest in protecting both the poor and minorities from exploitation.[136] Opponents of assisted suicide rely heavily on this concern.[137] Ter-

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suicide is rational if there is no treatable component to the depression because it derives purely from the terminal illness).

[129] *Compassion in Dying*, 79 F.3d at 820.

[130] *Id.* at 826.

[131] Yale Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 MINN. L. REV. 969, 990 (1958) [hereinafter Kamisar, *Some Non-Religious Views*].

[132] *Compassion in Dying*, 79 F.3d at 826.

[133] Charles N. Manning, Note, *Live and Let Die?: Physician-Assisted Suicide and the Right to Die*, 9 HARV. J.L. & TECH. 513, 522 (1996).

[134] Kamisar, *Some Non-Religious Views*, *supra* note 131, at 990.

[135] *See* OR. REV. STAT. 127.820 § 3.02 (1996). The Oregon Death With Dignity Act requires that the physician make a determination on whether the requesting patient is voluntarily requesting suicide. *Id.* The act also requires a signed statement witnessed by a person with no pecuniary interest in the death of the patient. *Id.* § 2.02.

[136] *Compassion in Dying*, 79 F.3d at 825.

[137] *Compassion in Dying*, 79 F.3d at 852 (Beezer, J., dissenting); Compassion in Dying v. State of Wash., 49 F.3d 586, 592 (9th Cir. 1995), *rev'd*, 79 F.3d 790 (9th Cir.), *cert. granted sub nom.* Washington v. Glucksberg, 117 S. Ct. 37 (1996).

minally ill patients with less financial resources may feel more pressure to commit suicide.[138] Also, the poor and minorities may have decreased access to adequate pain therapy or counseling for depression, making them more likely to request assisted suicide.[139]

Opponents of abortion made similar arguments: the poor and minorities may be "persuaded to have too many abortions or would be forced to have them against their will."[140] Others have argued the opposite concern, that the poor are not allowed as much opportunity to obtain abortions as are the rich.[141] Assisted suicide is very similar, some argue that the poor would be committing suicide due to lack of funds,[142] while others argue that the poor would be precluded from obtaining assistance in suicide due to a lack of funds.[143] While it is questionable whether the poor and minorities would be disproportionately affected by the legalization of assisted suicide, the liberty interest in deciding when to die is real and substantial.

5. *Protecting children*

There is a state interest in protecting children from emotional and financial abandonment by the parent.[144] In many cases, the government has asserted this interest against a non-terminally ill parent who refused medical treatment due to

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[138] *See Compassion in Dying*, 79 F.3d at 852.

[139] Kamisar, *Against Assisted Suicide*, *supra* note 33, at 738.

[140] *Compassion in Dying*, 79 F.3d at 825.

[141] *Id.* at 825 n.99 (citing 42 U.S.C. § 300a-6, prohibiting the use of Title X grants in programs in which abortions are performed or abortion counseling offered). *Id. See also* Planned Parenthood Affiliates of Ohio v. Rhodes, 477 F. Supp. 529, 540 (S.D. Ohio 1979) (finding that the continuance of Ohio's restrictions on the funding of medically necessary abortions will cause irreparable harm to the plaintiffs, their patients, and the policies of the Social Security Act); Doe v. Rampton, 366 F. Supp. 189, 193 (D. Utah 1973) (state statute which would limit exercise of a right to an abortion by the poor in all trimesters for reasons having no apparent connection to the health of mother or child was unconstitutional).

[142] Compassion in Dying v. State of Wash., 49 F.3d 586, 592 (9th Cir. 1995), *rev'd*, 79 F.3d 790 (9th Cir.), *cert. granted sub nom.* Washington v. Glucksberg, 117 S. Ct. 37 (1996).

[143] *Compassion in Dying*, 79 F.3d at 825.

[144] *See In re* President and Directors of Georgetown College, 331 F.2d 1000, 1008 (D.C. Cir. 1964) (holding that because "the patient had a responsibility to the community to care for her infant," the state could force a woman to go through blood transfusions), *cert. denied*, 377 U.S. 978 (1964); Gray v. Romeo, 697 F. Supp. 580, 588 (D.R.I. 1988) (holding that the state has an interest in protecting innocent third parties from the effects of assisted suicide); Holmes v. Silver Cross Hosp. of Joliet, Ill., 340 F. Supp. 125, 130 (N.D. Ill. 1972) (holding that a balancing approach is appropriate in determining whether to require medical treatment against a person's religious beliefs, and noting that minor children play a factor in the balance); 22A AM. JUR. 2D *Death* § 599 (1996) (citing cases which mention the state's interest in protecting children); Kristine C. Karnezis, Annotation, *Patient's Right to Refuse Treatment Allegedly Necessary to Sustain Life*, 93 A.L.R. 3D § 4(c) (1979) (recognizing the state's interest in protecting third parties).

religious reasons.[145] In contrast, a terminally ill patient is unlikely to be of much financial support,[146] and at some point, the effect of watching the deterioration of the parent could become more emotionally harmful to the child than a quiet, dignified suicide.[147] Thus, in the case of a terminally ill patient, the state interest diminishes considerably because the dependents could only receive questionable financial support and emotional care, and only for a short duration.[148]

6. Integrity of the medical profession

The state has an interest in protecting the integrity of the medical profession.[149] One court characterized this interest as "an interest in not having physicians in the role of killers of their patients,"[150] and asserted that medical progress would suffer because a "physician's commitment to curing is the medical profession's commitment to medical progress."[151] However, doctors already take actions which will result in the death of their patients without suppressing medical progress. As discussed above, in certain situations a physician may withdraw life support systems which supply basic human needs, such as hydration and nutrition.[152] The physician is also permitted to provide drugs which will relieve the patient's pain, but at the same time shorten his life expectancy.[153] This so-called "double effect" is ethically acceptable even though the physician knows the consequences of administering the

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[145] *See, e.g., In re* President, 331 F.2d at 1008 (holding that because the state does not allow a person to abandon a child, it should not allow the "most ultimate of voluntary abandonments," the refusal of medical treatment); *Holmes*, 340 F. Supp. at 130 (noting the state's interest in protection of minor children in the context of a patient who wishes to refuse medical treatment); United States v. George, 239 F. Supp. 752, 754 (D. Conn. 1965) (noting the existence of minor children in the context of a patient who wishes to refuse medical children).

[146] In fact, the opposite concern is often cited, that the terminally ill patient will be a financial drain. Lee v. Oregon, 891 F. Supp. 1429, 1434 (D. Or. 1995); *see also* Margaret M. Penrose, Note, *Assisted Suicide: A Tough Pill to Swallow*, 20 PEPP. L. REV. 689, 725 (1993) (arguing that in "sheer monetary terms, assisted suicide should be a legal alternative to patients caught under the financial burden of terminal diseases.").

[147] *Compassion in Dying*, 79 F.3d at 827.

[148] *But cf.*, St. Mary's Hosp. v. Ramsey, 465 So. 2d 666, 667 (Fla. Dist. Ct. App. 1985) (holding that a patient with minor children may be compelled to receive medical treatment where he does not have an unreasonably short life expectancy).

[149] *Compassion in Dying*, 79 F.3d at 827; Gray v. Romeo, 697 F. Supp. 580, 588-89 (D.R.I. 1988); *In re* Conroy, 486 A.2d 1209, 1224-25 (N.J. 1985); *see also* Michael R. Fuller, Note, *Just Whose Life Is It? Establishing a Constitutional Right For Physician-Assisted Euthanasia*, 23 SW. U. L. REV. 103, 125 (1993) (noting that the state's interest in protecting the integrity of the medical profession is often asserted in California right to die cases).

[150] Compassion in Dying v. State of Wash., 49 F.3d 586, 592 (9th Cir. 1995), *rev'd*, 79 F.3d 790 (9th Cir. 1996), *cert. granted sub nom.* Washington v. Glucksberg, 117 S. Ct. 37 (1996).

[151] *Id.*

[152] Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 279 (1990).

[153] *Compassion in Dying*, 79 F.3d at 823 n.95.

drug.[154] Such practices place the physician in the role of "killers of their patients" in the same way as physician assisted suicide.

Although the Hippocratic Oath starts with an admonition to do no harm,[155] the medical profession no longer takes the oath literally,[156] and students rarely study the oath in medical ethics courses.[157] Also, the Supreme Court has also found that physicians need not follow the oath literally.[158] Thus, resolution of this issue properly falls to the American Medical Association and the physicians themselves. Doctors would not be forced to assist patients in suicide, but the option would be given to those doctors who wish to provide the such services. Similarly, the American Medical Association would not be precluded from establishing further guidelines to protect the integrity of the profession.

7. Avoiding the slippery slope

Opponents of assisted suicide suggest that if physicians are allowed to assist in suicide at all, more drastic forms of suicide will soon follow.[159] Professor Yale Kamisar has authored a comprehensive review of what he deems as the slippery slope the legal community has been sliding down in the last few years.[160] Professor Kamisar discusses how the slippery slope was started by two landmark cases, *In re Quinlan*,[161] where a patient in a persistent vegetative state was permitted to remove

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[154] *Id.*

[155] STEDMAN'S MEDICAL DICTIONARY 799 (26th ed. 1995). The relevant portion of the Oath declares: "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect." LUDWIG EDELSTEIN, ANCIENT MEDICINE: SELECTED PAPERS OF LUDWIG EDELSTEIN 6 (Owsei Temkin & C. Lilian Temkin eds., C. Lilian Temkin trans., Johns Hopkins University Press 1987)(1967).

[156] Todd David Robichaud, Note, *Toward a More Perfect Union: A Cause of Action for Physician Aid-in-Dying*, 27 U. MICH. J.L. REF. 521, 538 (1994). The 1980 version of the American Medical Association ethical code does not expressly assert a physician's obligation to keep patients from harm. THOMAS A. MAPPES & JANE S. ZEMBATY, BIOMEDICAL ETHICS 54 (3d ed. 1991). Instead, it requires, *inter alia*, that the physician provide "competent medical service with compassion and respect for human dignity." *Id.*

[157] Robichaud, *supra* note 156, at 538.

[158] The Hippocratic Oath explicitly prohibits providing "a woman an abortive remedy." EDELSTEIN, *supra* note 155, at 6. Thus, the Oath's prohibition on abortion clearly shows that the Supreme Court has not found that physicians must follow the Oath literally. *See* Roe v. Wade, 410 U.S. 133, 143-46, 164 (1972) (holding that the state may not infringe upon a woman's right to terminate a pregnancy until the state's interest becomes compelling).

[159] *See generally* Kamisar, *When is there a Constitutional "Right to Die," supra* note 107; David B. Erikson, *A Response to Commentary on Physician-Assisted Suicide—Killing Isn't Caring*, 9 UTAH B.J. 12, 15 (1996); Charles N. Manning, Note, *Live and Let Die?: Physician-Assisted Suicide and the Right to Die*, 9 HARV. J.L. & TECH. 513, 536 (1996).

[160] Kamisar, *When is there a Constitutional "Right to Die," supra* note 107.

[161] 355 A.2d 647 (N.J. 1976), *cert. denied sub nom.* Garger v. New Jersey 429 U.S. 922 (1976).

a respirator, and *Cruzan*,[162] discussed earlier. He then predicted that courts would slip down the slope further by allowing the withdrawal of natural feeding.[163]

Others argue that legalization of physician assisted suicide will eventually lead to physicians assisting healthy people in suicide.[164] Dr. Herbert Hendin provides an example of a Dutch case where a psychiatrist was acquitted for assisting in the suicide of "a physically healthy fifty year old woman who had lost her two sons and who had been recently divorced from her husband."[165] Dr. Hendin warns that the United States could start down the slippery slope, which moves society "inexorably from assisted suicide to euthanasia, from euthanasia for the terminally ill to patients who are chronically ill, from physical suffering to mental suffering, from voluntary requests for euthanasia to killing at the discretion of the physician."[166]

Judge Beezer argues that the line should be drawn where the physician discontinues medical treatment.[167] He reasoned that people kept alive via life sustaining equipment are essentially non-viable,[168] analogizing *Roe* and *Casey*, where viability formed the constitutional line which permitted governmental interference.[169] However, the fetus becomes viable not at the point where it can live on its own *without* medical equipment, the fetus is viable where it can live independently *with* medical equipment.[170] Patients with or without medical equipment are viable according to the reasoning in *Casey*. Thus, in the context of assisted suicide, an arbitrary line at viability does not apply.

The state interest in avoiding the slippery slope is an extremely tenuous argument. Courts should not withhold an individual's constitutional liberty merely because the state's interest may be improperly expanded in the future. Early in the nation's history, Justice Story renounced such conduct:

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[162] 497 U.S. 261 (1990).

[163] Kamisar, *When is there a Constitutional "Right to Die," supra* note 107, at 1219-27.

[164] Robert Kline, *The Right to Assisted Suicide in Washington and Oregon: The Courts Will Not Allow A Northwest Passage*, 5 B.U. PUB. INT. L.J. 213, 233 (1996) (noting that many argue that physicians will eventually assist healthy people in suicide).

[165] Herbert Hendin, M.D., *Seduced by Death: Doctors, Patients, and the Dutch Cure*, 10 ISSUES L. & MED. 123, 123 (1994).

[166] Hendin, *supra* note 165, at 124.

[167] *Compassion in Dying*, 79 F.3d 790, 851 (9th Cir.), *cert. granted sub nom.* Washington v. Glucksberg, 117 S. Ct. 37 (1996) (Beezer, J., dissenting).

[168] *Id.*

[169] Roe v. Wade, 410 U.S. 113, 163 (1972); Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 835-36 (1992).

[170] *Roe*, 410 U.S. at 160 ("viable [means] potentially able to live outside the mother's womb, albeit with artificial aid.") (citing L. HELLMAN & J. PRITCHARD, WILLIAMS OBSTETRICS 493 (14th ed. 1971); DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1689 (24th ed. 1965)). *Casey* did not explicitly define viability, but reaffirmed *Roe* in that respect. *Casey*, 505 U.S. at 870. Additionally, *Casey* noted that there "may be some medical developments that affect the precise point of viability," verifying the use of artificial equipment when discussing viability. *Id.*

> The argument urged from the possibility of the abuse of the revising power, is equally unsatisfactory. It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse . . . [f]rom the very nature of things, the absolute right of decision, in the last resort, must rest somewhere . . . .[171]

8. Morality

Within the interests in life and the prevention of suicide, the state may have an implicit interest in the moral sanctity of life,[172] which bans all forms of killing and suicide for moral reasons. The Supreme Court in *Bowers v. Hardwick* indicated that "the law...is constantly based on notions of morality" and explicitly recognized that sentiments against the morality of homosexuality are valid to uphold state law.[173] However, the holding in *Bowers* has been severely criticized.[174] Political majority views of morality should not be used to suppress minority views of morality.[175] Any interest in morality should be solely the concern of the individual, not the state.[176]

9. Aggregate state interests

While the individual can only assert one privacy interest, the state can assert many different interests. The state can assert interests in preserving life,[177] pre-

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[171] Martin v. Hunter, 14 U.S. 304, 344-45 (1816).

[172] *Cf.* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (holding that there is an implicit moral interest in preventing homosexual sodomy); Barnes v. Glenn Theater, Inc., 501 U.S. 560, 569 (1991) (recognizing an implicit moral interest in prohibiting nude dancing).

[173] 478 U.S. at 196.

[174] Compassion in Dying v. State of Wash., 79 F.3d 790, 813 n.65 (9th Cir.), *cert. granted sub nom.* Washington v. Glucksberg, 117 S. Ct. 37 (1996). The Ninth Circuit court recognized that "in the decade since *Bowers* was handed down the Court has never cited its central holding approvingly." *Id. See also* Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331, 334-36 (1995) (arguing that *Bowers* forces majoritarian views of morality upon the rest of society); Mitchell L. Pearl, Note, *Chipping Away at Bowers v. Hardwick: Making the Best of an Unfortunate Decision*, 63 N.Y.U. L. REV. 154 (1988) (noting that many have criticized *Bowers* as discriminatory toward homosexuals).

[175] *See* Gey, *supra* note 174, at 349 (arguing that imposition of majoritarian views of morality is "deeply and irrevocably undemocratic," and that there is a large body of case law which "specifically prohibit[s]" enforcement of such views); D. Don Welch, *Legitimate Governmental Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67, 103 (1993) (arguing that "enforcing morality could become, in effect, enforcing religion," and that "codifying majoritarian moral preferences is especially troubling.").

[176] *See* Gey, *supra* note 174, at 331. Professor Gey argues that while morality may have an implicit effect on decision making which is difficult to separate, enforcing solely on the basis of moral beliefs is never permissible. *Id.*

[177] *See supra* part III.C.1.

venting suicide,[178] avoiding undue influence from family members,[179] protecting the poor and minorities from exploitation,[180] protecting children,[181] protecting the integrity of the medical profession,[182] avoiding the slippery slope,[183] and morality.[184] However, each state interest is substantially diminished when concerned with mentally competent, terminally ill adults.[185]

Conversely, the individual's interest in the right to be free from unwanted governmental intrusion is at its peak for a terminally ill, mentally competent adult.[186] A terminally ill patient suffers a pain that only he must bear,[187] and implicates a "most vital liberty interest."[188] Like the decision to have an abortion, the interest in determining the time and manner of death involves "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."[189] Thus, it is clear that the individual's privacy interest during the terminal phase of a debilitating illness outweighs the aggregate state interests.

IV. PHYSICIAN ASSISTED SUICIDE UNDER HAWAI'I LAW

In the context of physician assisted suicide, Hawai'i law particularly mandates recognition of physician assisted suicide. The Hawai'i Penal statute does not

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[178] *See supra* part III.C.2.

[179] *See supra* part III.C.3.

[180] *See supra* part III.C.4.

[181] *See supra* part III.C.5.

[182] *See supra* part III.C.6.

[183] *See supra* part III.C.7.

[184] *See supra* part III.C.8.

[185] *See Compassion in Dying*, 79 F.3d at 836-37 (holding that the state interests are at a "low point" for a terminally ill, mentally competent adult requesting assistance in suicide). These state interests may be further diminished if there is regulation by the state and the medical profession. *See* Baron, *supra* note 40, at 17-24 (proposing various safeguards for assisted suicide, minimizing the state's interests). Proposed regulation of assisted suicide is beyond the scope of this article. However, a number of states have proposed various "Death with Dignity" acts, legalizing and regulating the practice. California, Maine, Massachusetts, Michigan, Mississippi, New Hampshire, New York, Vermont, and Wisconsin have all introduced bills on assisted suicide. *See* Cal. A.B. 1080, 1995-96 Reg. Sess. (1996); Me. H.P. 552, 117th Leg., 1st Reg. Sess. (1995); Mass. H.B. 3173, 179th Gen. Ct., 1st. Ann. Sess. (1995); Mich. H.B. 4134, 88th Leg., 1995 Reg. Sess. (1995); Miss. H.B. 1023, 1996 Leg. Sess. (1996); N.H. H.B. 339, 1996 Reg. Sess. (1995); N.Y. S.B. 5024, 219th Gen. Ass., 2nd Reg. Sess. (1996); Vt. H.B. 335, 1995 Bien. Sess. (1995); Wis. A.B. 174, 92nd Leg. Sess., 1996 Reg. Sess. (1995). The Oregon legislature actually passed a Death with Dignity Act. OR. REV. STAT. 127.800 §§ 1.01-127.995 (1995). Additionally, the Harvard Journal on Legislation proposed a comprehensive model act to regulate assisted suicide. Baron, *supra* note 40, at 25-34.

[186] *Compassion in Dying*, 79 F.3d at 836.

[187] *Id.* at 814.

[188] *Id.*

[189] Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 851 (1992).

actually prohibit physician assisted suicide,[190] and Section 453-1 of the Hawai'i Revised Statutes gives physicians wide discretion in treating terminally ill patients.[191] Further, even if these statutes are overruled, the Hawai'i Constitution gives much broader privacy protection against unwanted governmental interference, mandating recognition of physician assisted suicide.[192]

A. *Hawai'i Manslaughter Statute*

The Hawai'i manslaughter statute prohibits "intentionally caus[ing] another person to commit suicide."[193] Other states that have dealt with the issue have much broader statutes prohibiting the practice.[194] While the Hawai'i statute relates only to a person who has helped another *commit* suicide,[195] other courts have addressed statutes which prohibit aiding in a suicide *attempt*.[196] Hence, a physician assisting in suicide can only be prosecuted in Hawai'i if the patient dies, while other states prohibit a mere attempt. Further, the Hawai'i statute requires intent,[197] a higher *mens rea* requirement than other states.[198]

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

[191] *See infra* part IV.B.

[192] *See infra* part III.C.

[193] HAW. REV. STAT. § 707-702(1)(b) (1996). The statute reads: A person commits the offense of manslaughter if: (a) [h]e recklessly causes the death of another person; or (b) [h]e intentionally causes another person to commit suicide. *Id.*

[194] In Compassion in Dying v. State of Wash., 79 F.3d 790, (9th Cir.), *cert. granted sub nom.* Washington v. Glucksberg, 117 S. Ct. 37 (1996), the Ninth Circuit Court evaluated the issue of assisted suicide under a Washington Statute which prohibits "knowingly caus[ing] or aid[ing] another person to attempt suicide." WASH. REV. CODE ANN. § 9A.36.060 (West 1995). In Quill v. Vacco, 80 F.3d 716 (2d Cir.), *cert. granted*, 117 S. Ct. 36 (1996), the Second Circuit court evaluated the issue of assisted suicide under a New York Statute which prohibits "intentionally caus[ing] or aid[ing] another person to attempt suicide." N.Y. PENAL LAW § 120.30 (McKinney 1996). In Kevorkian v. Arnett, 939 F. Supp. 725 (C.D. Cal. 1996), a California District Court evaluated a statute which provides that "anyone who deliberately aids, advises, or encourages another to commit suicide is guilty of a felony." CAL. PENAL CODE § 401 (West 1997). In Michigan v. Kevorkian, 527 N.W.2d 714 (Mich. 1994), *cert. denied*, 115 S. Ct. 1795 (1995), the Michigan Supreme Court scrutinized a statute which prohibits "providing the physical means by which the other person attempts or commits suicide." MICH. COMP. LAWS ANN. § 752.1027(1)(a) (West 1996).

[195] HAW. REV. STAT. § 707-702(1)(b) (1996).

[196] *Compassion in Dying*, 79 F.3d at 837 (scrutinizing WASH. REV. CODE ANN. § 9A.36.060 (West 1995)); *Quill*, 80 F.3d at 734 (scrutinizing N.Y. PENAL LAW § 120.30 (McKinney 1996)); Michigan v. Kevorkian, 527 N.W.2d 714, 716, (Mich. 1994), *cert. denied*, 115 S. Ct. 1795 (1995) (scrutinizing MICH. COMP. LAWS ANN. § 752.1027(1)(a)(West 1996)).

[197] HAW. REV. STAT. § 707-702(1)(b) (1996).

[198] In *Compassion in Dying*, 79 F.3d at 837, the court evaluated a Washington statute which merely requires that a person "knowingly" cause or aid a suicide attempt. WASH. REV. CODE ANN. § 9A.36.060 (West 1995). In *Quill*, 80 F.3d at 734, the court evaluated N.Y. PENAL LAW

The third, and most important, distinguishing characteristic involves the distinction between aiding and causing another person's suicide. In order for a person to cause a result, the actor must take a more active role than if he merely aided a primary actor. Professor Sanford Kadish provides a comprehensive discussion on the issue.[199] Professor Kadish distinguishes between the doctrine of complicity, which results in another person voluntarily taking action,[200] and the doctrine of causation, where a person's actions create an actual, physical result.[201] Complicity occurs only where a person either aids or influences the end result.[202] In contrast, causation occurs with any action which actually produces the desired result.[203] Complicity is equivalent to "aiding" in the context of assisted suicide, where the physician provides the lethal medication to be self-administered by the patient. Causation occurs when the physician himself administers the medication, causing the patient's death. Such conduct is referred to as "physician-aid-in-dying" rather than physician assisted suicide.[204] Courts have recognized the difference between causing and aiding,[205] and those courts which have found a right to assisted suicide specifically restricted analysis to the aiding portion of the statute, leaving the causing portion intact.[206]

The Hawai'i statute provides that a "person commits the offense of manslaughter if . . . [h]e intentionally *causes* another person to commit suicide,"[207]

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§ 120.30 (McKinney 1996), a statute requiring reckless conduct. People v. Duffy, 595 N.E.2d 814, 815-16 (N.Y. 1992).

[199] Kadish, *supra* note 32, at 327.

[200] *Id.* at 328.

[201] *Id.* Professor Kadish argued that but-for causation (*sine qua non*) is only required for causation, and it is not necessary for complicity. *Id.*

[202] *Id.*

[203] *Id.*

[204] Compassion in Dying v. State of Wash., 79 F.3d 790, 832 n.119 (9th Cir.), *cert. granted sub nom.* Washington v. Glucksberg, 117 S. Ct. 37 (1996).

[205] *See* People v. Kevorkian, 527 N.W.2d 714, 738-39 (Mich. 1994) (noting that one statute "prevent[s] an individual from actively causing the death of someone contemplating suicide, whereas the assisting suicide statute is aimed at preventing an individual from providing someone contemplating suicide with the means to commit suicide."), *cert. denied sub nom.* Hobbins v. Kelley, 115 S. Ct. 1795 (1995), *and cert. denied sub nom.* Kevorkian v. Michigan, 115 S. Ct. 1795 (1995); New Mexico v. Sexson, 869 P.2d 301, 304 (N.M. Ct. App. 1994)(holding that "'aiding,' in the context of determining whether one is criminally liable for their involvement in the suicide of another, is intended to mean providing the means to commit suicide, not actively performing the act which results in death."), *cert. denied*, 117 N.M. 215 (N.M. 1994); People v. Cleaves, 280 Cal. Rptr. 146, 150-51 (Cal. Ct. App. 1991) (holding that an assisted suicide statute does not go as far as to require "an overt act causing death," but it merely "contemplates some participation in the events leading up to the commission of the final overt act, such as furnishing the means for bringing about death . . . .").

[206] *Compassion in Dying*, 79 F.3d at 797; Quill v. Vacco, 80 F.3d 716, 719 (2d Cir.), *cert. granted*, 117 S. Ct. 36 (1996).

[207] HAW. REV. STAT. § 707-702(1)(b) (1996) (emphasis added).

with no prohibition on aiding. As such, Hawai'i does not actually prohibit the practice of physician assisted suicide, according to the plain language of the statute. Thus, physicians in Hawai'i have always been legally permitted to prescribe lethal medication to be self administered by the patient.

B. Hawai'i Revised Statutes Section 453-1

Further, Hawai'i's statute defining the practice of medicine contains a provision which allows a dying patient broad discretion on choice of therapy from the physician:

> [W]hen a duly licensed physician pronounces a person affected with any disease hopeless and beyond recovery and gives a written certificate to that effect to the person affected or the person's attendant nothing herein shall forbid any person from giving or furnishing any remedial agent or measure when so requested by or on behalf of the affected person.[208]

Originally added in 1909,[209] the purpose of the provision was to allow dying patients the option of obtaining therapy that had not yet been approved by the government.[210] The legislature stated that it wanted to allow dying patients "the opportunity of availing themselves of any hope of relief which might be offered without subjecting those willing to render them aid to the indignities of prosecution and persecution."[211] The language of the provision allows significant freedom of choice to the dying patient. This statutory language can be interpreted to allow physicians to assist terminally ill patients in suicide.

The statute can be read to encompass physician assisted suicide. The statute characterizes a terminally ill person as "hopeless and beyond recovery."[212] The statute originally extended to the "practice of any method, or the application" of any remedial agent or measure.[213] However, the legislature narrowed the statute to encompass only "giving or furnishing."[214] The distinction between "practice or application" and "giving or furnishing" is identical to the distinction between causing and aiding. Through the practice or application of a measure, the physician himself may administer the lethal medication to the patient, as in the case of physician-aid-in-dying. If a physician is limited to "giving or furnishing," he could only prescribe medication to be self administered by the patient, as in the case of

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[208] HAW. REV. STAT. § 453-1 (1996).

[209] S. STAND. COMM. REP. NO. 1123, 5th Leg., 1909 Reg. Sess., *reprinted in* 1909 HAW. SENATE J. 417, 528 [hereinafter S. STAND. COMM. REP. NO. 1123].

[210] *See* Terry T. Shintani, Note, *"Last Rights": Hawaii's Law on the Right to Choice of Therapy for Dying Patients*, 1 U. HAW. L. REV. 144, 151 (1979).

[211] S. STAND. COMM. REP. NO. 1123, *supra* note 209, at 417.

[212] HAW. REV. STAT. § 453-1 (1996).

[213] S. STAND. COMM. REP. NO. 1123, *supra* note 209, at 528.

[214] HAW. REV. STAT. § 453-1 (1996).

physician assisted suicide. Hawai'i Revised Statutes Section 453-1 is consistent with the Hawai'i manslaughter statute, which prohibits causing rather than aiding another in suicide.[215]

The main issue centers on whether giving or furnishing lethal medication would constitute a "remedial agent or measure." Unfortunately, the legislature did not specify whether the remedy should be used for the purpose of relief from pain and suffering or relief from the disease itself. If the purpose was to give hope of relief from pain, it is clear that the plain language of the statute would permit the physician to prescribe lethal medication, because the statute allows "*any* remedial agent or measure."[216] Lethal medication would remedy the unending pain of the hopeless patient. If the purpose of the statute is to give hope of a cure from the disease, then the argument is inapplicable.

C. Hawai'i Constitution

Although the Federal Constitution does not explicitly provide a right to privacy, it emanates from a penumbra created by certain guarantees in the Bill of Rights.[217] In contrast, article 1, section 6 of the Hawai'i Constitution provides for an explicit privacy provision that states: "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right."[218] The Hawai'i Supreme Court has held that article 1 section 6 affords "much greater privacy rights than the federal right to privacy."[219]

When article 1, section 6 was enacted in 1978, the legislature declared its intent in the following passage:

> By amending the Constitution to include a separate and distinct privacy right, it is the intent of your Committee to insure that *privacy is treated as a fundamental right for purposes of constitutional analysis* . . . this privacy concept encompasses the notion that in *certain highly personal and intimate matters*, the individual should be afforded freedom of choice absent a compelling state interest. This right is similar to the privacy right discussed in cases such as *Griswold v. Connecticut*, 381

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[215] HAW. REV. STAT. § 707-702(1)(b) (1996).

[216] HAW. REV. STAT. § 453-1 (1996) (emphasis added).

[217] Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

[218] HAW. CONST. art I, § 6.

[219] State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988) (ruling that an individual has a privacy right to view pornographic material in the privacy of the home); *see also* State v. Kim, 68 Haw. 286, 290, 711 P.2d 1291, 1294 (1985) (ruling that the Hawai'i Constitution provides a greater right to privacy for searches and seizures); State v. Kaluna, 55 Haw. 361, 369, 520 P.2d 51, 58-59 (1974)(ruling that the Hawai'i Supreme Court can "extend the protections of the Hawaii Bill of Rights beyond those of textually parallel provisions in the Federal Bill of Rights . . . .").

U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), [and] *Roe v. Wade*, 410 U.S. 113 (1973), etc.[220]

The legislature determined that privacy protection encompasses "certain highly personal and intimate matters."[221] The Hawai'i Supreme Court has used the "highly personal and intimate" test in privacy cases. In 1983, the Hawai'i Supreme Court ruled that an individual's decision to engage in unsolicited prostitution in the privacy of the home did not fit under the legislature's meaning of a highly personal and intimate matter.[222] In 1987, the court determined that there was no fundamental right to privacy in a settlement agreement because the agreement did not contain information that is "highly personal and intimate," such as "medical, financial, educational, or employment records."[223] In 1988, the court found a fundamental privacy right to view pornographic material in the privacy of one's own home,[224] because of the individual's right to "control personal and intimate affairs."[225]

However, the Hawai'i Supreme Court has recently used a different test in analyzing privacy under the Hawai'i Constitution. In *Baehr v. Lewin*,[226] the court declined to find a fundamental privacy right in same sex marriage.[227] Instead of using the "highly intimate and personal"[228] test, the court used a federal analysis of whether the privacy right was so rooted in "traditional collective conscience" as to be deemed fundamental.[229] The court did not utilize the language of the

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[220] COMM. WHOLE REP. NO. 15, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 1024 (1980) (emphasis added).

[221] *Id.*

[222] State v. Mueller, 66 Haw. 616, 625-28, 671 P.2d 1351, 1357-59 (1980).

[223] Printing Indus. of Haw. Mkt. Recovery Fund v. Alm, 69 Haw. 449, 453, 746 P.2d 79, 81 (1987).

[224] State v. Kam, 69 Haw. 483, 493-94, 748 P.2d 372, 378-79 (1988).

[225] *Id.* at 492, 748 P.2d at 378.

[226] 74 Haw. 530, 852 P.2d 44 (1993).

[227] *Id.* at 556-57, 852 P.2d at 57. The Hawai'i Supreme Court did find the denial of governmental benefits to same sex couples deserves strict scrutiny analysis under Article 1 § 5 of the Hawai'i Constitution. *Id.* at 580-82, 852 P.2d at 67-68.

[228] *Kam*, 69 Haw. at 493, 748 P.2d at 378 (1988). *See also* Painting Indus. of Haw. Mkt. Recovery Fund v. Alm, 69 Haw. 449, 453, 746 P.2d 79, 82 (1987) (finding that a settlement agreement does not contain information of a "highly intimate and personal matter," and therefore finding no fundamental right to retain the confidentiality of the agreement).

[229] *Baehr*, 74 Haw. at 556, 852 P.2d at 57. The court relied upon a concurring opinion by Justice Goldberg in Griswold v. Connecticut, 381 U.S. 479 (1965). Justice Goldberg had determined that the Court should not look to privacy notions to find a fundamental right, but should look to the "traditions and [collective] conscience" of society. Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring). In Bowers v. Hardwick, the Supreme Court used the same test to determine that there is no fundamental right to homosexual sodomy. 478 U.S. 186, 189 (1986).

legislature,[230] even though it recognized that it could provide broader privacy protection than the Federal Constitution.[231] However, the privacy analysis in *Baehr* may be inapplicable. The privacy right in the aforementioned Hawai'i cases deal with the individual's right to be *free* from governmental interference. The right to same sex marriage relies on a right to *obtain* governmental benefits. Hence, the right to same sex marriage is better analyzed in terms of a right against inequity of treatment between same sex and opposite sex couples, invoking the equal protection clause.[232]

Hence, to be consistent with legislative intent, the Hawai'i Supreme Court should determine whether physician assisted suicide is a highly intimate and personal matter. An individual's right to determine the time and manner of death is very intimate and very personal.[233] Thus, the right to obtain assistance from a physician, free from government interference, should be considered a fundamental right in Hawai'i, even if the Federal Constitution does not recognize such a right.

Although legalization of physician assisted suicide may seem extraordinary, in the past few decades the Hawai'i Supreme Court has handed down many controversial rulings.[234] Clinton R. Ashford[235] and Daniel H. Case,[236] former presidents of the Hawai'i State Bar Association, have criticized the court for practicing "judicial activism,"[237] referring to many cases with "radical" or "evolutionary" holdings in such areas as shoreline boundaries,[238] water rights,[239]

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[230] *Baehr*, 74 Haw. at 556-57, 852 P.2d at 57. The Hawai'i Supreme Court explained that Justice Goldberg determined that courts should look to the "traditions and [collective] conscience of our people" rather than "personal and private notions." *Id.* (alteration in original) (quoting *Griswold*, 381 U.S. at 493 (1965) (Goldberg, J., concurring)).

[231] *Baehr*, 74 Haw. at 555, 852 P.2d at 57.

[232] *Id.* at 580, 852 P.2d at 67. In fact, the Hawai'i Supreme Court determined that a strict scrutiny analysis should be used in the Equal Protection context because same sex marriage discriminates on the basis of gender. *Id.*

[233] Compassion in Dying v. State of Wash., 79 F.3d 790, 801 (9th Cir.), *cert. granted sub nom.* Washington v. Glucksberg, 117 S. Ct. 37 (1996).

[234] *See* Clinton R. Ashford & Daniel H. Case, *No Order in State High Court*, HONOLULU ADVERTISER, Aug. 4, 1996, at B2.

[235] Clinton R. Ashford served as president of the Hawai'i Bar Association in 1972, and is counsel for the law firm Ashford and Wriston. Ashford & Wriston, 6 MARTINDALE HUBBLE L. DIRECTORY HI6B, HI8B (1997). His primary practice areas include real property law, mediation, and arbitration. *Id.*

[236] Daniel H. Case served as president of the Hawai'i State Bar Association in 1978, and is currently a senior partner at the firm Case, Myrdal, Bigelow & Lombardi. Case Myrdal Bigelow & Lombardi, A Law Corp., 6 MARTINDALE HUBBLE L. DIRECTORY HI29B, HI29B. His primary practice areas include corporate law, business law, and estate planning law. *Id.*

[237] Ashford, *supra* note 234, at B2.

[238] *Id.* The Hawai'i Supreme Court has consistently expanded shoreline boundaries away from the ocean, to provide as much land for the people as feasible. *See, e.g.*, County of Hawai'i v. Sotomura, 55 Haw. 176, 182, 517 P.2d 57, 61-62 (1973) (holding that "[p]ublic policy . . . favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably

property law,[240] tort liability,[241] and same sex marriage.[242] Ashford and Case argue that the court has shown a liberal expansion of rights for the people of Hawai'i, overruling law that "had been considered settled for more than 100 years."[243]

Although Hawai'i lacks precedential authority on the issue of physician assisted suicide, the "evolutionary"[244] approach of the Hawai'i Supreme Court shows a

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possible."), *cert. denied*, 419 U.S. 872 (1974). In 1968, the court ruled that the shoreline boundary for private property owners is the upper reaches of the wash of waves, usually evidenced by the debris or vegetation line, rather than the mean high water mark. *In re* Ashford, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968). The higher debris or vegetation boundaries allow less land for the private property owner and more land for the people. *Id.* at 320, 440 P.2d at 80 (Marumoto, J., dissenting). In 1974, the court ruled that in any dispute where the debris and vegetation lines differ, the vegetation line controls, because it lies further inland. *Sotomura*, 55 Haw. at 182, 517 P.2d at 61-62 (1973). Finally, in 1977, the court held that regardless of whether permanent erosion has decreased the private property owner's land, the shoreline boundary still exists at the upper reaches of the waves. *In re* Sandborn, 57 Haw. 585, 590, 562 P.2d 771, 774-75 (1977).

[239] Ashford, *supra* note 234, at B2. The Hawai'i Supreme Court has shown a trend to reserve water use for the people of Hawai'i. In 1974, the court held that all surplus water is owned in public trust for the people of Hawai'i. McBryde Sugar Co., Ltd. v. Robinson, 54 Haw. 174, 186, 504 P.2d 1330, 1338 (1973), *cert. denied*, 417 U.S. 976 (1974). In 1982, the court affirmed *McBryde*, and ruled that traditional Hawaiian concepts of property should take precedence over western concepts of property in the context of water use. Reppun v. Bd. of Water Supply, 65 Haw. 531, 547-48, 656 P.2d 57, 68-69 (1982), *cert. denied sub nom.* Bd. of Water Supply v. Nakata, 471 U.S. 1014 (1985).

[240] Ashford, *supra* note 234, at B2. The Hawai'i Supreme Court held that the state has an obligation to protect traditional and customary Hawaiian rights, allowing Hawaiians reasonable access to private property. Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 442, 903 P.2d 1246, 1263 (1995), *cert. denied sub nom.* Nansay Hawai'i, Inc. v. Public Access Shoreline Hawai'i, 116 S. Ct. 1559 (1996). The court reasoned that western concepts of exclusivity are not always applicable in the state of Hawai'i. *Id.* at 447, 903 P.2d at 1268. Ashford and Case argue that title insurance companies are unwilling to fully insure Hawai'i land because of the recognition of Hawaiian rights, thereby forcing banks, insurance companies, and various estates to move investment capital to the mainland. Ashford, *supra* note 234, at B2.

[241] Touchette v. Ganal, 82 Hawai'i 293, 304, 922 P.2d 347, 358 (1996). Ashford and Case refer to *Touchette*, where the Hawai'i Supreme Court held that a woman who had an extramarital affair could be held legally responsible for her husband murdering her paramour's relatives in a fit of rage. 82 Hawai'i at 304, 922 P.2d at 358.

[242] Ashford, *supra* note 234, at B2. In 1993, Hawai'i became the first state to consider the issue of same sex marriage. Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993). The court ruled that denying same sex couples the right to marry constitutes gender discrimination, and is therefore presumptively invalid unless the government can show a compelling state interest. *Id.* at 579-80, 852 P.2d at 67. On remand to the circuit court, Judge Chang ruled that the state failed its burden to show a compelling interest. Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996).

[243] Ashford, *supra* note 234, at B2.

[244] *Id.*

willingness to accept the practice.[245] The court's "judicial activism"[246] may very well reach into the issue of physician assisted suicide. However, former Chief Justice William S. Richardson[247] responded to the Ashford and Case article, [248] stating that the court has not practiced activism of any kind.[249] He asserted that differences in Hawai'i law justify the results in past cases,[250] and that "[c]orrect interpretation is not judicial activism."[251] Richardson stated that western concepts of law do not control where the Hawai'i statutes and constitution mandate a different analysis.[252]

In the context of physician assisted suicide, the Hawai'i manslaughter statute, medical statute, and the explicit privacy provision in the state constitution mandate recognition of the right to determine the time and manner of one's death. While some may view explicit legalization of assisted suicide as "judicial activism,"[253] others may view it as simply adhering to Hawai'i law.[254] Whichever view is correct, physician assisted suicide will be permitted in Hawai'i.

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[245] Ashford and Case criticized the court for its desire to "change the established law" and for discarding "time-honored rules . . . ." *Id.*

[246] *Id.*

[247] William S. Richardson served as Chief Justice of the Supreme Court of Hawai'i from 1966 to 1982. David L. Callies et al., *The Lum Court, Land Use, and the Environment: A Survey of Hawaii Case Law 1983-1991*, 14 U. HAW. L. REV. 119, 155 n.3 (1992).

[248] William S. Richardson, *Did "Richardson Court" Rewrite Hawaii Law? Former Chief Justice Says, NO*, HONOLULU ADVERTISER, Sept. 1, 1996, at B2.

[249] *Id.*

[250] *Id.* Richardson stated that the Hawai'i Supreme Court has insisted upon "decisions based on standards and values time-honored and traditional *in Hawai'i*." *Id.* For instance, the Hawai'i Revised Statutes and Hawai'i Constitution explicitly recognize native Hawaiian rights, justifying the Hawai'i Supreme Court evolutionary holdings in the areas of water rights and property. *See supra* notes 239-40. In relevant part, the Hawai'i Constitution states that "[t]he State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua`a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 . . . ." HAW. CONST. art. XII, § 7. The Hawai'i Revised Statutes provides:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawai'i in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

HAW. REV. STAT. § 1-1 (1996). Also, the same sex marriage decision was based on the adoption of the Equal Rights Amendment in the Hawai'i Constitution. Baehr v. Lewin, 74 Haw. 530, 579-80, 852 P.2d 44, 67 (199).

[251] Richardson, *supra* note 186, at B2.

[252] *Id.* Richardson argues that Article XII, § 7 of the Hawai'i Constitution and § 1-1 of the Hawai'i Revised Statutes mandate divergence from western concepts of law. *Id.*

[253] Ashford, *supra* note 234, at B2.

[254] Richardson, *supra* note 186, at B2.

V. CONCLUSION

An individual's privacy interest in determining the time and manner of death is significant, invoking some form of heightened scrutiny. Although the interest may not amount to a fundamental right under the Constitution, courts have consistently applied a balancing test in right to die cases. Under a balancing test, the individual's liberty interest substantially outweighs the state's interests in preventing assisted suicide in the context of mentally competent, terminally ill adults.

As the law stands in Hawai'i, physicians are already allowed to assist suicide. The Hawai'i manslaughter statute does not prohibit aiding a person in suicide; Hawai'i Revised Statutes Section 453-1 gives physicians wide discretion in treating dying patients, and finally, the Hawai'i Constitution provides added privacy protection against governmental interference. Further, the Hawai'i Supreme Court has recognized that differences in Hawai'i law warrant revolutionary changes in the established law of the United States,[255] and is thus very likely to accept the practice of physician assisted suicide.

Although John Stuart Mill may have advocated an absolute right to personal autonomy where others are unhurt,[256] such overarching freedom would lead to horrendous results.[257] Anyone who may temporarily fall into despair or financial troubles would be given an easy opportunity to pointlessly take their lives.[258] However, it would be equally unfair to force terminally ill patients to suffer through horrific pain and agony because of the potential danger that some would request suicide because of mere depression. Where a determination of terminal illness can be made by the consulting physician or the government, patients should be permitted to end their lives with a touch of dignity.

Paul S. Kawai[259]

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[255] Ashford, *supra* note 234, at B2; Richardson, *supra* note 186, at B2.

[256] *See supra* note 1 and accompanying text.

[257] *See* Marc Spindelman, Comment, *Are the Similarities Between a Woman's Right to Choose an Abortion and the Alleged Right to Assisted Suicide Really Compelling?*, 29 U. MICH. J.L. REF. 775, 799 (1996). Marc Spindelman asserts that prostitution, incest, drug use, self-mutilation, sale of one's body parts, and active euthanasia would result from Mill's absolute right. *Id.*

[258] *See supra* notes 149-50 and accompanying text.

[259] Class of 1998, William S. Richardson School of Law.

State v. Sinagoga: The Collateral Use of Uncounseled Misdemeanor Convictions in Hawai'i

I. INTRODUCTION

The Sixth Amendment right to counsel has been a highly contemplated issue in the United States Supreme Court, but has only recently been clarified by Hawai'i's appellate courts. Although there is a consensus that the right to counsel is an essential element of a criminal defendant's due process rights, widespread confusion has surfaced about collateral uses of prior uncounseled convictions, particularly of uncounseled misdemeanors.[1] The United States Supreme Court added to the confusion with a series of contradictory cases that concluded that valid, uncounseled misdemeanors may be used for collateral purposes.[2] However, the Hawai'i Intermediate Court of Appeals ("ICA"), addressing this issue in *State v. Sinagoga*,[3] reached a different conclusion. The ICA held that, in Hawai'i, a previous uncounseled conviction may not be used to enhance a subsequent sentence.[4] In addition, the ICA set forth a five-step process to be followed before an enhanced sentence may be imposed.[5] This five-step process appears to be fundamentally flawed.

This article outlines the evolvement of the Sixth Amendment right to counsel in the United States Supreme Court and in Hawai'i, culminating with the ICA's decision in *Sinagoga*. Part II discusses the history of the right to counsel and its implications in felony and misdemeanor convictions. Then, Part III addresses the collateral use of uncounseled convictions to enhance sentencing. Next, Part IV sets out the facts and holding of *Sinagoga* and Part V compares and contrasts the ICA's decision with prior case law and established policy. Finally, Part VI comments on the implications of the *Sinagoga* decision.

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[1] *See, e.g.*, Lily Fu, Note, *High Crimes from Misdemeanors: The Collateral Use of Prior, Uncounseled Misdemeanors Under the Sixth Amendment, Baldasar and the Federal Sentencing Guidelines*, 77 MINN. L. REV. 165 (1992) (discussing the conflicting holdings of Baldasar v. Illinois and Nichols v. United States); David S. Rudstein, *The Collateral Use of Uncounseled Misdemeanor Convictions After Scott and Baldasar*, 34 U. FLA. L. REV. 517 (1982).

[2] *See* Burgett v. Texas, 389 U.S. 109 (1967); Baldasar v. Illinois, 446 U.S. 222, *reh'g denied*, 447 U.S. 930 (1980), *overruled by*, 114 S. Ct. 1921 (1994); Nichols v. United States, 114 S. Ct. 1921 (1994).

[3] 81 Hawai'i 421, 918 P.2d 228 (1996).

[4] *Id.*

[5] *Id.* at 447, 918 P.2d at 254.

II. HISTORY OF THE SIXTH AMENDMENT RIGHT TO COUNSEL

A. Right to Counsel in Felony Convictions

The Sixth Amendment of the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defence."[6] For nearly 150 years following the enactment of the Bill of Rights, the prevalent notion was that this guarantee did not extend beyond the right to employ defense counsel at a criminal prosecution in federal court.[7]

In 1932, the United States Supreme Court, in *Powell v. Alabama*,[8] defined the right to counsel as a fundamental right, the denial of which is a violation of the Due Process Clause of the Fourteenth Amendment.[9] In *Powell*, the Court held that the state of Alabama had a duty to appoint counsel for four indigent black youths who faced death sentences for being charged with the rape of two white girls.[10] The Court recognized that court-appointed counsel was necessary in a "capital case" where the defendant was unable to employ counsel and was incapable of adequately defending himself because of "ignorance, feeble mindedness, illiteracy or the like."[11] The "right to be heard" and, hence, the right to counsel does not exclude the "intelligent and educated layman," for even the most educated person may lack the legal expertise necessary to prepare an adequate defense.[12] However, the holding in *Powell* was narrowed to its facts and thus did not specifically extend the right to counsel to fully encompass all defendants in state courts.[13]

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[6] U.S. CONST. amend. VI.

[7] *See* Scott v. Illinois, 440 U.S. 367, 370 (1979) (citing WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 27-30 (1955)).

[8] 287 U.S. 45 (1932).

[9] *Id.* at 71. The Fourteenth Amendment provides that "nor shall any State deprive any person of life, liberty or property, without due process of law . . ." U.S. CONST. amend XIV, § 1.

[10] *Powell*, 287 U.S. at 71.

[11] *Id.*

[12] *Id.* at 69.

[13] The facts the Court focused on were:

> [T]he ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives
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> . . . .

Id. at 71. The Court further stated that under the circumstances, "the necessity of counsel was so vital and imperative" failure to appoint counsel was a violation of the Fourteenth Amendment. *Id.* "Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine." *Id.*

In a subsequent case, *Johnson v. Zerbst*,[14] the United States Supreme Court reaffirmed and expanded the right to counsel by interpreting the Sixth Amendment to require court-appointed counsel for indigent defendants in all federal felony trials.[15] However, just four years later, in *Betts v. Brady*,[16] the Court refused to extend *Johnson* to the states through the Fourteenth Amendment.[17] The Court held that not every indigent defendant accused in a state criminal prosecution was entitled to court-appointed counsel because the appointment of counsel was not a fundamental right essential to a fair trial.[18] Instead, the appointment of counsel is a matter of legislative policy requiring a case-by-case "appraisal of the totality of facts" to determine whether failure to appoint counsel is a denial of fundamental fairness.[19]

Twenty-one years later, the United States Supreme Court in *Gideon v. Wainwright*[20] unanimously overruled *Betts*, reverting back to the *Powell* notion that the right to counsel is "fundamental and essential to a fair trial."[21] In *Gideon*, the defendant was charged with breaking and entering a poolroom with the intent to commit a misdemeanor, a felony under Florida law.[22] The state court denied the defendant's request for counsel, because under Florida law a court can only appoint counsel to a person charged with a capital offense.[23] The defendant proceeded *pro se* and was sentenced to five years imprisonment.[24]

The Court reversed the decision and held that the Sixth Amendment right to counsel is applicable to the states through the Due Process Clause of the

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[14] 304 U.S. 458 (1938). In *Johnson*, a United States marine was convicted and jailed for uttering and possessing counterfeit money. *Id.* at 460. The Court reversed a denial of habeas corpus finding that petitioner was denied right to counsel when he was uncounseled at trial, although he was represented at preliminary hearings. *Id.* at 469.

[15] *Id.* The majority provided that "[t]he Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." *Id.* at 463.

[16] 316 U.S. 455 (1942), *overruled by*, 372 U.S. 335 (1963).

[17] *Id.* at 464-65. In *Betts*, the petitioner requested and was denied counsel at his trial. *Id.* at 457. The judge advised him that it was not the practice in Carroll County to appoint counsel for indigent defendants except in prosecutions for murder and rape. *Id.* Proceeding *pro se*, the petitioner was ultimately indicted for robbery. *Id.*

[18] *Id.* at 471.

[19] *Id.* at 462. The Court gives a loose qualification of the "totality of the circumstances" by stating that "[they] may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." *Id.*

[20] 372 U.S. 335 (1963).

[21] *Id.* at 336. The Gideon Court interpreted Betts v. Brady as holding "that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment . . . ." *Id.* at 339.

[22] *Id.* at 336.

[23] *Id.* at 337.

[24] *Id.*

Fourteenth Amendment.[25] The extension of the right to the states was held to be necessary to "achieve a fair system of justice."[26] The Court reasoned that an indigent defendant can only be assured a fair trial when provided with counsel, because "lawyers in criminal courts are necessities, not luxuries."[27]

However, *Gideon* did not define the parameters of the Sixth Amendment right to counsel. Justice Harlan, in his concurring opinion, contended that the holding is only applicable to offenses that "carry the possibility of a substantial prison sentence."[28] Justice Harlan also declined to address whether the rule should extend to all criminal cases.[29] Although *Gideon* did not explicitly limit its holding to felonies, the lower courts and the United States Supreme Court have interpreted *Gideon* to apply only to felony cases.[30] The issue has been further confused by the Court's refusal to hear cases on the issue of whether *Gideon* applied to misdemeanor convictions.[31]

B. Right to Counsel in Misdemeanor Cases

The United States Supreme Court finally addressed uncounseled misdemeanor cases in the 1972 landmark decision *Argersinger v. Hamlin*.[32] In *Argersinger*, the Court held the "fundamental" right to counsel advanced in *Powell* and *Gideon* attached to all criminal prosecutions in which an "accused is deprived of his liberty," including misdemeanors.[33]

In *Argersinger*, the indigent defendant was charged with carrying a concealed weapon, an offense punishable by up to six months imprisonment, a $1,000 fine, or both.[34] The defendant was sentenced to an extended term of ninety days imprisonment.[35] In reversing the decision, the Court found that the defendant was denied due process because he was not afforded counsel.[36] The

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[25] *Id.* at 342-43.

[26] *Id.* at 344.

[27] *Id.*

[28] *Id.* at 351 (Harlan, J., concurring).

[29] *Id.*

[30] For a list of lower court and United States Supreme Court cases that have interpreted *Gideon* as applying only to felonies, *see* Rudstein, *supra* note 1, at 523 nn.25, 26.

[31] For a list of Supreme Court cases that refused to hear the issue of whether the "fundamental right" to counsel applies to misdemeanor cases, *see* Rudstein, *supra* note 1, at 523 n.27.

[32] 407 U.S. 25 (1972).

[33] *Id.* at 32. The Supreme Court evidenced its concern for cases that never go to trial by revealing that the large volume of misdemeanor cases in overcrowded dockets could lead to a type of "assembly-line justice," in which fairness is sacrificed for efficiency in dealing with cases. *Id.* at 36.

[34] *Id.* at 26.

[35] *Id.*

[36] *Id.* at 37.

Court recognized that, due to the severity of imprisonment, a fair trial often requires the assistance of counsel regardless of the nature of the offense.[37] The Court concluded that absent a knowing and intelligent waiver of counsel, incarceration for any offense, whether classified as a petty misdemeanor, or felony, is impermissible unless the defendant had representation at his trial.[38]

Although *Argersinger* clarified that the Sixth Amendment right to counsel was applicable to misdemeanors as well as felonies, the Court left a significant question unanswered: whether an indigent defendant was entitled to court-appointed counsel when charged with a misdemeanor for which imprisonment is authorized by statute, but not actually imposed. Because the defendant was actually sentenced to prison, the Court declined to address the issue.[39]

The Court answered this question seven years later with a split decision in *Scott v. Illinois*.[40] The *Scott* decision adopted the "actual imprisonment" standard and clarified that the Sixth Amendment right to counsel extends only to misdemeanor convictions that actually result in imprisonment.[41] The Court held that the Sixth and Fourteenth Amendments "require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."[42]

In *Scott*, the indigent defendant was convicted of shoplifting and fined fifty dollars.[43] However, the applicable Illinois statute authorized a maximum penalty of $500, one year in jail, or both.[44] In affirming the conviction, Justice Rehnquist followed the central premise of *Argersinger*, that the severity of imprisonment made it inherently different from other punishments,[45] and therefore, warranted adoption of "actual imprisonment," and not "the mere threat of imprisonment" as the standard defining whether the constitutional right to appointment of counsel was triggered.[46] In *Scott*, the defendant was merely fined fifty dollars and was not sentenced to jail, so he was not deprived

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[37] *Id.*

[38] *Id.*

[39] *Id.* "We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here petitioner was in fact sentenced to jail." *Id.*

[40] 440 U.S. 367 (1979).

[41] *Id.* at 373.

[42] *Id.* at 374.

[43] *Id.* at 367.

[44] *Id.*

[45] *Id.* at 372-73. Justice Rehnquist interpreted *Argersinger* to conclude that "incarceration was so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense . . . ." *Id.*

[46] *Id.* "The Sixth and Fourteenth Amendments . . . do not require a state trial court to appoint counsel for a criminal defendant . . . who is charged with a statutory offense for which imprisonment upon conviction is authorized but not imposed." *Id.* at 367.

of his constitutional right to counsel when the state failed to provide him with an attorney.[47]

The Court noted that any extension beyond "actual imprisonment" would create great confusion and impose unpredictable and substantial costs on the states and, therefore, would be unworkable.[48] Although it is now clear that uncounseled misdemeanors are constitutionally valid if there is no jail sentence imposed,[49] *Scott* did not determine whether an uncounseled misdemeanor conviction could be used collaterally in a later conviction. That issue would become essential in subsequent United States Supreme Court decisions concerning the right to counsel.[50]

III. COLLATERAL USES OF UNCOUNSELED CONVICTIONS

A. Felony Convictions

1. United States Supreme Court

In *Burgett v. Texas*,[51] the United States Supreme Court initially addressed the issue of whether an uncounseled felony can be used collaterally to enhance a subsequent sentence. In *Burgett*, the defendant was subject to life imprisonment based on a Texas repeat-offender statute.[52] The statute required that a defendant receive the maximum penalty for an offense if he had previously been convicted for the same or similar offense, and shall be sentenced to life imprisonment upon the third conviction.[53] The defendant challenged the introduction of the four previous uncounseled convictions and the prosecution failed to rebut the challenge by showing that counsel was waived.[54] As a result, the trial judge instructed the jury to disregard the prior convictions.[55] The jury found the defendant guilty and sentenced him to ten years in prison, rather than the maximum penalty of twenty-five years.[56]

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[47] *Id.* at 369. The United States Supreme Court agreed with the Illinois Supreme Court that the Constitution does not require a state trial court to appoint counsel for a criminal defendant that was not actually sentenced to imprisonment. *Id.*

[48] *Id.* at 373.

[49] *See supra* text accompanying notes 40-46.

[50] *See* Baldasar v. Illinois, 446 U.S. 222 (1980); Nichols v. United States, 114 S. Ct. 1921 (1994).

[51] 389 U.S. 109 (1967).

[52] *Id.* at 111. The statutes involved here are Articles 62 and 63 of the Texas Penal Code. *Id.*

[53] *Id.* at 111 n.3.

[54] *Id.* at 112.

[55] *Id.* at 112-13.

[56] *Id.* at 110.

Although the jury did not enhance Burgett's sentence, the Court feared the jury may have handed down a guilty verdict based on his prior criminal record rather than on the evidence at trial.[57] In reversing the conviction, the United States Supreme Court held that any conviction that violated *Gideon* was "inherently prejudicial" and using such conviction "against a person either to support guilt or enhance punishment for another offense" would "erode the principle" of *Gideon*.[58] In addition, since the prior convictions were not constitutionally valid due to denial of right to counsel, the accused "suffers anew from the deprivation of that Sixth Amendment right."[59] The *Burgett* court held that the use of prior uncounseled felony convictions may not be used to enhance a prison sentence.[60]

Five years later, the United States Supreme Court affirmed *Burgett* in *United States v. Tucker*,[61] which reiterated that uncounseled felony convictions could not be used to enhance a defendant's sentence.[62] In sentencing the defendant to the maximum prison term allowed, the sentencing court "gave explicit attention to the three previous felony convictions the [defendant] had acknowledged."[63]

Several years later, the Superior Court of Alameda County conclusively determined that the defendant's prior convictions were constitutionally invalid.[64] In two prior convictions considered by the sentencing court, the defendant did not have counsel, nor did he waive his right to counsel.[65] While the Court acknowledged that the sentencing court had the discretion to consider broad and largely unlimited sources of information, it held that the sentencing court could not impose a sentence "founded at least in part upon misinformation of constitutional magnitude."[66]

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[57] *Id.* at 115. Justice Douglas stated that admission of prior criminal conviction, which was introduced for purpose of enhancing punishment, and which was constitutionally infirm because of presumption that defendant was denied right to counsel, was inherently prejudicial. *Id.* Instructions to disregard prior criminal conviction did not render constitutional error harmless beyond reasonable doubt. *Id.*

[58] *Id.*

[59] *Id.*

[60] Burgett v. Texas, 389 U.S. 109 (1967).

[61] 404 U.S. 443 (1972).

[62] *Id.*

[63] *Id.* at 444.

[64] *Id.* at 444-45. This determination was made by the Superior Court of Alameda County, California, upon that court's finding in a collateral proceeding that those convictions had resulted from proceedings in which the respondent had been unrepresented by counsel, and that he had been neither advised of his right to legal assistance nor did he intelligently and understandingly waive this right to the assistance of counsel. *Id.*

[65] *Id.* at 445.

[66] *Id.* at 447.

Relying on *Burgett*, the Court determined that *Gideon* established an "unequivocal rule" making it unconstitutional to try a person for a felony in a state court unless he had counsel or validly waived it.[67] Accordingly, the Court found it clear that the use of defendant's prior uncounseled convictions violated the Sixth Amendment right to counsel and, therefore, was "wholly unconstitutional."[68] Reversal of the conviction was the only way to prevent erosion of the *Gideon* principle.[69] Although *Burgett* and *Tucker* conclusively held that uncounseled felony convictions may not be used collaterally, the implications of uncounseled misdemeanor convictions were yet to be contemplated by the Supreme Court.

2. *Hawai'i Supreme Court*

The Hawai'i Supreme Court has followed the United States Supreme Court's reasoning in approaching enhanced sentencing issues. In *State v. Kamae*,[70] the Hawai'i Supreme Court vacated the extended term sentence[71] imposed on the defendant due to a "glaringly deficient" presentence report, which did not show that the defendant had been represented by counsel during alleged prior offenses or that he had intelligently and voluntarily waived his constitutional right to counsel.[72] The court looked to *Burgett*'s reasoning that an extended sentence would be a violation of *Gideon* and would "erode the principle of that case."[73] Furthermore, the court noted that it would be impermissible to

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[67] *Id.* at 449.

[68] *Id.* at 447, 449.

[69] *Id.* at 449.

[70] 56 Haw. 628, 548 P.2d 632 (1976).

[71] The extended term sentence was imposed pursuant to section 706-662(4) of the Hawai'i Revised Statutes, the "multiple offender" section which provides that a defendant is subject to an extended term sentence if:

(a) The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for felony; or

(b) The maximum terms of imprisonment authorized for each of the defendant's crimes, if made to run consecutively would equal or exceed in length the maximum of the extended term imposed, or would equal or exceed forty years if the extended term imposed is for a class a felony.

HAW. REV. STAT. § 706-662(4) (1993).

[72] *Kamae*, 56 Haw. at 638, 548 P.2d at 639.

[73] *Id.* at 639, 548 P.2d at 639 (citing Burgett v. Texas, 389 U.S. 109, 115 (1967)). *Burgett* and *Gideon* concerned the right to counsel guaranteed under the Sixth Amendment of the United States Constitution. The right to counsel is also guaranteed by article I, section 14 of the Hawai'i State Constitution. State v. Sinagoga, 81 Hawai'i 421, 431 n.11, 918 P.2d 228, 238 n.11 (1996).

presume a waiver of counsel from a silent record.[74] Therefore, *Kamae* established that uncounseled felony convictions may not be used to enhance sentences in Hawai'i unless counsel was waived.[75]

The Hawai'i Supreme Court again faced the issue of collateral uses of prior uncounseled convictions in *State v. Morishige*.[76] *Morishige* involved an extended term sentence under both the "persistent offender" and the "multiple offender" provisions of the Hawai'i Revised Statutes.[77] The trial court adjudged the defendant to be a persistent and a multiple offender after rejecting testimony on the purported ineffectiveness of his attorneys in prior convictions upon which the enhanced sentence was based.[78] The defendant was sentenced to an extended term of twenty years without the possibility of parole for ten years and he appealed to the Hawai'i Supreme Court.[79]

In remanding the case for resentencing, the Hawai'i Supreme Court emphasized that the right to counsel guaranteed by the United States and Hawai'i Constitutions "is satisfied only when such assistance is 'effective.'"[80] A hearing to determine whether an extended term should be imposed cannot be equated with the "routine sentence of the trial judge."[81] Accordingly, the court set forth a two-step process to be followed in imposing an extended term sentence.[82] The first step involves a finding that the defendant is within the class of offenders to which the persistent and multiple offender provisions apply.[83] If the court so finds, it must then determine whether an enhanced

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[74] *Kamae*, 56 Haw. at 639, 548 P.2d at 639 (quoting Carnley v. Cochran, 369 U.S. 506, 516 (1962)).

[75] *Id.*

[76] 65 Haw. 354, 652 P.2d 1119 (1982). In *Morishige*, the defendant, a previously convicted felon, was convicted of Assault in the First Degree and Attempted Assault in the First Degree for shooting his brother and his brother's girlfriend. *Id.* at 357, 652 P.2d at 1123. The defendant was denied the opportunity to demonstrate the ineffectiveness of counsel in prior cases and the court sentenced him to an extended term of twenty years imprisonment without possibility of parole. *Id.* at 356, 652 P.2d at 1122-23.

[77] The "persistent offender" provision refers to section 706-662(1) and the "multiple offender" provision refers to section 706-662(4) of the Hawai'i Revised Statutes.

[78] *Morishige*, 65 Haw at 366, 652 P.2d at 1129.

[79] *Id.* at 356, 652 P.2d at 1122.

[80] *Id.* at 368, 652 P.2d at 1129 (quoting State v. Kahalewai, 54 Haw. 28, 30, 501 P.2d 977, 979 (1972)).

[81] *Id.* at 367, 652 P.2d at 1128 (citing State v. Kamae, 56 Haw. 32, 38, 526 P.2d 1200, 1204 (1974)).

[82] *Morishige*, 65 Haw. at 367, 652 P.2d at 1128-1129. The court cited State v. Huelsman, 60 Haw. 71, 76, 588 P.2d 394, 398 (1978), in holding that "[e]ach of the subsections of § 706-662 requires the trial court to engage in a two-step process to impose a sentence for an extended term." *Id.*

[83] *Morishige*, 65 Haw. at 367, 652 P.2d at 1128-1129.

sentence is "necessary for the public's protection or that his criminality is so extensive that an extended term is warranted."[84]

The first step, the establishment of the defendant's status as a persistent or multiple offender involves a finding of "historical facts," defined as the "proof of which exposes the defendant to punishment by an extended term sentence."[85] This is similar to "the manner in which the proof of his guilt exposes him to ordinary sentencing."[86] In a hearing where ordinary rules of evidence apply, these "historical facts" must be established beyond a reasonable doubt.[87] Accordingly, when prior convictions are used collaterally to enhance a subsequent offense, the record must show beyond a reasonable doubt that the defendant was represented by counsel during prior offenses, or that he "intelligently and voluntarily waive[d] his constitutional right to counsel."[88] The court alluded to *Burgett*'s reference to *Gideon*, stating that allowing such a conviction "to support guilt or enhance punishment for another offense is to erode the principle of" *Gideon*.[89] Although the defendant's record reflected the prior convictions premised on guilty pleas and the presence of counsel in previous cases, the defendant maintained that he was not afforded "effective" counsel when the guilty pleas were entered.[90] The court, therefore, held that the defendant should have the opportunity to develop such evidence.[91]

Kamae and *Morishige* maintained that uncounseled convictions may not be used to collaterally enhance an offense in Hawai'i.[92] However, both cases dealt solely with prior felony convictions and did not address the issue of whether there is a similar bar to the use of uncounseled misdemeanor and petty misdemeanor convictions.[93]

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[84] *Id.* at 367, 652 P.2d at 1129.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.* (citing State v. Kamae, 56 Haw. 628, 638, 548 P.2d 632, 639 (1976)).

[89] *Id.* at 367, 652 P.2d at 1129 (citing Burgett v. Texas, 389 U.S. 109, 115 (1967)).

[90] *Id.* at 366, 652 P.2d at 1128.

[91] *Id.* at 369, 652 P.2d at 1130. The court stated that the burden of proving ineffectiveness of counsel lies with the defendant, who faces a "two-fold" test:

> First, he must establish specific omissions of defense counsel reflecting counsel's lack of skill, judgment or diligence. Second, he must establish that these errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.

Id. (quoting State v. Antone, 62 Haw. 346, 348, 615 P.2d 101 (citations omitted)).

[92] State v. Kamae, 56 Haw. 628, 548 P.2d 632 (1976); *Morishige*, 65 Haw. 354, 652 P.2d 1119.

[93] *See Kamae*, 56 Haw. 628, 548 P.2d 632; *Morishige*, 65 Haw. 354, 652 P.2d 1119. *Kamae* involved prior convictions which included referral to juvenile court approximately twenty times and incarceration at the Hawai'i Youth Correctional Facility. *Kamae*, 56 Haw. at

B. Misdemeanor Convictions

1. Baldasar v. Illinois

The United States Supreme Court addressed the issue of whether uncounseled misdemeanor convictions may be used collaterally to enhance subsequent sentences in *Baldasar v. Illinois*.[94] In a split decision, the Court held that, similar to uncounseled felony convictions, uncounseled misdemeanor convictions may not be used collaterally.[95] In *Baldasar*, the defendant was previously convicted of misdemeanor theft, fined $159, and sentenced to one year of probation.[96] The record showed that the defendant was not represented by counsel and had not formally waived any right to counsel.[97] Under *Scott* and *Argersinger* this was a constitutionally valid conviction because it did not meet the "actual imprisonment" standard.[98] Later that same year, the defendant was charged with stealing a shower head worth twenty-nine dollars from a department store.[99] The Illinois enhancement statute treats second convictions of the same offense as a felony, punishable with a prison term of one to three years.[100] Consequently, the defendant was convicted and sentenced to prison for up to three years.[101]

In a per curiam opinion, a fragmented United States Supreme Court reversed the conviction on the ground that such use of a prior conviction to convert a misdemeanor into a felony was unconstitutional under the Sixth Amendment.[102] However, instead of providing a clear rationale for its decision, the Court alluded to the various "reasons stated in the concurring opinions."[103] There were three concurring opinions written by Justices Stewart, Marshall, and

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628, 548 P.2d at 633. *Morishige* involved prior convictions of assault in the first degree and attempted assault in the first degree. *Morishige*, 65 Haw. at 356, 652 P.2d at 1122.

[94] 446 U.S. 222 (1980).

[95] *Id.* at 224.

[96] *Id.* at 223.

[97] *Id.*

[98] *See supra* notes 32 & 40 and accompanying text.

[99] *Baldasar*, 446 U.S. at 223.

[100] Under Illinois law, theft "not from the person" of property worth less than $150 is a misdemeanor punishable by not more than a year imprisonment and a fine of not more than $1000. ILL. REV. STAT. ch. 38, § 6-1(e)(1), 1005-8-3(a)(1), 1005-9-1(a)(2) (1975). A second conviction for the same offense, however, may be treated as a felony with a prison term of one to three years. ILL. REV. STAT. ch. 38, § 1005-8-1(b)(5) (1975).

[101] Baldasar v. Illinois, 446 U.S. 222, 223 (1980).

[102] *Id.* at 224.

[103] *Id.*

Blackmun.[104] In a brief opinion, Justice Stewart, joined by Justices Brennan and Stevens, reaffirmed the "actual imprisonment" standard set out in *Scott*, and held that the defendant's prison sentence violated the Sixth Amendment right to counsel.[105] The defendant's sentence was enhanced solely because of a prior uncounseled conviction and, therefore, he was sentenced to imprisonment as a direct result of that prior conviction.[106]

Justice Marshall's concurrence, joined by Justices Brennan and Stevens, agreed with Justice Stewart's premise and found that the use of the defendant's prior uncounseled conviction was unconstitutional because it constituted "actual imprisonment."[107] Justice Marshall contended that uncounseled convictions that are constitutional under *Scott* are not valid for all purposes.[108] More specifically, under *Scott* and *Argersinger*, such convictions are "invalid for the purpose of depriving [the defendant] of his liberty."[109] He maintained that the defendant's sentence would not have been authorized "but for the previous conviction."[110] Moreover, uncounseled convictions are unreliable and do not "become more reliable merely because the accused has been validly convicted of a subsequent offense."[111] Justice Marshall concluded that a sentencing judge may not use a prior uncounseled conviction to enhance the term of imprisonment for a subsequent offense.[112] Any other holding would be "an illogical and unworkable deviation from [the Supreme Court's] previous cases."[113]

Justice Blackmun, in his concurrence, followed his dissent in *Scott* and adhered to the "bright line" approach that he introduced in *Scott*.[114] The "bright line" approach would require counsel to be appointed for all offenses authorizing punishment of six months or more.[115] He reasoned that the

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[104] *Id.* at 222. Justice Marshall wrote a dissenting opinion that was joined by Chief Justice Burger, Justice White and Justice Rehnquist. *Id.*

[105] *Id.* at 224 (Stewart, J. concurring).

[106] *Id.*

[107] *Id.* at 224 and 226 (Marshall, J., concurring).

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.* at 227-28. Justice Marshall further stated that "a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction . . . ." *Id.* at 228.

[112] *Id.* at 228-29.

[113] *Id.*

[114] *Id.* at 229-30 (Blackmun, J., concurring).

[115] *Id.* In *Scott*, Justice Blackmun wrote in his dissenting opinion:

> I would hold that an indigent defendant in a state criminal case must be afforded appointed counsel whenever the defendant is prosecuted for a nonpetty criminal offense, that is, one punishable by more than six months' imprisonment . . . or whenever the defendant is convicted of an offense and is actually subjected to a term of imprisonment

collateral use of the defendant's prior conviction was not allowed because under the "authorized imprisonment" standard the conviction was punishable by more than six months imprisonment.[116] Justice Blackmun concluded that since the first conviction was not valid, it could not be used to enhance a subsequent sentence.[117]

Justice Powell, writing for the four dissenters, classified the additional time sentenced for the uncounseled misdemeanor as "solely a penalty for the second theft."[118] He maintained that recidivist statutes neither alter nor enlarge a prior sentence, rather, they only punish the last offense committed.[119] In addition, the dissent accused Justice Marshall of creating a "new hybrid" of misdemeanor convictions which "are valid for the purposes of their own penalties as long as the defendant receives no prison term," but "are invalid for the purpose of enhancing punishment upon a subsequent misdemeanor conviction."[120]

Furthermore, Justice Powell predicted that *Baldasar*'s holding would "create confusion in local courts and impose greater burdens on state and local governments."[121] Due to the lack of a rationale to support its decision, the effect of the decision was unclear.[122] The uncertainty resulted in an inconsistent application of *Baldasar* in the lower courts.[123]

2. *Hawai'i Supreme Court Cases*

The Hawai'i Supreme Court, in *State v. Hoglund*,[124] adopted *Baldasar* in Hawai'i.[125] In *Hoglund*, the court cited the rule from *Baldasar*, that an

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> . . . This resolution, I feel, would provide the "bright line" that . . . would reconcile on a principled basis the important considerations . . . .

Scott v. Illinois, 440 U.S. 367, 389-90 (1979).

[116] *Id.* (Marshall, J., concurring).

[117] *Id.*

[118] *Id.* at 232 (Powell, J., dissenting).

[119] *Id.*

[120] *Id.*

[121] *Id.* at 234.

[122] *See id.* at 224. In support of the Court's holding, the opinion merely stated that the reasoning is based on "the reasons stated in the concurring opinions[.]" *Id.*

[123] For an analysis of *Baldasar* and a summary of the various interpretations of *Baldasar* made by the lower courts, *see* Rudstein, *supra* note 1. *See also* Michael J. Stacchini, Comment, *Nichols v. United States: Narrowing the Sixth Amendment Guarantee to Counsel*, 75 B.U. L. REV. 1233, 1243 (1995); Fu, *supra* note 1.

[124] 71 Haw. 147, 785 P.2d 1311 (1990).

[125] *Id.* at 152, 785 P.2d at 1313. In *Hoglund*, the defendant was convicted of driving under the influence of intoxicating liquor. *Id.* at 148, 785 P.2d at 1312. He was sentenced as a second-time offender as follows: "a one-year license suspension, a $500 fine, 80 hours of community service and an alcohol dependence assessment, and treatment if necessary, at his expense." *Id.*

uncounseled misdemeanor conviction cannot be used collaterally to impose an increased term of imprisonment upon a subsequent conviction.[126] As a result, the State was not required to show that the defendant's prior conviction was counseled because no sentence of imprisonment was imposed on the defendant's second conviction.[127] The court provided that *Baldasar* "only prohibits the use of an uncounseled conviction to impose an enhanced sentence where an increased term of imprisonment results . . . ."[128]

The Hawai'i Supreme Court also cited *Baldasar* in another misdemeanor DUI case, *State v. Vares*.[129] The court held that because the defendant was not represented by counsel on a prior DUI misdemeanor conviction, the conviction cannot be utilized to sustain the enhanced sentence imposed for a third DUI conviction.[130] The defendant's sentence was vacated and remanded to the trial court for resentencing as a second-time offender.[131] Thus, the appellate decisions in Hawai'i have followed *Baldasar* by requiring proof that a prior misdemeanor conviction was counseled when used as a basis for imprisonment or an enhanced sentence of imprisonment.[132]

3. *Nichols v. United States*

In 1994, the United States Supreme Court overruled *Baldasar* in the landmark decision, *Nichols v. United States*.[133] *Nichols* marked the first time the Court narrowed the protection under the right to counsel instead of

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[126] *Id.* at 152, 785 P.2d at 1313.

[127] *Id.*

[128] *Id.*

[129] 71 Haw. 617, 801 P.2d 555 (1990). In the court's ruling, it cited *Baldasar* in saying that, "[a]n uncounseled conviction cannot be used collaterally to support an enhanced sentence where such enhanced sentence includes a term of imprisonment." *Id.* at 621, 801 P.2d at 557 (1990) (citing Baldasar v. Illinois, 446 U.S. 222, *reh'g denied*, 447 U.S. 930 (1980), *overruled by*, 114 S. Ct. 1921 (1994)).

[130] *Vares*, 71 Haw. at 623, 801 P.2d at 558. Under section 291-4(b) of the Hawai'i Revised Statutes, penalties become harsher for subsequent DUI offenses. HAW. REV. STAT. § 291-4(b) (1985). An offense which occurs within five years of two prior convictions is punishable by a fine of $500-$2,500, revocation of license for one to five years, and ten to one hundred eighty days imprisonment. HAW. REV. STAT. § 291-4(b) (1985).

In *Vares*, the defendant was convicted of driving under the influence of intoxicating liquor and sentenced as a third-time offender. *Vares*, 71 Haw. at 618, 801 P.2d at 556. The court imposed a $1,000 fine, revoked his driver's license for a period of three years, assessed eight traffic points, and imposed a jail term of 180 days, but suspended all but 15 days of that term subject to certain conditions. *Id.* at 618-619, 801 P.2d at 556-557.

[131] *Vares*, 71 Haw. at 622, 801 P.2d at 558.

[132] *See also* State v. Nishi, 9 Haw. App. 516, 527-528, 852 P.2d 478, 482 (1993).

[133] 114 S. Ct. 1921 (1994).

broadening it.[134] Chief Justice Rehnquist, writing for the majority, held that a prior uncounseled misdemeanor conviction, valid due to the absence of a sentence of imprisonment, is also valid when used to enhance punishment at a subsequent conviction.[135]

In *Nichols*, the defendant pled guilty to conspiracy to distribute cocaine and was sentenced to 235 months' imprisonment.[136] Under the Sentencing Guidelines, in his criminal history score, one point was assessed for a previous misdemeanor conviction for DUI, increasing his Criminal History Category from category II to category III.[137] The defendant was fined $250 for the misdemeanor DUI conviction, but was not incarcerated.[138] That additional point resulted in an increased maximum sentence of imprisonment from 210 to 235 months.[139] The defendant objected to the inclusion of his DUI conviction on the ground that he had not been represented by counsel in the prior proceeding and, thus, his extended sentence would violate the Sixth Amendment under the principles set forth in *Baldasar*.[140]

The Court affirmed the conviction and expressly overruled *Baldasar*.[141] The Court stated that the high degree of confusion generated by the per curiam opinion of *Baldasar* was "itself a reason for reexamining that decision."[142] As a result, the Court adhered to *Scott*'s "actual imprisonment" standard and agreed with the dissent in *Baldasar*, holding that enhancement statutes "do not change the penalty imposed for . . . earlier conviction[s]."[143] Furthermore, the Supreme Court has "consistently . . . sustained repeat-offender laws as penalizing only the last offense committed by the defendant."[144]

The Court further explained that because a sentencing court might validly consider "the underlying conduct which gave rise" to the prior conviction, "it must be constitutionally permissible to consider a prior uncounseled misdemeanor conviction based on the same conduct. . . ."[145] In addition, the

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[134] *See id.*

[135] *Id.* at 1927.

[136] *Id.* at 1923.

[137] *Id.* There are six criminal history categories under the Sentencing Guidelines. United States Sentencing Commission, Guidelines Manual ch. 5, pt. A (Nov. 1993) (Sentencing Table). *Id.* at 1923 n.2. A defendant's criminal history category is determined by the number of his criminal history points, which in turn is based on his prior criminal record. *Id.*

[138] *Id.* at 1923.

[139] *Id.*

[140] *Id.*

[141] *Id.* at 1928. The Court stated that "we adhere to Scott v. Illinois . . . and overrule *Baldasar*." *Id.*

[142] *Id.* at 1927.

[143] *Id.*

[144] *Id.*

[145] *Id.* at 1928.

Court found that reliance upon uncounseled convictions, valid under *Scott*, is consistent with the traditional understanding of the sentencing process, which has been recognized as less exacting than the process of first establishing guilt.[146] Therefore, *Nichols* held that a valid uncounseled conviction may be used to enhance the sentence for a subsequent offense.[147]

Justice Souter, writing a concurring opinion, approved the use of uncounseled misdemeanor convictions, because unlike the sentence enhancement scheme in *Baldasar*, "the Sentencing Guidelines do not provide for automatic enhancement based on prior uncounseled convictions."[148] Instead, the Sentencing Guidelines seek to punish those who exhibit a pattern of "criminal conduct," and not a pattern of prior convictions.[149] Justice Souter viewed prior convictions as playing a "presumptive" role, rather than a conclusive one, for which the Sentencing Guidelines allow the defendant the chance to rebut this presumption.[150]

Justice Souter further explained that as long as the "concern for reliability is accommodated, as it is under the Sentencing Guidelines, nothing in the Sixth Amendment or our cases requires a sentencing court to ignore the fact of a valid uncounseled conviction[.]"[151] Justice Souter did not join in the majority opinion because he was concerned that the majority's holding encompassed sentencing schemes, not before the court, which would automatically require enhancement for prior uncounseled convictions.[152]

Justice Blackmun, in a dissenting opinion joined by Justices Stevens and Ginsburg, adhered to the principles of *Gideon* and *Argersinger*, by emphasizing that "an uncounseled misdemeanor, like an uncounseled felony, is not reliable enough to form the basis for the severe sanction of incarceration."[153] Justice Blackmun maintained that uncounseled misdemeanor convictions could never justify any term of imprisonment, either directly or collaterally.[154] Thus, Justice Blackmun asserted that uncounseled misdemeanor convictions should be

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[146] *Id.* at 1927. The Court quoted United States v. Tucker stating "[a]s a general proposition, a sentencing judge 'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.'" *Id.* (quoting United States v. Tucker, 404 U.S. 443, 446 (1972)).

[147] *Id.*

[148] *Id.* at 1930 (Souter, J., concurring).

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.* at 1931. He explained that "[t]he Court will not anticipate a question of constitutional law in advance of the necessity of deciding it." *Id.*

[153] *Id.* at 1935 (Blackmun, J., dissenting). The dissent went on to say that "we cannot have confidence in the reliability of the conviction and, therefore, cannot impose a prison term based on it." *Id.*

[154] *Id.* at 1936.

invalid for enhancing prison sentences, just as they are initially invalid for imposing jail sentences, due to the concern for reliability.[155] Justice Blackmun acknowledged that this "clear rule" may cause counsel to be appointed for more indigent defendants, in order to preserve the right to use the conviction collaterally for enhancement purposes.[156] However, "[t]he Sixth Amendment guarantee of counsel should not be subordinated to these costs."[157]

The Supreme Court's ambivalence in addressing the right to counsel has caused much speculation on what the state of the law should be.[158] In Hawai'i, the Intermediate Court of Appeals (ICA) wrestled with the issue of the collateral use of uncounseled misdemeanors in a 1996 case, *State v. Sinagoga*.[159] Although the case is seemingly inconsistent with the Supreme Court's holding in *Nichols*, Hawai'i appellate courts may interpret the Hawai'i Constitution to afford greater protection than the U.S. Constitution.[160]

IV. STATE V. SINAGOGA

A. Facts

In *State v. Sinagoga*,[161] the defendant, John E. Sinagoga, was charged with three counts of Terroristic Threatening in the First Degree.[162] He pleaded no contest to Count I and guilty to Counts II and III.[163] Sinagoga was sentenced to consecutive prison terms of five years each on Counts I, II and III.[164]

Prior to a change of plea hearing, Sinagoga had entered into a plea agreement with the State where Sinagoga agreed to plead no contest to Count I[165] and

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[155] *Id.* at 1935-36. "Both the plain wording of the Amendment and the reasoning in Gideon would support the guarantee of counsel in 'all' criminal prosecutions, petty or serious, whatever their consequences." *Id.* at 1931 (Blackmun, J., dissenting).

[156] *Id.* at 1936.

[157] *Id.*

[158] *See, e.g.*, Joseph L. Hendrickson, *The Use of Uncounseled Misdemeanor Convictions to Enhance a Penalty for a Subsequent Offense After Nichols v. United States*, 39 ST. LOUIS U. L.J. 669 (1995); Christine S. May, *Uncounseled Misdemeanor Convictions and Their Unreliability for Sentence Enhancement Under the United States Federal Sentencing Guidelines: Nichols v. United States, 114 S.Ct. 1921 (1994)*, 18 HAMLINE L. REV. 231 (1994).

[159] State v. Sinagoga, 81 Hawai'i 421, 918 P.2d 228 (1996).

[160] State v. Silva, 78 Hawai'i 115, 121, 890 P.2d 702, 708 (1995).

[161] 81 Hawai'i 421, 918 P.2d 228 (1996).

[162] *Id.* at 424, 918 P.2d at 231.

[163] *Id.*

[164] *Id.*

[165] Sinagoga was charged in Count I with Terroristic Threatening in the First Degree defined in HAW. REV. STAT. § 707-716(1)(d)(1993) as "[a] person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening . . . [w]ith the use of a dangerous weapon." HAW. REV. STAT. § 707-716(1)(d) (1993).

guilty to Counts II and III[166] of the Terroristic Threatening in the First Degree charges.[167] In return, the State agreed to Sinagoga's request for probation with one year of incarceration and credit for time served.[168] In addition, the State agreed not to seek enhanced sentencing.[169]

At the beginning of the hearing, the overseeing judge explained to Sinagoga that signing the change in plea document meant that he had conceded to plead in accordance with his agreement with the State.[170] After Sinagoga indicated that he had doubts about signing, the court recessed to allow him time to consult with his attorney.[171] After reconvening, the judge repeated her earlier statement to Sinagoga that by signing the document he was agreeing to plead as provided in the agreement.[172] This time, Sinagoga responded that he did understand the document and confirmed, in responses to further questions, that he had the requisite capacity to enter the plea.[173]

The trial judge then informed Sinagoga that the court could order an "extended term"—a "doubling" of the five-year ordinary sentence on each count to ten years on each count, which, if imposed consecutively, would total thirty years.[174] She also explained that neither she nor any other judge was bound by the plea agreement and Sinagoga answered that he understood.[175]

Sinagoga then entered a plea of no contest to Count I and pleas of guilty to Counts II and III.[176] After the court accepted the pleas, the court clerk informed both parties that sentencing would take place before Judge Spencer.[177]

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[166] Sinagoga was charged with Counts II and III, Terroristic Threatening in the First Degree defined in HAW. REV. STAT. § 808-716(1)(a) (1993) as: "[a] person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening . . . [b]y threatening another person on more than one occasion for the same or a similar purpose." HAW. REV. STAT. § 808-716(1)(a) (1993).

[167] *Sinagoga*, 81 Hawai'i at 424, 918 P.2d at 231.

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.* at 425, 918 P.2d at 232.

[174] *Id.* *See id.* at 424, 918 P.2d at 231 n.3 (1996) (recounting the relevant portion of the transcript of the hearing as to Sinagoga's understanding of extended sentencing appurtenant to his case).

[175] *Id.* at 425, 918 P.2d at 232. The opinion restates part of the transcript of the hearing:

> [Judge Waldorf:] All right. Do you further understand, though, that as a matter of fact, the court, *whether it be me or any other judge*, is not compelled to follow agreements that are reached by attorneys. You understand that?
>
> [Defendant:] Yes, I do.

Id.

[176] *Id.*

[177] *Id.*

At the sentencing hearing before Judge Leland H. Spencer, both the prosecutor and public defender requested that the court follow the plea agreement.[178] However, Judge Spencer chose to read off Sinagoga's prior criminal record, which included convictions in various jurisdictions for burglary, assault, driving under the influence, and drug and concealed weapon possession.[179] Judge Spencer noted that since Sinagoga's charges were felonies involving violence and that Sinagoga was not a young man, he would be "a danger to people, whether in Hawai'i or any other state where he happens to be; and that as long as he's free to do so, he's going to continue to be a danger to both people and to property."[180] Judge Spencer sentenced Sinagoga to a term of imprisonment of five years on each count, with the terms to run consecutively.[181]

Sinagoga asserted that his due process rights were violated because he was sentenced to an "extended" sentence without the "procedural and substantive due process protection . . . guaranteed to a criminal defendant before an extended sentence can be imposed[,]" as well as his "statutory due process rights."[182] Sinagoga also maintained that the prior convictions used against him were invalid unless it was demonstrated that he was represented by counsel in those cases.[183] The court denied Sinagoga's motion for reconsideration and modification.[184] Sinagoga appealed, challenging the sentences, and his case was heard by the Intermediate Court of Appeals ("ICA").[185]

B. Majority Opinion

On appeal, the ICA dismissed the notion that Sinagoga received an extended sentence.[186] The court explained that Sinagoga was convicted of three class C felonies, and the "ordinary term" for each of these felonies was five years.[187]

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[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.* at 429, 918 P.2d at 236. Sinagoga is referring to sections 706-664 and 706-662 of the Hawai'i Revised Statutes. *Id.* Section 706-662 sets forth the criteria for extended terms of imprisonment. *Id.* Section 706-664 sets forth the procedure for imposing an extended term of imprisonment. *Id.* Thus, the "rights" the defendant claims pertain only to an extended sentence. *Id.*

[183] *Id.*

[184] *Id.* at 425, 918 P.2d at 232.

[185] *Id.*

[186] *Id.* at 429-30, 918 P.2d at 236-37.

[187] *Id.* at 430, 918 P.2d at 237. The ordinary term for a sentence of imprisonment for class B and C felonies is set forth in HAW. REV. STAT. § 706-660 (1993).

An extended sentence[188] would have doubled the ordinary term to ten years each and Sinagoga would have been sentenced to a total of thirty years imprisonment instead of fifteen.[189] Thus, Sinagoga's fifteen year term was distinguished as a consecutive sentence and not an extended sentence.[190]

Then, the ICA, for the first time, confronted the issue of the collateral use of an uncounseled misdemeanor. The court first acknowledged that the sentencing court expressly relied on Sinagoga's prior convictions in imposing consecutive terms, even though the presentence report did not indicate whether Sinagoga had counsel or waived counsel in each prior conviction.[191]

The court then analyzed case law involving the collateral use of prior uncounseled felony convictions by the United States Supreme Court,[192] and its application in similar cases in Hawai'i.[193] Based on the logic of these cases, the ICA "independently adopted" the "basic proposition under article I, section 14 of the Hawai'i Constitution, which affords accused persons the right to counsel."[194] The court found that "absent a valid waiver of the right to counsel, the use of prior uncounseled felony convictions to enhance a prison sentence violates a defendant's right to counsel."[195] Despite that finding, the issue of the collateral use of uncounseled misdemeanor and petty misdemeanor convictions still required examination.

In remanding the case for resentencing, the ICA chose not to follow the rationale of *Nichols*, which allowed the collateral use of uncounseled misdemeanors to enhance a subsequent sentence.[196] The ICA stated that "*Nichols* has not yet been the subject of any appellate discussion [in Hawai'i]."[197] Instead, the court chose to adhere to the current rule in Hawai'i that follows the proposition of *Baldasar*, which prohibits the collateral use of

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[188] An extended sentence is defined by the court as "a sentence that enlarges the ordinary sentence for any given offense." *Id.* (citing State v. Tyquiengco, 6 Haw. App. 409, 413, 723 P.2d 186, 189 (1986)).

[189] *Id.* at 430, 918 P.2d at 237. The extended term for a sentence of imprisonment for a felony is set forth in HAW. REV. STAT. § 706-661 (1993).

[190] *Id.*

[191] *Id.*

[192] The ICA looks to United States v. Tucker, 404 U.S. 443 (1972), and its affirmation of Burgett v. Texas, 389 U.S. 109 (1967), and Gideon v. Wainwright, 372 U.S. 335 (1963).

[193] *Sinagoga*, 81 Hawai'i at 431-432, 918 P.2d at 238-239. The two Hawai'i cases analogized were State v. Kamae, 56 Haw. 628, 548 P.2d 632 (1976) and State v. Morishige, 65 Haw. 354, 652 P.2d 1119 (1982). *Sinagoga*, 81 Hawai'i at 432, 918 P.2d at 239.

[194] *Sinagoga*, 81 Hawai'i at 431, 918 P.2d at 238.

[195] *Id.*

[196] Nichols v. United States, 114 S. Ct. 1921 (1994).

[197] *Sinagoga*, 81 Hawai'i at 434, 918 P.2d at 241. The court mentions the rule from State v. Silva, 78 Haw. 115, 121, 890 P.2d 702, 708 (1995), that "Hawai'i appellate courts may interpret the state constitution to afford greater protection than the federal constitution." *Sinagoga*, 81 Hawai'i at 434, 918 P.2d at 241.

uncounseled misdemeanor convictions to enhance a subsequent sentence.[198] The court reasoned that it would be "logically inconsistent" to rely on an uncounseled misdemeanor conviction to enhance a prison term for a subsequent offense if that same conviction was too unreliable to support imprisonment in the first place.[199] In addition, the court extended this "logical" rationale to apply to uncounseled petty misdemeanors as well.[200] The ICA further explained that although the court was extending greater protection to an accused person than would the United States Supreme Court, the decision remained within the bounds of precedent set by the Hawai'i Supreme Court, which allows greater protection of the right to effective counsel under article I, section 14 of the Hawai'i Constitution.[201] The court concluded that the sentencing court must ensure that any prior felony, misdemeanor, or petty misdemeanor conviction relied on in choosing to impose a consecutive, rather than concurrent, term of imprisonment was a counseled one.[202]

The ICA also set forth a five-step sentencing procedure for using prior convictions to impose or enhance prison sentences.[203] The first step is for the court to furnish a copy of the presentence report and any other report of defendant's prior criminal conviction(s) to both parties.[204] If the defendant contends that one or more of the reported criminal convictions was uncounseled, otherwise invalid or not against the defendant, the second step is to make a good faith challenge on the record stating the basis for the

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[198] *Sinagoga*, 81 Hawai'i at 434, 918 P.2d at 241. *See supra* notes 124-32 and accompanying text.

[199] *Id.*

[200] *Id.*

[201] *Id.* Hawai'i appellate courts may interpret the state constitution to afford greater protection that the federal constitution. *See e.g.*, State v. Hoey, 77 Hawai'i 17, 881 P.2d 504 (1994) (holding that the Hawai'i Constitution provides broader protection than the U.S. Constitution in interpreting when police must cease interrogation after Miranda rights are read to a defendant); State v. Aplaca, 74 Haw. 54, 67, 837 P.2d 1298, 1305 n.2 (1992) (relaxing the "unduly difficult" federal standard used to measure ineffectiveness of counsel); State v. Lessary, 75 Haw. 446, 865 P.2d 150 (1994) (holding that Hawai'i affords greater protection in determining whether a defendant has been subject to double jeopardy).

[202] *Sinagoga*, 81 Hawai'i at 435, 918 P.2d at 242.

[203] *Id.* at 447, 918 P.2d at 254. These steps are "to be taken by Hawai'i courts in cases where ordinary sentencing procedures are applicable and there is a possibility that the court may use the defendant's prior conviction(s) as a basis for the imposition or enhancement of a prison sentence." *Id.*

[204] *Id.* This is consistent with § 706-604(2) which provides that:

> The court shall furnish to the defendant or the defendant's counsel and to the prosecuting attorney a copy of the report of any pre-sentence diagnosis or psychological, psychiatric, or other medical examination and afford fair opportunity, if the defendant or the prosecuting attorney so requests, to controvert or supplement them.

HAW. REV. STAT. § 706-604(2) (1993).

challenge.[205] The third step must be made prior to imposing the sentence. The court must inform the defendant that each reported conviction that is not challenged will be considered valid.[206] Also, any challenge not made prior to sentencing may not, absent good cause, be used to attack the court's sentence.[207] Step four entails making a determination on whether the state satisfied its burden of proving that the defendant's challenge is erroneous.[208] If the court is aware of the defendant's prior uncounseled or otherwise invalid criminal conviction(s), step five prohibits the court from imposing or enhancing a prison sentence without expressly stating on the record that it did not consider that conviction(s) as a basis for imposition or enhancement of a prison sentence.[209]

C. *Dissenting Opinion*

In a dissenting opinion, Judge Acoba disagreed with the majority's basic proposition that the defendant should bear the burden of raising a "good faith challenge" to the validity of a prior criminal conviction and the underlying assumptions and methodology used.[210] "Not every case justifies a sentence greater than would ordinarily be imposed, nor does every case require consideration of prior convictions in order to impose an enhanced sentence."[211] The State is the party that usually seeks enhanced sentencing, otherwise, the court may impose it at its discretion.[212] For that reason, it is unnecessary to place the burden on the defendant to make a "good faith challenge" in anticipating the possible use of a prior conviction in every case.[213] The state should bear the burden, because the State is the party who knows "whether it will rely on prior convictions at the sentencing hearing, and if so, which ones."[214] It is a waste of resources, because the effort the defendant puts forth

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[205] *Sinagoga*, 81 Hawai'i at 447, 918 P.2d 228, 254.

[206] *Id.*

[207] *Id.*

[208] *Id.* "[W]ith respect to each reported prior criminal conviction that the defendant challenges, the [Hawai'i Rules of Evidence] shall apply . . . ." *Id.*

[209] *Id.*

[210] *Id.* at 435, 918 P.2d at 242 (Acoba, J., dissenting). Judge Acoba wrote the entire majority opinion except for Part IV.B.4, which was Judge Acoba's dissenting opinion. *Id.* With respect to Part IV.B.4, the majority opinion was written by Chief Judge Burns. *Id.* at 437, 918 P.2d at 244.

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Id.*

in making a "good faith challenge" will be duplicated by the State in verifying the prior convictions it relies on.[215] Hence, "the public will pay twice."[216]

The majority's approach "ignores the expertise, experience, and ingenuity of the bar, the trial courts, and probation officers, which can easily be brought to bear on any 'problem.'"[217] Furthermore, the state has greater and easier access to law enforcement and court records, thus, the administrative burden on the state of proving that prior convictions relied on were counseled are minimal.[218] More importantly, Judge Acoba questions "the fairness of requiring a defendant, in effect, to disprove the State's sentencing case."[219] Requiring the burden to shift to the defendant is contrary to the Hawai'i Penal Code's procedural approach to the enlargement of ordinary sentences.[220] Also, cases have historically demonstrated that "lay persons are typically unaware of the nature and import of court procedures," therefore, the majority's premise that "the defendant, more than anyone else, knows whether or not his or her prior criminal conviction was uncounseled, otherwise invalid, or irrelevant," has no support.[221]

Judge Acoba viewed the majority's five step procedure as allowing the state to use a prior conviction, even if uncounseled, in the sentencing process in cases where the defendant fails to raise a challenge.[222] In effect, it constitutes a waiver of a defendant's constitutional right to effective assistance of counsel, without provision for the required procedures for the knowing, voluntary and intelligent waiver of the right to counsel.[223] He also criticized the majority's use of provisions not involved in the case to support their proposition.[224] The ICA is not vested with either the legislative power to create new sentencing procedures or the rulemaking power of the Hawai'i Supreme Court.[225] "Proof of a prior conviction is simple and straightforward and can be done sensibly."[226] However, "the majority's procedure unnecessarily complicates these matters."[227]

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[215] *Id.*

[216] *Id.*

[217] *Id.* at 436, 918 P.2d at 243.

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *Id.* at 437, 918 P.2d at 244.

[222] *Id.*

[223] *Id.*

[224] *Id.* The majority expanded their holding to impose new sentencing procedures under HAW. REV. STAT. §§ 706-606.5, 706-660.1, and 706-620(3). *Id.*

[225] *Id.*

[226] *Id.*

[227] *Id.*

Instead, Judge Acoba would remand the case with instructions that the sentence be affirmed if the prior convictions relied on are shown to be counseled ones.[228] If they cannot be shown to be counseled, then Sinagoga should be resentenced.[229]

V. ANALYSIS

A. Spirit of the Sixth Amendment

1. Rejection of Nichols

The Sixth Amendment of the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."[230] Similarly, Article 1, section 14 of the Hawai'i Constitution states that "[i]n all criminal prosecutions . . . [t]he State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment."[231] The spirit and intent of these constitutional provisions are best met by *Sinagoga* and *Baldasar*,[232] which prohibited the collateral use of uncounseled misdemeanor convictions to enhance a subsequent sentence.[233] This is in contrast to *Nichols*, as Supreme Court precedent rejected by the ICA in favor of the approach taken in *Baldasar*.[234]

Nichols unfairly allows the collateral use of highly untrustworthy convictions.[235] The plain wording of the Sixth Amendment and the reasoning of *Gideon* supports "the guarantee of counsel in 'all' criminal prosecutions,

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[228] *Id.*

[229] *Id.*

[230] U.S. CONST. amend. VI.

[231] HAW. CONST. art. I, § 14.

[232] *See supra* notes 94-123 and accompanying text.

[233] State v. Sinagoga, 81 Hawai'i 421, 918 P.2d 228 (1996); Baldasar v. Illinois, 446 U.S. 222 (1980).

[234] The ICA disregarded *Nichols* by stating that "*Nichols* has not yet been the subject of any appellate discussion in our jurisdiction. In the context of consecutive term sentencing, we choose not to follow the rationale in *Nichols*." *Id.* at 241.

By rejecting *Nichols*, the ICA afforded the defendant greater protection than the federal constitution in disallowing the use of prior uncounseled convictions. As long as the ICA provides "the minimum protections of the U.S. Constitution, the court is free to interpret the Hawai'i Constitution so as to afford defendants greater protection." Robert T. Nakatsuji, Note, *State v. Lessary: The Hawaii Supreme Court's Contribution to Double Jeopardy Law*, 17 U. HAW. L. REV. 269, 288 (1995). The court will expand protections beyond the Federal Constitution "when logic and a sound regard for the purposes of those protections so warrant." *See supra* note 229 (citing State v. Kaluna, 55 Haw. 361, 369, 520 P.2d 51, 58 (1974)).

[235] Nichols v. United States, 114 S. Ct. 1921, 1928 (1994).

petty or serious, whatever their consequences."[236] "Counsel can have a profound effect in misdemeanor cases, where both the volume of cases and the pressure to plead are great."[237] Accordingly, an indigent defendant cannot be assured a fair trial unless counsel is provided for him.[238]

Nichols focused solely on the existence of a prior conviction and not its validity.[239] The Court sidestepped the "actual imprisonment" standard by asserting that enhancement statutes "do not change the penalty imposed for the earlier conviction" because they punish only the later offense.[240] The dissent in *Nichols* acknowledged this argument, but argued that it does not establish that an uncounseled conviction is reliable enough for Sixth Amendment purposes to justify the imposition of imprisonment, even in the sentencing context."[241] Even if a prior conviction is invalid, a defendant may nevertheless be subject to an enhanced sentence.[242] Therefore, *Nichols* is arguably unconstitutional because uncounseled misdemeanor convictions may never justify any term of imprisonment, either directly or collaterally.[243]

Uncounseled convictions are not sufficiently reliable to support the severe sanction of imprisonment.[244] Imprisonment is perceived as inherently different from other punishments because of its severity as a deprivation of liberty.[245]

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[236] *Id.* at 1931 (Blackmun, J., dissenting).

[237] *Id.* at 1935.

[238] *Id.*

[239] The *Nichols* Court explained that because a sentencing court might validly consider "the underlying conduct which gave rise" to the prior conviction, "the state need prove such conduct only by a preponderance of the evidence." *Id.* at 1928. "Surely, then, it must be constitutionally, permissible to consider a prior uncounseled misdemeanor conviction based on the same conduct must be proven beyond a reasonable doubt." *Id.*

[240] *Id.* at 1927. *See id.* at 1933 (Blackmun, J., dissenting).

[241] *Id.* at 1933-44.

[242] An example of a defendant being subject to an enhanced sentence even if a prior conviction was invalid is:

> [I]f a maximum sentence for a crime is one year, but with enhancement by a prior uncounseled misdemeanor that sentence increases to one and one-half years, a court is imposing a sentence of six months for no reason other than the prior conviction. In that case, the individual would not face the additional six months imprisonment but for the prior uncounseled misdemeanor. Logically, the deprivation of liberty, specifically the addition of six months imprisonment, is a direct result of the uncounseled misdemeanor conviction.

Kirsten M. Nelson, Note, *Nichols v. United States and the Collateral Use of Uncounseled Misdemeanors in Sentence Enhancement*, 37 B.C. L. REV. 557, 582-83 (1996).

[243] Nichols v. United States, 114 S. Ct. 1921, 1936 (1994) (Blackmun, J., dissenting).

[244] Argersinger v. Hamlin, 407 U.S. 25 (1972).

[245] *Id.* at 37. The *Nichols* dissent finds that "imprisonment is a punishment 'different in kind' from fines or the threat of imprisonment" and the Supreme Court has consistently "read the Sixth Amendment to require that courts decrease the risk of unreliability, through the

Using such convictions to support guilt or enhance punishment for another offense "erode[s] the principle" of *Gideon*.[246] Moreover, the United States Supreme Court has consistently focused on the necessity of reliable proceedings and has endorsed the view that when a defendant is not counseled, the conviction is inherently unreliable to support a deprivation of liberty.[247]

Nichols' treatment of the collateral use of uncounseled misdemeanors is contrary to the *Powell* notion that the right to counsel is "fundamental and essential to a fair trial."[248] In fact, the *Nichols*' rationale itself is an infringement on the Sixth Amendment.[249] The Court improperly based the decision on the "underlying conduct which gave rise" to the prior conviction.[250] Consequently, the Court stated that "it must be constitutionally permissible to consider a prior uncounseled misdemeanor conviction based on the same conduct . . . ."[251] However, if a previous conviction was uncounseled, the "same conduct" that a sentencing court relies on may not have been assessed fairly. In order for any conviction to be sufficiently reliable to support imprisonment, the defendant must have "the guiding hand of counsel at every step in the proceedings against him."[252] The stakes of a previous conviction may not have been very great, resulting in a less-than-zealous defense and, therefore, an unreliable conviction. To allow this type of conviction to support an increased term of imprisonment would be fundamentally unfair.

2. *Application of Baldasar*

Although the Hawai'i Supreme Court denied certiorari in *Sinagoga*,[253] there is no doubt the issue of the collateral use of uncounseled misdemeanor convictions is far from settled. The court in *Sinagoga* considered whether the collateral use of uncounseled misdemeanors violates the Sixth Amendment.[254] The ICA properly followed the rationale of *Baldasar* and recognized the logical inconsistencies of a prior conviction being reliable enough to enhance a subsequent sentence, but not being reliable enough to impose a prison sentence

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provision of counsel, where a conviction results in imprisonment." *Nichols*, 114 S. Ct. at 1932 (Blackmun, J., dissenting).

[246] Burgett v. Texas, 389 U.S. 109, 115 (1967).

[247] *See* Argersinger v. Hamlin, 407 U.S. 25 (1972); Scott v. Illinois, 440 U.S. 367 (1979); Baldasar v. Illinois, 446 U.S. 222 (1980).

[248] Gideon v. Wainwright, 372 U.S. 335, 339 (1963). *See* Powell v. Alabama, 287 U.S. 45 (1932).

[249] *See infra* notes 250-51 and accompanying text.

[250] Nichols v. United States, 114 S. Ct. 1921, 1928 (1994).

[251] *Id.*

[252] *Baldasar*, 446 U.S. at 227-28.

[253] State v. Sinagoga, 81 Hawai'i 421, 918 P.2d 228 (1996).

[254] *See supra* notes 94-123 and accompanying text.

in the first place.[255]

Although *Baldasar* has a sensible conclusion, concededly the case has a vague rationale. *Sinagoga*'s reliance on *Baldasar* and the "actual imprisonment" standard of *Scott* and *Argersinger*, that uncounseled convictions are invalid for depriving a defendant of his liberty, was well-founded.[256] Uncounseled convictions are unreliable and do not "become more reliable merely because the accused has been validly convicted of a subsequent offense."[257] Any other holding would be "an illogical and unworkable deviation from previous cases."[258]

As well as being consistent with *Baldasar*, *Sinagoga* is also in accordance with the appellate decisions in Hawai'i. *Hoglund*[259] and *Vares*[260] both adhered to *Baldasar*'s approach by requiring proof that a prior misdemeanor conviction was counseled when used as a basis for an enhanced sentence.[261] Likewise, *Kamae*[262] and *Morishige*[263] were also based on the sound principles of *Powell* and *Gideon*.[264] As in *Kamae*, *Sinagoga* involved a situation where the defendant's presentence report did not indicate whether prior convictions were counseled, or had been intelligently and voluntarily waived.[265] *Sinagoga* properly followed *Kamae* in upholding the *Burgett* ruling that an uncounseled conviction is inherently prejudicial and would erode the principle of *Gideon*.[266] This fundamental right to counsel attaches to all prosecutions in which an "accused is deprived of his liberty, including misdemeanors."[267]

Sinagoga's reliance on *Morishige* was proper in that the right to counsel is only satisfied when counsel is "effective" and a defendant should have the opportunity to rebut the presumption of effectiveness.[268] Utilizing the

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[255] *Id.* at 434, 918 P.2d at 241. *See Baldasar*, 446 U.S. at 228-29 (Marshall, J., concurring).

[256] *See Sinagoga*, 81 Hawai'i at 433-34, 918 P.2d at 239-40; *Baldasar*, 446 U.S. at 227 (Marshall, J., concurring).

[257] *Baldasar*, 446 U.S. at 228 (Marshall, J., concurring).

[258] *Id.* at 228-29.

[259] *See supra* notes 124-28 and accompanying text.

[260] *See supra* notes 129-32 and accompanying text.

[261] *See* State v. Sinagoga, 81 Hawai'i 421, 434, 918 P.2d 228, 241 (1996).

[262] *See supra* notes 70-75 and accompanying text.

[263] *See supra* notes 76-91 and accompanying text.

[264] *See* State v. Morishige, 56 Haw. 354, 367, 652 P.2d 1119, 1129 (1982); State v. Kamae, 56 Haw. 628, 638, 548 P.2d 632, 639 (1976).

[265] *See Sinagoga*, 81 Hawai'i at 442-43, 918 P.2d at 249-50; *Kamae*, 56 Haw. at 638, 548 P.2d at 639.

[266] *Sinagoga*, 81 Hawai'i at 432, 918 P.2d at 239. *Kamae* stated that "[t]o permit a conviction obtained in violation of Gideon v. Wainwright to be used against a person either to support guilt or enhance punishment for another offense is to erode the principle of that case." *Kamae*, 56 Haw. at 638, 548 P.2d at 639 (citing Burgett v. Texas, 389 U.S. 109, 115 (1967)).

[267] Argersinger v. Hamlin, 407 U.S. 25, 32 (1972).

[268] State v. Morishige, 65 Haw. 354, 368, 652 P.2d 1119, 1129 (1982).

distinction between effective and non-effective counsel, it seems more apparent that a presentence record must be validated. Accordingly, *Sinagoga* correctly found that for a prior conviction to be used collaterally, counsel must be shown to be either waived or effective.[269] Lawyers are necessities and not luxuries to assure the defendant of a fair trial.[270]

B. "Five-Step Procedure"

Although *Sinagoga* appropriately held that uncounseled misdemeanors should not be used collaterally, its five-step sentencing procedure for using prior convictions may be viewed as a contradiction to the spirit of the Sixth Amendment.[271] The "five-step process" is troublesome, as well as impractical, because it inefficiently places the burden of identifying past convictions on the defendant.[272] The ICA's aspiration for reliability in using prior convictions may have been superseded by practicality and convenience.[273] In an ordinary term sentencing proceeding, a sentencing judge customarily relies upon information furnished to him in a presentence diagnosis and report.[274] Previous Hawai'i cases have held that it is the State's burden to prove that prior convictions were counseled.[275] However, the majority distinguished Sinagoga's case because previous cases did not involve prior convictions entered in other jurisdictions.[276] Consequently, the ICA viewed the State's burden as an enormous practical

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[269] *Sinagoga*, 81 Hawai'i at 432, 918 P.2d at 239. *See also Morishige*, 65 Haw. at 367, 652 P.2d at 1129; *Kamae*, 56 Haw. at 638, 548 P.2d at 639.

[270] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[271] "[A] defendant's failure to raise an uncounseled conviction constitutes, in effect, a waiver of his state constitutional right to effective assistance of counsel . . . and permits the State to use such a conviction, even if uncounseled, in the sentencing process." *Sinagoga*, 81 Hawai'i at 437, 918 P.2d at 244 (Acoba, J., dissenting).

[272] The dissent "foresee[s] a great deal of unnecessary time and expense . . . since the effort the defense expends in satisfying its 'good faith challenge' will ultimately have to be duplicated by the State in verifying the prior convictions it relies on . . . ." *Id.* at 435, 918 P.2d at 242 (Acoba, J., dissenting). In effect, "the public will pay twice." *Id.*

[273] The majority stated that the "[d]efendant's case is an example of the enormity of the practical problem faced by the State in some cases." *Id.* at 441, 918 P.2d at 248.

[274] *Id.*

[275] *See* State v. Afong, 61 Haw. 281, 602 P.2d 927 (1979); State v. Morishige, 65 Haw. 354, 652 P.2d 1119 (1982).

[276] Sinagoga's adult record reflects convictions in Michigan, Wisconsin, Colorado, Florida, Virginia, Arizona, South Carolina, and Georgia and included crimes such as burglary, theft, drug possession, weapons possession, harassment, aggravated assault, battery, driving under the influence, disorderly conduct, trespassing, shoplifting, terroristic threatening and criminal contempt of court. State v. Sinagoga, 81 Hawai'i 421, 442-43, 918 P.2d 228, 249-50 (1996).

problem.[277] Instead of eliminating the problem, the court shifted the burden to the defendant.

The ICA's contention that the defendant, "more than anyone else," should know whether prior convictions were uncounseled may be too far-reaching of an assumption.[278] In his dissent, Judge Acoba recognized that "time and time again, the cases indicate that lay persons are typically unaware of the nature and import of court procedures."[279] A failure to raise a "good faith challenge" would constitute an involuntary and unintelligent "waiver," a violation of the guarantee of the right to counsel.[280] This "waiver" would essentially permit the State to collaterally use a conviction in the sentencing process, even if uncounseled.[281] This would be a direct contradiction to the Sixth Amendment, as well as the principles of *Powell* and *Gideon* adhered to by the majority in *Sinagoga*.

The practical implications of *Sinagoga* are far-reaching. After *Sinagoga*, the defendant has the burden of making a "good faith challenge" otherwise, the court will presume that he was afforded counsel.[282] Even after a challenge has been made, the State will have to prove that the conviction was counseled.[283] Because the State knows which convictions it will rely on in requesting an enhanced sentence, it would be much more efficient for the State to research whether the defendants were counseled or not.[284] In contrast, it is far more burdensome on the defense to search out each and every conviction on the defendant's record, at the risk of a claim of ineffectiveness of counsel. Because defense counsel does not have equal access to court records, the task appears highly illogical, particularly when the presentence report contains convictions

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[277] *Id.* at 441, 918 P.2d at 248.

[278] *Id.* at 445, 918 P.2d at 252.

[279] *Id.* at 437, 918 P.2d at 244 (Acoba J., dissenting).

[280] *Id.* The United States Supreme Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense whether classified as petty, misdemeanor or felony, unless he was represented by counsel at trial." Argersinger v. Hamlin, 407 U.S. 25, 32 (1972).

[281] *Sinagoga*, 81 Hawai'i at 437, 918 P.2d at 244.

[282] The ICA stated that "if the presentence report states that the defendant has a prior criminal conviction and the defendant does not respond to that report with a good faith challenge on the record . . . that prior criminal conviction is reliable for all sentencing purposes." *Id.* at 445, 918 P.2d at 252.

[283] Step three of the process provides that the court expressly decide whether the state has satisfied its burden of proving that the prior convictions challenged were counseled or that counsel was effectively waived. *Id.* at 447, 918 P.2d at 254.

[284] The dissenting opinion asserted that:

> [There is] no gain achieved in first requiring a defendant to make a "good faith challenge" before the State is put to the task that it would have to undertake anyway. The State is obviously the only party which can define that part of a defendant's criminal record it will use to support its request for consecutive sentencing.

Id. at 435, 918 P.2d at 242 (Acoba, J., dissenting).

which span several jurisdictions.[285] Although determining whether a conviction is counseled is seemingly an arduous task for the State, it is equally, if not more arduous for the defense. Furthermore, it is the State that intends to use uncounseled convictions to enhance a defendant's sentence. It seems only fair and logical to require the State to put in the necessary research and effort to determine which of the particular past convictions it wishes to use against a defendant.

C. Alternative to Sinagoga's Five-Step Procedure

Using *State v. Morishige*, *Sinagoga* may have a workable solution which would not only address the ICA's concern for reliability in using uncounseled misdemeanors, but also change the "five-step process" to one that is more appropriate. In *Morishige*, the Hawai'i Supreme Court set out a two-step process in imposing an extended term sentence.[286] The first step involves a finding that the defendant is within the class of offenders to which the repeat offender provision apply.[287] This involves establishing "historical facts"[288] by proof beyond a reasonable doubt in a hearing where the ordinary rules of evidence apply.[289] When prior convictions are used to enhance the penalty for a subsequent offense, the State must establish "historical facts" that show that the defendant was represented by counsel, or that the defendant intelligently and voluntarily waived his right to counsel.[290]

The second step under *Morishige* is to determine whether an extended sentence is necessary for the public's protection, or that the defendant's criminality is so extensive that an extended term is warranted.[291] Each factor considered in this step must meet the requirements of step one.[292] In other words, only convictions that involve "historical facts" may be used to support an enhanced sentence.[293]

Under *Sinagoga*, the burden of establishing the requisite "historical facts" falls on the defendant to make a "good faith challenge," because the defendant knows "more than anyone else" whether his convictions were counseled or

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[285] The dissent asserted that the majority, "ignores the reality that the State and the court, through its probation office, as opposed to an individual defendant, have greater and easier access to law enforcement and court records." *Id.* at 436, 918 P.2d at 243.

[286] State v. Morishige, 65 Haw. 354, 367, 652 P.2d 1119, 1128-29 (1982)

[287] *Id.* at 367, 652 P.2d at 1128-29.

[288] "Historical facts" are defined as "the proof of which exposes the defendant to punishment by an extended term sentence." *Id.*, 652 P.2d at 1129.

[289] *Id.*

[290] *Id.*

[291] *Id.*

[292] *Id.*

[293] *Id.*

not.[294] If this challenge is not made, the State may use a prior conviction, even if uncounseled, to enhance a sentence.[295] This amounts to a "waiver" of the right to counsel, although it cannot be categorized as intelligent or knowing as required by *Argersinger*.[296]

The better rule would be to follow Judge Acoba's dissenting opinion in *Sinagoga* and place the burden on the prosecution to prove "historical facts."[297] The prosecution has greater and easier access to the defendant's prior criminal records, particularly when the convictions occur in other jurisdictions.[298] The burden placed on the defendant may require him to determine whether each and every one of his convictions was counseled or not, including those convictions that may never be considered in a sentencing hearing. Placing the burden on the State makes logical sense. The State knows which prior convictions it will rely on in requesting enhanced sentencing and can more efficiently research whether the convictions were counseled or not.[299] The State would have to conduct this research anyway, no matter where the burden is placed, so placing the burden on the State will avoid the public paying twice.[300]

Morishige's two-step process should have been applied in *Sinagoga*. The first step would require the State to find that the repeat offender provisions apply to the defendant.[301] In *Sinagoga*, the defendant's record was silent on whether his prior convictions were counseled or had been waived.[302] If this process is applied to *Sinagoga*, the State would need "historical facts" that each of the prior convictions relied on in requesting an enhanced sentence was counseled or that counsel was waived.[303] The second step would entail the sentencing judge's determination of whether the defendant is a threat to the public safety, or that his record reflects an extensive history of criminal activity to sanction an increased deprivation of his liberty.[304]

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[294] State v. Sinagoga, 81 Hawai'i 421, 445, 918 P.2d 228, 252 (1996).

[295] *Id.*

[296] Argersinger v. Hamlin, 407 U.S. 25 (1972). The *Argersinger* Court concluded that "absent a knowing and intelligent waiver of counsel, incarceration for any offense, whether classified as a petty, misdemeanor, or felony, is impermissible unless the defendant had representation at trial." *Id.* at 37.

[297] *Sinagoga*, 81 Hawai'i at 435-36, 918 P.2d at 242-43.

[298] *See id.* at 436, 918 P.2d at 243 (Acoba, J. dissenting).

[299] *See id.* at 435, 918 P.2d at 242.

[300] *See id.*

[301] *See supra* notes 82-88 and accompanying text.

[302] *Id.* at 442-43, 918 P.2d at 249-50.

[303] *See supra* notes 85-88 and accompanying text.

[304] *See supra* note 84 and accompanying text.

In this case, the sentencing judge did believe that, according to his record, the defendant would be a danger to both people and property.[305] Therefore, under the *Morishige* test, if the state could prove that the prior convictions were counseled, the defendant would have legitimately received an extended term. However, if the state could not prove that the prior convictions were counseled, the result may be different. The judge would not be able to rely on any uncounseled convictions as the basis of an enhanced sentence. Utilizing this two-step process would eliminate unnecessary duplication of research efforts, and protect the Sixth Amendment right to counsel of the defendant.

VI. CONCLUSION

Sinagoga will affect every indigent defendant who must face a criminal charge without the assistance of counsel. Although *Sinagoga* appears to guarantee that no uncounseled misdemeanor will be used against a defendant to enhance a penalty for a subsequent offense, it is nevertheless a possibility if the defendant fails to raise the requisite "good faith challenge." The *Sinagoga* court should have limited its holding to the boundaries provided by *Baldasar*, rather than expanding the rule to include the five-step process for the use of prior convictions to impose or enhance prison sentences. By allowing the possibility for an enhanced sentence based on an uncounseled conviction, the *Sinagoga* rule may result in fundamental unfairness to defendants, something that the court intended to prevent.

Shirley M. Cheung[306]

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[305] *Id.* at 425, 918 P.2d at 232. Judge Spencer, the sentencing judge, declared that the defendant would be "a danger to people, whether in [Hawai'i] or any other state where he happens to be; and that as long as he's free to do so, he's going to continue to be a danger to both people and to property." *Id.*

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The *Best Place, Inc. v. Penn America Insurance Company*: Hawai'i Bad Faith Cause of Action for Insurer Misconduct

I. INTRODUCTION

"Insurance is a small world that reflects the purposes of the larger world outside it."[1] Insurance encompasses the universal principles of probability, risk

[1] ROBERT JERRY, II, UNDERSTANDING INSURANCE LAW § 11, at 17 (2d ed. 1996) [hereinafter JERRY] (citing Spencer Kimball, *The Purpose of Insurance Regulation: A Prelimin-ary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471, 524 (1961)).

and distribution of loss.[2] The individual obtains insurance for peace of mind, and pays a relatively small premium to protect against the off-chance that calamity will strike.[3] On the other hand, the insurer enters a contract for economic gain,[4] and, generally, maintains a high degree of control over the insurance relationship.[5] In fact, the insurance contract, itself, is viewed as one of adhesion.[6]

An insurer has a basic "obligation to pay" legitimate claims, avoid unnecessary litigation, and protect the public from increased costs due to fraudulent claims.[7] These duties are based upon the unique nature of an insurance contract,[8] one which contains an overwhelming duty to consider the public interest.[9] Traditionally, recovery was limited to the amount of the policy,

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[2] *Id.* § 10, at 12-13.

[3] Egan v. Mutual of Omaha Ins. Co., 620 P.2d 141, 145 (Cal. 1979), *cert. denied*, 445 U.S. 912 (1980) (holding that failure of disability insurer to properly investigate insured's claim constituted a breach of implied covenant of good faith and fair dealing); *see also* Crisci v. Security Ins. Co., 426 P.2d 173, 179 (Cal. 1967) (California Supreme Court recognized third-party bad faith as a tort); Chavers v. National Sec. Fire & Casualty Co., 405 So. 2d 1, 7 (Ala. 1981) (bad faith arises when an insurer knows or fails to determine that there is no lawful basis to refuse settlement).

[4] *See Egan*, 620 P.2d at 145; *Crisci*, 426 P.2d at 179.

[5] *See* 7C JOHN APPLEMAN, INSURANCE LAW AND PRACTICE § 4712, at 426 (1981) [hereinafter APPLEMAN]; PAUL J. SKOK, TRIAL ATTORNEY'S GUIDE TO INSURANCE COVERAGE AND BAD FAITH § 7.2, at 306 (1994) [hereinafter SKOK]; Mark Lish, Note, *Insurers Have a Common Law Duty to Deal Fairly and in Good Faith with Their Insureds: Arnold v. National County Mutual Fire Insurance Co., 725 S.W.2d 165 (Tex. 1987)*, 19 TEX. TECH. L. REV. 1163, 1192-93 (1988) [hereinafter Lish]; Parsons v. Continental Nat'l Am. Group, 550 P.2d 94, 99-100 (Ariz. 1976) (carrier that fails to enter into good faith settlement negotiation is liable for entire judgment); Barrera v. State Farm Mut. Auto. Ins. Co., 456 P.2d 674, 685 (Cal. 1969).

[6] *See* JERRY, *supra* note 1, § 25A, at 135; E. ALLAN FARNSWORTH, CONTRACTS § 4.26, at 311 (2d ed. 1990) [hereinafter FARNSWORTH]; *see also* Dolan v. Aid Ins. Co., 431 N.W.2d 790, 791-92 (Iowa 1988).

[7] 7C APPLEMAN, *supra* note 5, § 4712, at 446; *see* Robert Emerson, *Insurance Adjusters and Plaintiffs' Attorneys: From Claims Fraud Consensus to Settlement Reform*, 30 AM. BUS. L.J. 537, 552-53 n.55 (1993) [hereinafter Emerson] (citing L. Potter, *Fair Insurance Claims Adjustment - ABA Conference Report*, 25 FOR THE DEFENSE 30, 30 (February, 1983)). Also generally agreed is "that insurers should investigate and[,] in a reasonably prompt manner[,] state the company's position on a claim[.]" *See* Emerson, *supra*, at 552-53.

[8] *See* RESTATEMENT (SECOND) OF CONTRACTS § 291 (1981). An insurance contract is also aleatory ("a mutual agreement, of which the effects, with respect both to the advantages and losses . . . depend on an uncertain event." BLACK'S LAW DICTIONARY 70 (6th ed. 1990)) in nature. *Id.*

[9] *See* SKOK, *supra* note 5, at § 7.1, 305. The court in *Rawlings v. Apodaca* poignantly stressed that the insurance industry portrays itself as ever present and reliable; for example, the slogans of State Farm: "like a good neighbor," and AllState: "you're in good hands," elicit the confidence and trust of the insured. 726 P.2d 565, 571 n.3 (Ariz. 1986) (intentionally breaching implied covenant of good faith and fair dealing may warrant tort recovery).

plus any foreseeable consequential damages.[10] Today, an insurer that denies coverage does so at its own financial risk.[11] The mere threat of a bad faith claim can greatly deter insurers from breaching their contractual duties;[12] however, even if the insurer denies payment on an apparently sound basis, a bad faith judgment may result if the reason for denying coverage is later found to be "wrongful."[13] If an insurer is found to have acted in bad faith, it may pay, either to a third party the complete judgment in excess of the policy limits, or to its insured the underlying amount covered by the insurance contract, any damages for emotional distress, and, potentially, punitive damages.[14]

On June 5, 1996, the Hawai'i Supreme Court, balancing the above implications, joined the majority of jurisdictions when it recognized the tort of insurer bad faith.[15] The Hawai'i Supreme Court's decision in *Best Place, Inc. v. Penn America Insurance Co.*[16] places Hawai'i as the 47th state to recognize

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[10] *See* Hadley v. Baxendale, 156 Eng. Rep. 145, 151 (Ex. 1854) (holding that an injured party may recover damages for loss that may fairly and reasonably be considered as arising naturally and that was contemplated between the parties); FARNSWORTH, *supra* note 6, § 12.14, at 913; SKOK, *supra* note 5, § 7.3, at 307; Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute*, 26 U. MICH. J.L. REF. 1, 16 (1992) [hereinafter Henderson, *Refining the Standard*].

[11] *See* Henderson, *Refining the Standard*, *supra* note 10, at 2-3; *cf.* JERRY, *supra* note 1, § 25G, at 158-59. The United States Supreme Court's decision of *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) held that § 514 of the Employee Retirement Income Sec. Act of 1974 ("ERISA") preempts certain state common law tort and contract claims. *Id.* at 158.

[12] *See* JERRY, *supra* note 1, § 25G, at 159; Henderson, *Refining the Standard*, *supra* note 10, at 2-3.

[13] *See* Comunale v. Traders & General Ins. Co., 328 P.2d 198, 202 (Cal. 1958) (holding insurer liable for entire judgment when it unreasonably refused to defend or to settle within policy limits); *cf.* 16A APPLEMAN, *supra* note 5, § 8878.25. Appleman has written that an insurance company may challenge claims which are "fairly debatable" and will be liable only if it intentionally acted in bad faith or there is no reasonable basis for denial. *Id.*; *see also* Anderson v. Continental Ins. Co., 271 N.W.2d 368 (Wis. 1978).

[14] *See* Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 127-28, 920 P.2d 334, 341-42 (1996) (citing W. SHERNOFF ET AL., INSURANCE BAD FAITH LITIGATION § 1.07 [2] (1994)); *see also* Rawlings v. Apodaca, 726 P.2d 565, 576 (Ariz. 1986).

[15] *Best Place*, 82 Hawai'i at 127, 920 P.2d at 341. A recent decision of the Hawai'i Supreme Court cited *Best Place* for the proposition that "there is a legal duty, implied in a first and third-party insurance contract, that the insurer must act in good faith in dealing with its insured, and a breach of that duty of good faith gives rise to an independent tort cause of action." Alzharani v. Pacific Int'l Servs. Corp., 82 Hawai'i 466, 473 n.8, 923 P.2d 408, 415 n.9 (1996) (citing *Best Place*, 82 Hawai'i at 132, 920 P.2d at 336).

[16] 82 Hawai'i 120, 920 P.2d 334 (1996); *cf.* Dold v. Outrigger Hotel, 54 Haw. 18, 501 P.2d 368 (1972) (Hawai'i Supreme Court refused to recognize a separate action for tortious bad faith, yet recognized tortious breach of contract); Genovia v. Jackson Nat'l Life Ins. Co., 795 F. Supp. 1036 (D. Haw. 1992) (no Hawai'i bad faith cause of action in tort). For a short but well-written feature article on *Best Place*, see Hillary Gangnes, *If You're Planning to Commit Bad Faith,*

the tort of bad faith in either the first-[17] or third-party[18] context, or in some statutory form.[19] Fundamental to the court's recognition of bad faith were the revelations that the existing statutory remedies were inadequate,[20] and that public interest dictates that an insured be able to obtain more than the premium paid for benefits.[21] The decision has notable implications for both Hawai'i's insurers and insureds.[22]

The primary purpose of this Casenote is to highlight the Hawai'i Supreme Court's recent recognition of the tort of bad faith. In addition, this Casenote will focus on the implications of the decision in *Best Place* and consider alternative standards used when evaluating bad faith. In particular, Part II will address the history of bad faith as explained by the Hawai'i Supreme Court in *Best Place*. Part III will elucidate various standards courts have used to evaluate conduct alleged as bad faith. Part IV will outline the facts of *Best Place*. Part V will critique the Hawai'i Supreme Court's analysis and holding. Part VI will address two of the secondary decisions contained within *Best Place* that will affect the tort's interpretation and application. Finally, Part VII will predict the impact of the tort's recognition on Hawai'i law.

Hawaii is Not the Best Place to Be, Says Unanimous Hawaii Supreme Court, THE JOURNAL OF CONSUMER LAWYERS OF HAWAII, LAW REP. (Consumer Lawyers of Hawaii), June 1996, at 6, [hereinafter Gangnes, *Planning to Commit Bad Faith*].

[17] *See Best Place*, 82 Hawai'i at 124 n.4, 920 P.2d at 338 n.4. "[A] 'first-party claim' refers to an insurance agreement where the insurer agrees to pay claims submitted to it by the insured for losses suffered by the insured." *Id.*

[18] *See id.* "A 'third-party claim' is one where the insurer contracts to defend [its own] insured against claims made by third parties against the insured and to pay any resulting liability, up to the specified dollar limit." *Id.*

[19] *See* STEPHEN S. ASHLEY, BAD FAITH ACTIONS, LIABILITY AND DAMAGES § 5:01, at 2 (Supp. Nov. 1993) [hereinafter ASHLEY BAD FAITH ACTIONS].

[20] *Best Place*, 82 Hawai'i at 127, 920 P.2d at 341; *see* W. T. Barker & M. A. Barnes, *The Standard for First-Party Bad Faith*, COVERAGE (Aspen Law & Business), Nov./Dec. 1994, at 17 [hereinafter Barker & Barnes, *First-Party Standard*].

[21] *See Best Place*, 82 Hawai'i at 127-28, 920 P.2d at 341-42; SKOK, *supra* note 5, § 8.1, at 320.

[22] *See* Emerson, *supra* note 7, at 537 (citing ANDREW TOBIAS, THE INVISIBLE BANKERS: EVERYTHING THE INSURANCE INDUSTRY NEVER WANTED YOU TO KNOW 124 (1982)). "On one side of the battlefield, then, viewed in stereotype, you have an infantry of clever policyholders scheming with [lawyer] Willie Whiplash to defraud insurers . . . [a]nd on the other side, the uncaring, greedy insurance companies . . . that will do practically anything to keep from fully paying a claim." *Id.*

II. HISTORY OF BAD FAITH

A. *Duty of Good Faith and Fair Dealing in Third-Party Context*

In *Best Place*, the Hawai'i Supreme Court provided a thorough analysis of the evolution of the tort of bad faith, starting with the early New York decision of *Brassil v. Maryland Casualty Co.*[23] The plaintiff in *Brassil* purchased an insurance policy for protection "against loss . . . on account of bodily injuries suffered by any of his employes [sic]."[24] The insurer refused to settle within the policy limits (a settlement offer of $1,500.00), and refused to appeal a judgment against the insured that was more than three times the policy limit.[25] Although the defendant insurer in *Brassil* ultimately and "graciously announced that it [was] . . . 'ready to comply with the terms' of the contract[,]"[26] the *Brassil* court found it "a reproach to the law if there were no remedy for so obvious a wrong as was inflicted upon th[e] plaintiff."[27] In holding the defendant insurer liable for bad faith, the *Brassil* court found that "there is a contractual obligation of universal force"[28] underlying all written contracts, an obligation of good faith compelling one to carry out what is written.[29] Essentially, the *Brassil* court recognized that the insured's right to good faith is implied-in-law and is "deeper than the mere surface of the contract written for him by the defendant."[30] In highlighting *Brassil*, the Hawai'i Supreme Court focused on the *Brassil* court's proposition that "the tendency . . . has been to ex[pan]d, rather than to circumscribe, the field of liability on the part of the [insurance] company."[31]

The next jurisdiction to recognize bad faith in the third-party context was California, in 1958.[32] In *Comunale v. Traders & General Insurance Co.*, the plaintiffs were "struck in a marked pedestrian crosswalk"[33] by a driver who did

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[23] 104 N.E. 622 (N.Y. 1914). New York was the first jurisdiction to recognize the duty of good faith and fair dealing in the insurance context. *See* Neil A. Goldberg et al., *Can The Puzzle Be Solved: Are Punitive Damages Awardable In New York For First Party Bad Faith?*, 44 SYRACUSE L. REV. 723, 727 (1993) [hereinafter Goldberg].

[24] Brassil v. Maryland Casualty Co., 104 N.E. 622, 622 (N.Y. 1914) (quotations omitted).

[25] *Id.*

[26] *Id.* at 624.

[27] *Id.*

[28] *Id.*

[29] Brassil v. Maryland Casualty Co., 104 N.E. 622, 624 (N.Y. 1914)).

[30] *Id.*

[31] Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 124, 920 P.2d 334, 338 (citing *Brassil*, 104 N.E. at 624).

[32] *See* Comunale v. Traders & General Ins. Co., 328 P.2d 198 (Cal. 1958); Lish, *supra* note 5, at 1165.

[33] *Comunale*, 328 P.2d at 200.

not own the truck he was driving.[34] The defendant insurer claimed that the accident between its insured and the Comunales was not covered.[35] The defendant refused to defend the claim despite policy terms so providing, and refused to settle the Comunales' claim ($4,000) within the $10,000 policy limit.[36] The *Comunale* court found in favor of the third-party plaintiffs, holding that:

> [A]n insurer, who wrongfully declines to defend and who refuses to accept a reasonable settlement within the policy limits in violation of its duty to consider in good faith the interest of the insured in the settlement, is liable for the entire judgment against the insured even if it exceeds the policy limits.[37]

The court was patently aware of the conflict of interest held by the insurer in a third-party dispute, i.e., to protect its insured and settle within the policy limits, or to ensure that the claim is not fraudulent.[38]

The next case to play a key role in defining the common-law tort of bad faith was *Crisci v. Security Insurance Co. of New Haven, Conn.*[39] Mrs. June DiMare, a tenant in an apartment building owned by Mrs. Crisci, fell through a staircase and hung "15 feet above the ground."[40] The defendant insurer refused reasonable settlements within the $10,000 policy limit and decided to go to trial.[41] "A jury awarded Mrs. DiMare $100,000.00 and her husband $1,000.00."[42] The *Crisci* court held that an insurer, who failed to accept a settlement within policy limits by not giving the insured's interests at least as much consideration as it gives its own interests, was liable for any resulting judgment against its insured, regardless of the policy limits.[43] The basic issue was "whether a prudent insurer without policy limits would have accepted the settlement offer."[44] The California Supreme Court affirmed the third-party bad faith test established in *Comunale*,[45] and more importantly, affirmed an award

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[34] *Id.*

[35] *Id.* at 200-02.

[36] *Id.* at 200.

[37] *Id.* at 202. The trial resulted in an award of $25,000 for Mr. Comunale and $1,250 for Mrs. Comunale. *Id.* at 200; *see* 7C APPLEMAN, *supra* note 5, § 4712.

[38] *See* Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 127-28, 920 P.2d 334, 341-42 (1996).

[39] 426 P.2d 173 (Cal. 1967).

[40] *Id.* at 175.

[41] *Id.* at 175-76.

[42] *Id.* at 176.

[43] *Id.* at 176-77.

[44] Crisci v. Security Ins. Co., 426 P.2d 173, 176 (Cal. 1967).

[45] *Id.* at 178.

for mental suffering, "thereby firmly establishing the availability of tort-based remedies for breach of the duty to settle."[46]

Crisci and *Comunale* established the concept that an insured can recover for harm emanating from a contract under the damages rubric of tort recovery.[47] By permitting an insured to bring the cause of action in tort, courts have successfully opened the door to "a broader range of . . . recovery, such as . . . emotional [di]stress [damages] and punitive[s,] . . . which are generally not available in actions founded solely on breach of contract."[48] In essence, *Comunale* and *Crisci* affirmed the notion that insurance is purchased for the "peace of mind" it brings, and that "when an insurer breaches its duty . . . [and] disrupt[s] the mental security it promised[,] . . . it is liable for [all of] the consequences . . . ."[49]

B. The Landmark First-Party Case

With the "theoretical underpinnings"[50] of *Comunale* and *Crisci*, California established first-party bad faith with its decision in *Gruenberg v. Aetna Insurance Co.*[51] The facts of *Gruenberg* are somewhat similar to those of *Best Place*.[52] Gruenberg owned a cocktail lounge and restaurant that burned to the ground in the early morning hours.[53] He informed his three insurers ("defendants") of the fire the following day.[54] Gruenberg was investigated and later charged with the crimes of arson and insurance fraud.[55] The defendants demanded that Gruenberg submit to an examination under oath, but he declined due to the pending criminal charges.[56] The defendants thereafter denied the

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[46] JERRY, *supra* note 1, § 25G, at 154; *see also Crisci*, 426 P.2d at 178. The jury returned a verdict of $25,000 in favor of Mrs. Crisci for the emotional distress she suffered. *Id.*

[47] *See* Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 127, 920 P.2d 334, 341 (1996); *see also Crisci*, 426 P.2d at 178.

[48] *Best Place*, 82 Hawai'i at 127, 920 P.2d at 341 (citing W. SHERNOFF ET AL., INSURANCE BAD FAITH LITIGATION § 1.07, 2 (1994)).

[49] 16A APPLEMAN, *supra* note 5, § 8877 (footnote omitted).

[50] *Best Place*, 82 Hawai'i at 128, 920 P.2d at 342.

[51] 510 P.2d 1032 (Cal. 1973) (the California Supreme Court extended the tort of bad faith in the third-party context to the first-party situation); *see* Goldberg, *supra* note 23, at 728.

[52] *See infra* section IV; Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1034-36 (Cal. 1973); *Best Place*, 82 Hawai'i at 123, 920 P.2d at 337.

[53] *Gruenberg*, 510 P.2d at 1034.

[54] *Id.*

[55] *Id.* In comparison, however, the plaintiff in *Best Place* was never charged with any crime of or relating to the June 22, 1987 fire. *See* Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 123, 920 P.2d 334, 339 (1996).

[56] *Gruenberg*, 510 P.2d at 1034-35.

claim based upon Gruenberg's failure to submit to the examination or to produce requested documents.[57]

The issue presented to the *Gruenberg* court was whether the insured could recover damages for emotional distress for an insurer's wrongful failure to settle.[58] The court found the insurers liable for bad faith since they "fail[ed] to deal fairly and in good faith with [the plaintiff] *by refusing, without proper cause*, to compensate . . . for a loss covered by the polic[ies]."[59]

The Hawai'i Supreme Court found further guidance with the California Supreme Court case, *Egan v. Mutual of Omaha Insurance Co.*,[60] which refined the definition of bad faith.[61] The plaintiff in *Egan* suffered repeated back injuries at work and filed several claims on his health and disability insurance policy.[62] While visiting plaintiff's home to evaluate a fourth disability claim, the insurance adjuster called Egan "a fraud" and accused the plaintiff of not wanting to work.[63] When Egan expressed his need for money due to the pending holiday season, the adjuster simply laughed, reducing Egan to tears in front of his physically disabled wife and only child.[64] Evidence showed that the insurer never had Egan examined by a medical doctor of its own choosing nor consulted with Egan's treating physician or surgeon.[65] Instead, the insurer relied upon its insurance adjuster's interpretation of the medical records submitted by the insured.[66] The Supreme Court of California, *en banc*, found that the "insurer . . . breach[ed] the covenant of good faith and fair dealing when it *fail[ed] to properly investigate* its insured's claim."[67] Ultimately, *Gruenberg* and *Egan* shaped the modern concept of bad faith.[68] These cases

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[57] *Id.* at 1035.

[58] *Id.*

[59] *Id.* at 1037 (emphasis added). The court also noted that the evidence showed that the insurers intentionally alerted the police of potential arson for profit, and then attempted to force the plaintiff to submit to an examination under oath, knowing that he would decline based upon Fifth Amendment privilege. *Id.*

[60] 620 P.2d 141 (Cal. 1979).

[61] *See* Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 132, 920 P.2d 334, 346 (1996).

[62] Egan v. Mutual of Omaha Ins. Co., 620 P.2d 141, 143 (Cal. 1979).

[63] *Id.* at 147.

[64] *Id.*

[65] *Id.* at 144.

[66] *Id.* at 143-44.

[67] Egan v. Mutual of Omaha Ins. Co., 620 P.2d 141, 145 (Cal. 1979) (emphasis added); *see also* 16A APPLEMAN, *supra* note 5, § 8878.25.

[68] *See* 16A APPLEMAN, *supra* note 5, § 8878, at 418. The majority of states have adopted the doctrine examined in California, that is, an insurer in its relationship to its policyholders and to the public owes a duty of good faith and fair dealing. An insurer thus owes to its insured an implied-in-law duty of good faith and fair dealing that it would do nothing to deprive the insured of the benefits of his policy. *Id.*

have directly shaped the standards by which Hawai'i courts will analyze allegations of insurer bad faith.[69]

III. STANDARDS TO DETERMINE BAD FAITH CONDUCT

A. Standards

Commentators vary in their opinions as to how many standards for bad faith really exist. For example, one commentator separates the tort of bad faith into two standards: 1) an objective standard, and 2) a subjective standard.[70] Under the objective standard, the tort is viewed from the perspective of negligence, requiring a duty of due care.[71] Whereas, under the subjective standard, the tort is considered an intentional one, requiring intent or culpability.[72] A majority of jurisdictions utilize the subjective standard and define the tort as an intentional one, such that liability is based on "the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim."[73] By adding a subjective element to the definition of the tort, the standard remains "more stringent."[74] A minority of jurisdictions utilize an objective or negligent standard, evaluating "objectively unreasonable conduct on the part of the insurer."[75] In other words, an insurer that "unreasonably" denies or delays payments due under a policy "without proper cause" will be found to have committed bad faith.[76]

Other commentators recognize more options or standards than those mentioned above.[77] For example, early cases required a "conscious wrongdoing" by the insurer.[78] Although the Hawai'i Supreme Court cited "*Gruenberg* and its progeny" as a negligence standard,[79] *Gruenberg*'s standard has been considered by some to be an "intentional bad faith test," since it

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[69] *See, e.g.*, Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 132, 920 P.2d 334, 346 (1996).

[70] Barker & Barnes, *First-Party Standard*, *supra* note 20, at 17.

[71] *See* SKOK, *supra* note 5, § 7.9, at 312-13.

[72] *See id.*

[73] *Id.*; *see e.g.*, Anderson v. Continental Ins. Co., 271 N.W.2d 368, 376 (Wis. 1978).

[74] Barker & Barnes, *First-Party Standard*, *supra* note 20, at 17.

[75] *Id.*; *see also* McCormick v. Sentinel Life Ins. Co., 200 Cal. Rptr. 732, 741 (Cal. Ct. App. 1984) (an insurer may breach the duty of good faith without acting maliciously or immorally—this can occur merely by unreasonably denying a claim for benefits).

[76] Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1037 (Cal. 1973).

[77] *See* Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions After Two Decades*, 37 ARIZ. L. REV. 1153, 1156-57 (1995) [hereinafter Henderson, *After Two Decades*].

[78] *Id.* at 1156.

[79] Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 133, 920 P.2d 334, 347 (1996).

requires "wrongdoing" on the part of the insurer.[80] Today, some jurisdictions find liability for the "intentional tort" of bad faith by a *clear showing* that the insurer unreasonably, and, in bad faith, withheld payment of the claim of its insured.[81] The Wisconsin Supreme Court, for example, adopted "the reckless test" when it first recognized a bad faith cause of action.[82] The reckless test provides that an insurer may be liable for bad faith "if there is a high probability that it did not have a reasonable basis"[83] for denying a claim, and "the insurer is either: (1) aware of this fact[,] or (2) has information that would put a reasonable insurer on notice of this fact."[84] Similarly, a few jurisdictions "have expanded the basis of culpability to include 'gross negligence'. . . ."[85]

Some courts impose a more stringent standard than the "reckless test" so that plaintiffs are required to demonstrate that the insurer's conduct was dishonest, malicious, or oppressive and not based on misjudgment or negligence.[86] Other jurisdictions require a plaintiff to be entitled to a directed verdict on the contract claim.[87] The directed verdict standard provides that, if the court finds a genuine issue of material fact, or more simply, that it is "fairly debatable" whether the insurer breached the contract at all, the bad faith cause of action must be dismissed in favor of the insurer.[88] From the array of potential standards, the Hawai'i Supreme Court chose to follow the objective standard, and, therefore, Hawai'i's tort of bad faith lies in the arena of negligence.[89]

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[80] Henderson, *After Two Decades*, *supra* note 77, at 1156. In comparison, some proponents of change are promulgating a standard of strict liability. *See generally* Christina Boyer, Note, *Strict Liability for Insurers Refusing Settlements Within Policy Limits: Let's Quit Talking About It and Just Do It*, 17 J. CORP. L. 615 (1992).

[81] *See* McCorkle v. Great Atlantic Ins. Co., 637 P.2d 583, 587 (Okla. 1981).

[82] Anderson v. Continental Ins. Co., 271 N.W.2d 368, 376-77 (Wis. 1978).

[83] Henderson, *After Two Decades*, *supra* note 77, at 1157; *see also Anderson*, 271 N.W.2d at 376.

[84] Henderson, *After Two Decades*, *supra* note 77, at 1157.

[85] *Id.* at 1158; *see also* Aetna Casualty & Sur. Co. v. Day, 487 So. 2d 830, 832 (Miss. 1986); Jessen v. National Excess Ins. Co., 776 P.2d 1244, 1247 (N.M. 1989).

[86] *See* Aetna Casualty & Sur. Co. v. Broadway Arms Corp., 664 S.W.2d 463, 465 (Ark. 1984); *see also* Masaki v. General Motors Corp., 71 Haw. 1, 780 P.2d 566 (1989) (Hawai'i standard for awarding punitive damages).

[87] *See* National Sav. Life Ins. Co. v. Dutton, 419 So. 2d 1357 (Ala. 1982); Hayseeds, Inc. v. State Farm Fire & Casualty, 352 S.E.2d 73, 80 (W.Va. 1986); *see generally* Hadorn v. Shea, 456 S.E.2d 194 (W.Va. 1995) (applying the "substantially prevails" test).

[88] *See Dutton*, 419 So. 2d at 1361-62.

[89] *See* Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 132-33, 920 P.2d 334, 346-47 (1996).

B. Bad Faith Conduct

A bad faith cause of action is "generally proven by evidence largely circumstantial in nature."[90] In evaluating whether bad faith exists, courts have relied upon and considered such factors as: (1) "whether, by reason of the severity of plaintiff's injuries, any verdict is likely to be greatly in excess of the policy limits;"[91] (2) "whether the facts in the case indicate that defendant's verdict on the issue of liability is doubtful;"[92] (3) "whether the company has given due regard to the recommendations of its trial counsel;"[93] (4) "whether [an] insured has been informed of all settlement demands and offers;"[94] (5) "whether [an] insured has demanded that the insurance company settle within the policy limits;"[95] and (6) "whether the company has given due consideration to any offer of contribution made by [an] insured."[96]

Generally, an insurer's liability for bad faith can rest in a number of areas.[97] The insurer must maintain adequate investigation procedures and draw reasonable conclusions regarding the viability of success.[98] The insurer must communicate any settlement offer to its insured, may not seek contribution from its insured if the settlement is within policy limits, and may not unreasonably refuse to settle within policy limits.[99] Undue or unreasonable delay without cause is an indication of bad faith.[100] The insurer must also disclose policy limits and explain applicable policy provisions or exclusions.[101] The insurer must refrain from unreasonable communications with the insured, such as a misrepresentation of facts of the insurer's position.[102] The insurer may also be

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[90] 17 C.J.S. *Insurance* § 1163 (1983) (citations omitted).

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] 17 C.J.S. *Insurance* § 1163 (1983) (citations omitted).

[96] *Id.*; *see also* 7C APPLEMAN, *supra* note 5, § 4712; JERRY, *supra* note 1, § 25G, at 160 (citing Commercial Union Ins. Co. v. Liberty Mut. Ins. Co., 393 N.W.2d 161, 164 (Mich. 1986)).

[97] SKOK, *supra* note 5, § 9.20, at 356.

[98] GUY O. KORNBLUM & WILLIAM A. CERILLO, LITIGATING INSURANCE CLAIMS: COVERAGE, BAD FAITH, AND BUSINESS DISPUTES § 7.18-19, at 235-38 (1993) [hereinafter KORNBLUM & CERILLO]; SKOK, *supra* note 5, § 9.21, at 356 (citing Zieman Mfg. Co. v. St. Paul Fire & Marine Ins. Co., 724 F.2d 1343 (9th Cir. 1983)).

[99] SKOK, *supra* note 5, §§ 9.22-23, at 356-57; KORNBLUM & CERILLO, *supra* note 98, § 7.15, at 229-31.

[100] SKOK, *supra* note 5, § 9.26, at 358 (citing Phelan v. State Farm Mut. Auto Ins. Co., 448 N.E.2d 579 (Ill. App. Ct. 1983).

[101] SKOK, *supra* note 5, §§ 9.25, 9.30, at 357-58, 359.

[102] *Id.* § 9.29, at 359.

responsible for unethical actions of the insured's legal counsel.[103] Finally, the insurer may be subject to bad faith suits if it disregards the advice of counsel, or if it fails to raise affirmative defenses that the insured may have raised in a third-party action.[104] Thus, the insurer must act reasonably in the areas of investigation, communication, and legal representation.[105]

C. Public Policy

In addition to the Hawaii legislature intending to create this cause of action, the strongest argument in favor of recognizing the tort of bad faith is the protection of the public interest.[106] Another legitimate viewpoint, clearly from the insured's perspective, is that the "economic resources of an insurer are so disproportionate . . . that the insurer could economically coerce . . . every insured unless there is a penalty for such coercion."[107] In support of this assertion, Plaintiff Best Place cited *Egan*,[108] which provides that:

> The insured in a contract like the one before us does not seek to obtain a commercial advantage by purchasing the policy — rather, he seeks protection against calamity . . . . The purchase of such insurance provides peace of mind and security . . . . To protect these interests it is essential that an insurer fully inquire into possible bases that might support the insured's claim . . . . An insurer cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial.[109]

Another particularly persuasive and applicable argument can be found in the Iowa Supreme Court's decision in *Dolan v. Aid Insurance Co.*[110] *Dolan* elucidated a number of frequently cited arguments in favor of the adoption of bad faith,[111] including:

> Without the tort, 'an insurance company can arbitrarily deny coverage and delay payment of a claim' to its insured 'with no more penalty than interest on the amount owed' . . . . The bad faith tort 'is justified because of the nature of the insurance industry, which is imbued with the public interest . . . . An insured is

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[103] *Id.* § 9.11, at 351.

[104] *Id.* §§ 9.27-28, at 358-59.

[105] *Id.* § 9, at 343-61.

[106] *See* Amended Opening Brief of Plaintiff-Appellant at 25, Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 920 P.2d 334 (1996) (No. 16065) [hereinafter Plaintiff's Amended Opening Brief].

[107] *See id.* at 21.

[108] *Id.*

[109] *Egan*, 620 P.2d at 145-46 (Cal. 1979).

[110] 431 N.W.2d 790 (Iowa 1988); *see* Plaintiff's Amended Opening Brief, *supra* note 106, at 22-23.

[111] *Dolan*, 431 N.W.2d at 791-92.

> often 'suffering from physical injury or economic loss when bargaining with the insurance company' and hence 'the vulnerable position justifies the additional remedy of a bad faith cause of action' . . . .[112]

Although there exists a minority of jurisdictions that refuse to recognize first-party bad faith,[113] the Iowa Supreme Court, found it "appropriate to recognize the first party bad faith tort to provide the insured an adequate remedy for an insurer's wrongful conduct."[114] Balancing the standards, the conduct, and the public policy considerations, the Hawai'i Supreme Court, in *Best Place*, recognized the breach of the duty of good faith and fair dealing as a tort warranting damages beyond the insurance contract.[115]

IV. FACTS OF BEST PLACE[116]

The Best Place, Inc. was a nightclub located on the top floor of a two-story building in Waikiki.[117] On June 22, 1987, some time after 2:40 a.m., a fire broke out and destroyed the nightclub, less than five months after Best Place secured a fire insurance policy from Defendant Penn America.[118] A final report by the Honolulu Police Department stated that "[t]his case ha[s] strong overtones of being an [a]rson for [p]rofit situation in regards to the owner."[119] An investigation by Penn America into the nightclub's finances revealed that from April 1986 to June 1987, Best Place lost money every month it was in operation.[120] Furthermore, Penn America discovered that, although many of the nightclub's bills were left unpaid, the manager and majority stockholder paid the nightclub's fire insurance premium with a cashier's check on June 18,

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[112] *Id.*; *see also* Mary Phelan, *The First Party Dilemma: Bad Faith or Bad Business?*, 34 DRAKE L. REV. 1031, 1035-36 (1985-86) (citing Spencer v. Aetna Life & Casualty Ins. Co., 611 P.2d 149, 152-53 (Kan. 1980)).

[113] *See Dolan*, 431 N.W.2d at 792 (citations omitted).

[114] *Id.* at 794; *see also* Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 126-27, 920 P.2d 334, 340-41 (1996).

[115] *Best Place*, 82 Hawai'i at 123, 920 P.2d at 367.

[116] *Id.* at 122, 920 P.2d at 336. As a threshold matter, it is important to note that the Hawai'i Supreme Court did not rule on the merits of the case, but instead recognized the tort of bad faith when adjudicating an interlocutory appeal. *Id.*

[117] *See id.* at 123, 920 P.2d at 337; *see also* Amended Opening Brief of Defendant-Appellant at 2, Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 920 P.2d 334 (1996) (No. 16065) [hereinafter Defendant's Amended Opening Brief].

[118] *Best Place*, 82 Hawai'i at 123, 920 P.2d at 337; *see also* Defendant's Amended Opening Brief, *supra* note 117, at 5.

[119] Defendant's Amended Opening Brief, *supra* note 117, at 5 (citing report by Honolulu Police Dep't). Further investigation revealed that the only two persons who had keys to the premises were the owner and her son. *Id.*

[120] *Best Place*, 82 Hawai'i at 123, 920 P.2d at 337.

1987, three days before the fire.[121] Penn America investigated the claim for two months, in addition to corresponding with Plaintiff Best Place, its attorneys, and its own adjuster.[122] Penn America continued to correspond regarding the possibility of obtaining proof of loss,[123] although nothing was submitted by the 60-day due date for the "Proof of Loss" form required by the policy.[124]

On December 15, 1987, Defendant Penn America's attorney wrote plaintiff and demanded submission of previously-specified records by December 29, 1987,[125] and also demanded that the owner and majority stockholder submit to an examination under oath.[126] Best Place's owner failed to submit to the examination or to turn over the requested documentation.[127] Best Place then retained a new attorney,[128] and, in a good-faith effort to comply with Penn America's requests, sent three separate letters to Penn America's counsel, dated February 3, 1988, February 19, 1988, and March 23, 1988.[129] Defendant Penn America admitted to receiving all three letters and to not responding to any of them.[130] After six months of "be[ing] totally and completely ignored and abandoned . . . by its insurer . . . who had not paid one cent[,]" [131] Best Place filed a complaint on June 20, 1988, alleging breach of contract and "tortious breach of the implied covenant of good faith and fair dealing."[132]

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[121] *Id.*

[122] *See* Defendant's Amended Opening Brief, *supra* note 117, at 5-6.

[123] *See id.* at 6. On October 21, 1987, plaintiff submitted a partial claim, and promised to submit the balance of the claim as soon as possible. *Id.* at 7. The court held that Penn America's conduct waived the sixty-day time limitation, but Penn America did not waive the defense of arson or evidence of any of the plaintiff's other obligations under the policy. *Best Place*, 82 Hawai'i at 140, 920 P.2d at 354.

[124] *See*Defendant's Amended Opening Brief, *supra* note 117, at 6. The policy provided, in relevant part:

> [W]ithin 60 days after the loss, unless such time is extended in writing by this company, the insured shall render to this company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: . . . the time and origin of the loss . . . the actual cash value of each item thereof and the amount of loss thereto . . . .

Id. (citing Plaintiff's insurance policy).

[125] *See* Defendant's Amended Opening Brief, *supra* note 117, at 7.

[126] *Id.*

[127] *Best Place*, 82 Hawai'i at 123, 920 P.2d at 337.

[128] *Id.*; *see* Plaintiff's Amended Opening Brief, *supra* note 106, at 7.

[129] *Best Place*, 82 Hawai'i at 123, 920 P.2d at 337; *see* Plaintiff's Amended Opening Brief, *supra* note 106, at 7.

[130] *Best Place*, 82 Hawai'i at 123, 920 P.2d at 337; *see* Plaintiff's Amended Opening Brief, *supra* note 106, at 7.

[131] *See* Plaintiff's Amended Opening Brief, *supra* note 106, at 7-8.

[132] *Best Place*, 82 Hawai'i at 122, 920 P.2d at 336; *see* Plaintiff's Amended Opening Brief, *supra* note 106, at 7-8.

Penn America moved to exclude all evidence, testimony or argument on the issue of bad faith and/or punitive damages.[133] The circuit court granted Penn America's motion and excluded all evidence dealing with the duty of good faith and fair dealing.[134] Best Place quickly filed an interlocutory appeal.[135] The appeal resulted in the Hawai'i Supreme Court's recognition of the "tort of bad faith,"[136] in addition to several other evidentiary decisions.[137]

V. DECISION

Partially due to a lack of clear legislative guidance or curtailment, the Hawai'i Supreme Court joined a majority of jurisdictions recognizing a cause of action for bad faith in either the first- or third-party context, or in some statutory form.[138] The court's decision focused on two basic issues: first, the

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[133] *Best Place*, 82 Hawai'i at 122, 920 P.2d at 336.

[134] *Id.*

[135] *Id.* The appeal was filed pursuant to HAW. REV. STAT. § 641-1(b)(1993).

[136] *Id.* at 122, 920 P.2d at 336.

[137] *Id.* The Hawai'i Supreme Court upheld the circuit court's exclusion of all evidence relating to: 1) Best Place's financial condition, and 2) its failure to provide proof of loss to the insurer. *See id.* The court also upheld: 1) the exclusion of Penn America's settlement offer; 2) the sanctions against Penn America for violating the discovery cut off; and 3) the granting of five additional witnesses to Penn America. *See id.* The court, however, reversed the decision to exclude the evidence of arson and other potential breaches of policy by the plaintiff. *See id.*

[138] *See* Chavers v. National Sec. Fire & Casualty Co., 405 So. 2d 1, 6 (Ala. 1981); State Farm Fire & Casualty Co. v. Nicholson, 777 P.2d 1152, 1156-57 (Alaska 1989); Noble v. Nat'l Am. Life Ins. Co., 624 P.2d 866, 867-68 (Ariz. 1981); Rawlings v. Apodaca, 726 P.2d 565, 572-73 (Ariz. 1986); Aetna Casualty & Sur. Co. v. Broadway Arms Corp., 664 S.W.2d 463, 465 (Ark. 1984); Stevenson v. Union Standard Ins. Co., 746 S.W.2d 39 (Ark. 1988); Crisci v. Security Ins. Co., 426 P.2d 173 (Cal. 1967); Gruenberg v. Aetna Ins. Co., 510 P.2d 1032 (Cal. 1973); Farmers Group, Inc. v. Trimble, 691 P.2d 1138 (Colo. 1984); Travelers Ins. Co. v. Savio, 706 P.2d 1258, 1267-71 (Colo. 1985); Grand Sheetmetal Prods. Co. v. Protection Mut. Ins. Co., 375 A.2d 428 (Conn. Super. Ct. 1977); Buckman v. People Express, Inc., 530 A.2d 596, 599 (Conn. 1987); McNally v. Nationwide Ins. Co., 815 F.2d 254 (3rd Cir. 1987)); Campbell v. Government Employees Ins. Co., 306 So. 2d 525 (Fla. 1974); FLA. STAT. ch. 624.155 (Supp. 1991); Home Ins. Co. v. North River Ins. Co., 385 S.E.2d 736 (Ga. Ct. App. 1989); Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 920 P.2d 334 (1996); LaRotunda v. Royal Globe Ins. Co., 408 N.E.2d 928 (Ill. App. Ct. 1980); White v. Uniguard Mut. Ins. Co., 730 P.2d 1014 (Ind. 1986); Kooyman v. Farm Bureau Ins. Co., 315 N.W.2d 30 (Iowa 1982); Dolan v. Aid Ins. Co., 431 N.W.2d 790, 794 (Iowa 1988); Bollinger v. Nuss, 449 P.2d 502 (Kan. 1969); Curry v. Fireman's Fund Ins. Co., 784 S.W.2d 176, 178 (Ky. 1989); Holtzclaw v. Falco, Inc., 355 So. 2d 1279 (La. 1977); Linscott v. State Farm Mut. Auto. Ins. Co., 368 A.2d 1161 (Me. 1977); Fireman's Fund Ins. Co. v. Continental Ins. Co., 519 A.2d 202 (Md. 1987); MASS. GEN. LAWS, ch. 93A, § 9 and ch. 176 D, § 3 (9); Commercial Union Ins. Co. v. Liberty Mut. Ins. Co., 393 N.W.2d 161 (Mich. 1986); Short v. Dairyland Ins. Co., 334 N.W.2d 384 (Minn. 1983); State Farm Fire & Casualty Co. v. Simpson, 477 So. 2d 242, 248-52 (Miss. 1985); Weems v. American Sec. Ins. Co., 486 So. 2d 1222 (Miss. 1986); Zumwalt v. Utilities Ins. Co., 228

basic tenet that all contracts are to be carried out in good faith;[139] and, second, the extra-contractual nature of the relationship between the insurer and insured.[140]

A. Analysis

As a threshold argument, Penn America submitted to the Hawai'i Supreme Court the basic proposition that the facts in *Best Place* did not warrant a finding of bad faith.[141] In other words, because there was no evidence of bad faith, the court should have refused to decide the issue or refused to establish a new cause of action.[142] Although the opinion is devoid of an explicit finding that Penn

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S.W.2d 750 (Mo. 1950); Lipinski v. Title Ins. Co., 655 P.2d 970, 977 (Mont. 1982); Gibson v. Western Fire Ins. Co., 682 P.2d 725 (Mont. 1984); Braesch v. Union Ins. Co., 464 N.W.2d 769, 772-76 (Neb. 1991); U.S. Fidelity & Guar. Co. v. Petersen, 540 P.2d 1070 (Nev. 1975); United Fire Ins. Co. v. McClelland, 780 P.2d 193, 197 (Nev. 1989); Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 323 A.2d 495 (N.J. 1974); State Farm Gen. Ins. Co. v. Clifton, 527 P.2d 798, 800 (N.M. 1974); Travelers Ins. Co. v. Montoya, 566 P.2d 105 (N.M. 1977); Gordon v. Nationwide Mut. Ins. Co., 285 N.E.2d 849 (N.Y. 1972), cert. denied 410 U.S. 931 (1973); Payne v. North Carolina Farm Bureau Mut. Ins. Co., 313 S.E.2d 912 (N.C. Ct. App. 1984); Corwin Chrysler-Plymouth, Inc. v. Westchester Fire Ins. Co., 279 N.W.2d 638, 643 (N.D. 1979); Hoskins v. Aetna Life Ins. Co., 452 N.E.2d 1315, 1319 (Ohio 1983); McCorkle v. Great Atl. Ins. Co., 637 P.2d 583 (Okla. 1981); Christian v. American Home Assurance Co., 577 P.2d 899, 904-05 (Okla. 1977); Eastham v. Oregon Auto. Ins. Co., 542 P.2d 895 (Ore. 1975); Dercoli v. Pennsylvania Nat'l Mut. Auto. Ins. Co., 554 A.2d 906 (Pa. 1989); R.I. GEN. LAWS § 9-1-33 (1985); Nichols v. State Farm Mut. Auto. Ins. Co., 306 S.E.2d 616, 619 (S.C. 1983); Champion v. U.S. Fidelity & Guar. Co., 399 N.W.2d 320, 324 (S.D. 1987); State Auto. Ins. Co. v. Rowland, 427 S.W.2d 30 (Tenn. 1968); Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987); Meyers v. Ambassador Ins. Co., 508 A.2d 689 (Vt. 1986); Aetna Casualty and Sur. Co. v. Price, 146 S.E.2d 220 (Va. 1966); Tyler v. Grange Ins. Ass'n, 473 P.2d 193 (Wash. Ct. App. 1970); Anderson v. Continental Ins. Co., 271 N.W.2d 368, 374 (Wis. 1978); McCullough v. Golden Rule Ins. Co., 789 P.2d 855, 856-60 (Wyo. 1990); Washington v. Group Hospitalization, Inc., 585 F. Supp. 517, 520 (D.D.C. 1984); Justin v. Guardian Ins. Co., 670 F. Supp. 614 (D.V.I. 1987).

[139] *Best Place*, 82 Hawai'i at 123-24, 920 P.2d at 337-38; *see* JERRY, *supra* note 1, § 25G, at 152. "Good faith performance . . . of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct . . . because they violate community standards of decency, fairness or reasonableness." *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 205, cmt. a (1981)).

[140] *Best Place*, 82 Hawai'i at 128, 920 P.2d at 342; *see* SKOK, *supra* note 5, § 7.5, at 309.

[141] *See* Amended Answering Brief of Defendant-Appellee, at 12, Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 920 P.2d 334 (1996) (No. 16065) [hereinafter Defendant's Amended Answering Brief].

[142] *See id.*

America committed bad faith, the court's decision to adopt the tort of bad faith leads to a presumption that the plaintiff's claim should be presented to a jury.[143]

1. Prior legislative recognition of bad faith

In arguing against the recognition of the tort of bad faith, Penn America asserted that the "statutory remedies provided by the legislature [were] adequate, and additional remedies [were] unnecessary."[144] The Hawai'i Supreme Court disagreed and held that the tort of bad faith implicitly existed in Hawai'i statutory law as well as case law, and that the administrative remedies were inadequate.[145] The court evaluated relevant statutes, in addition to case law.[146] The court noted several legislative references to the duty of good faith and fair dealing and implicitly recognized a preexisting cause of action of bad faith.[147] First, the court cited Hawai'i Revised Statutes section 431:1-102 when stating that the "insurance industry affects the public interest, and, therefore, insurers are obligated to act in good faith."[148] The court then pointed to provisions of the Hawai'i No-fault Statute, including the statute of limitations for a "cause of action for insurer bad faith,"[149] and the discovery

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[143] *See* Best Place, 82 Hawai'i at 122-23, 920 P.2d at 336-37; *cf.* Colonial Penn Ins. Co. v. First Ins. Co. of Hawai'i, Ltd., 71 Haw. 42, 42, 780 P.2d 1112, 1113-14 (1989); Stratis v. Pacific Ins. Co., 7 Haw. App. 1, 3-4, 739 P.2d 251, 253-54 (1987); Goo v. Continental Casualty Co., 52 Haw. 235, 241, 473 P.2d 563, 567 (1970).

[144] *Best Place*, 82 Hawai'i at 126, 920 P.2d at 340 (citing Spencer v. Aetna Life & Casualty Ins. Co., 611 P.2d 149, 153 (Kan. 1980) (citations omitted)). The defendant was referring to HRS §§ 431:13-201 and 203 which provide the Insurance Commissioner with the sole discretion to penalize insurer malfeasance. *Id.*

[145] *Best Place*, 82 Hawai'i at 127, 920 P.2d at 341.

[146] *Id.* at 125-27, 920 P.2d at 339-341.

[147] *See id.*

[148] *See id.* at 126, 920 P.2d at 340 (citing HAW. REV. STAT. § 431:1-102 (1993)). Although the legislature did not explicitly state that Hawai'i has a bad faith cause of action, it certainly referred to one. *See id.* Several Hawai'i statutes implied the tort of bad faith, for example, HAW. REV. STAT. § 431:1-102 (1993) provides that:

> The business of insurance is one affected by the public interest, requiring that *all persons be actuated by good faith, abstain from deception and practice honesty and equity in all insurance matters.* Upon the insurer, the insured and their representatives rests the duty of preserving inviolate the integrity of insurance.

HAW. REV. STAT. § 431:1-102 (1993) (emphasis added).

[149] *Best Place*, 82 Hawai'i at 126, 920 P.2d at 340. HAW. REV. STAT. § 431:10C-315 (1993) provides, in relevant part:

> (a) No suit shall be brought on any contract providing no-fault benefits or any contract providing optional additional coverage more than, the later of: . . . (4) Two years after the entry of a final judgment in, or dismissal with prejudice of, a tort action

limitations on peer review proceedings, which expressly includes claims of insurer bad faith.[150]

The court also cited state Senate and House Committee reports in support of its decision to recognize bad faith as an independent tort.[151] The relevant Senate Committee report provided as follows:

> Your committee finds that [Hawai'i Revised Statutes Section 431:13-202(b)] would prevent an insurance carrier, engaged in unfair claim settlement practices, from claiming that the cease and desist provision is an exclusive remedy . . . . Furthermore, the current cease and desist remedy is inadequate because the administrative procedure could be lengthy[,] thereby allowing an insurance carrier to continue to engage in unfair and deceptive practices during the pendency of the administrative hearing; the revocation of an insurance carrier's license by the commissioner is not likely to occur since this would have a detrimental effect on innocent policy holders; and the administrative procedures do not afford compensation to the individual damaged by the insurance carrier.[152]

Therefore, the Hawai'i Supreme Court recognized a cause of action for insurer bad faith, because recognition of the tort would not "contravene the legislative intent. . . ."[153]

2. *Hawai'i case law*

Based upon *Brassil* and *Comunale*, the Hawai'i Supreme Court recognized that the obligation to deal in good faith is a well established principle of contract law.[154] Hawai'i courts were slow to enforce this obligation in the context of the insurance contract,[155] even though it is universally recognized

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> arising out of a motor vehicle accident, *where a cause of action for insurer bad faith arises out of the tort action.*

Best Place, 82 Hawai'i at 126, 920 P.2d at 340 (emphasis added).

[150] *Best Place*, 82 Hawai'i at 126, 920 P.2d at 340. HAW. REV. STAT. § 624-25.5(b)(1993) provides, in relevant part: "The prohibition relating to discovery or testimony shall not apply . . . *in any action against an insurance carrier alleging bad faith by the carrier in refusing to accept a settlement offer within the policy limits.*" *Best Place*, 82 Hawai'i at 126, 920 P.2d at 340 (emphasis added).

[151] *Best Place*, 82 Hawai'i at 125-27, 920 P.2d at 339-41.

[152] *Id.* at 126, 920 P.2d at 340. The House Committee Report similarly provided:

> Your Committee finds that the current administrative procedures for cease and desist orders by the Insurance Commissioner are inadequate and do not afford compensation to the individual damaged by the carrier's unfair claim settlement practices. Therefore, your Committee emphasizes its accord with the provisions of this bill clarifying that the cease and desist order is not the exclusive remedy.

Id.

[153] *Best Place*, 82 Hawai'i at 127, 920 P.2d at 341.

[154] *Id.* at 124, 920 P.2d at 338.

[155] *Id.*

that every contract imposes upon each party a duty of good faith and fair dealing in the performance and enforcement of the contract.[156] In 1970, the Hawai'i Supreme Court acknowledged in *Goo v. Continental Casualty Co.*[157] that "[a] small but growing number of jurisdictions allow juries to award punitive damages in appropriate contract cases,"[158] and that "tort and contract are no longer distinct, rather they overlap."[159] Because the factual situation of *Goo* did not present a claim for punitive damages, the court refused to take a "determinative stance" on the recognition of bad faith as a tort.[160] The Hawai'i Supreme Court later explicitly held that tort damages, such as emotional distress and disappointment, in addition to out-of-pocket expenses, could be recovered for certain wanton and reckless contractual breaches.[161] Thus, the "fusion" of tort and contract was not a difficult concept for the court to adopt.[162]

Although bad faith jurisprudence was advancing on a national scale, Hawai'i courts were impeded from extending the implied duty of good faith and fair dealing[163] into insurance contracts by the Hawai'i Supreme Court's decision in *Parnar v. Americana Hotels, Inc.*[164] The court's refusal in *Parnar* to recognize bad faith in an at-will employment context[165] fortified and validated federal and state court judges' reliance upon preexisting legislative remedies, and their refusal to recognize the tort of bad faith as an independent cause of action.[166] In 1985, however, the Intermediate Court of Appeals ("I.C.A.") did recognize that parties to a contract have a basic duty of good faith and fair dealing in performing contractual obligations.[167] In *Hawaii Leasing*, the plaintiff leased

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[156] RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979).

[157] 52 Haw. 235, 473 P.2d 563 (1970).

[158] *Id.* at 240, 473 P.2d at 566 (footnote omitted).

[159] *Id.* at 241, 473 P.2d at 567.

[160] *Id.*

[161] *See* Dold v. Outrigger Hotel, 54 Haw. 18, 18, 501 P.2d 368, 369 (1972) holding that stranded travelers could not recover for punitive damages but could recover for out-of-pocket and emotional distress damages).

[162] *See id.* at 22, 501 P.2d at 372 (citing Goo v. Continental Casualty Co., 52 Haw. 235, 241, 473 P.2d 563, 567 (1970)).

[163] *See* Genovia v. Jackson Nat'l Life Ins. Co., 795 F. Supp. 1036, 1045-46 (D. Haw. 1992).

[164] 65 Haw. 370, 652 P.2d 625 (1982) (at-will employee brought suit against employer for alleged retaliatory discharge).

[165] *See generally id.*

[166] *See* Cuson v. Maryland Casualty Co., 735 F. Supp. 966 (D. Haw. 1990) (federal district court denied recognition of tort of bad faith because the state must recognize the tort first).

[167] Hawaii Leasing v. Klein, 5 Haw. App. 450, 456, 698 P.2d 309, 313 (1985). The I.C.A. adopted RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981), which provides in relevant part: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Id.* at 456 n.4, 698 P.2d 313 n.4.

car wash equipment in Pearl City, Hawai'i.[168] When the lessee was in default by approximately $99,175, the guarantors refused to cure the default.[169] Although the plaintiff sold the equipment for only $20,000 in an effort to mitigate damages, the court held the plaintiff acted in good faith because the trial court found that the amount was "commercially reasonable under the circumstances."[170] The I.C.A. stressed the importance of faithfully performing the "agreed common purpose" of the contract and complying with the "justified expectations of the other party."[171] In 1987, the legislature explicitly extended the concept of faithfully performing the purpose of a contract to the area of insurance by requiring good faith in all insurance transactions pursuant to Hawai'i Revised Statutes section 431:1-102.[172]

In 1992, the Hawai'i Supreme Court began to refine the concept of good faith. In *Gossinger v. Association of Apartment Owners*,[173] the court held that "a mistake, whether mutual or unilateral, as to the nature or extent of an injury [wa]s not a proper basis for rescinding a release . . . ."[174] The *Gossinger* dissent quoted with approval the language of *Williams v. Glash*,[175] which stated that "[i]nsurers are now faced with a Hobson's choice."[176] If the insurer settles the claim promptly, it is not protected from the later assertion of unknown claims; if it refuses to settle until all injuries are known, then it faces potential liability under a bad faith claim.[177]

Within two days of slipping on her flooded bathroom floor, the plaintiff in *Gossinger* sent a demand letter to the apartment association, requesting immediate action.[178] Although Mrs. Gossinger was told by her doctor that she might not have fully recovered and that she should return to the hospital in two weeks, she accepted a minimal settlement amount, signing a release and

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[168] *Id.* at 452, 698 P.2d at 311.

[169] *Id.* at 453, 698 P.2d at 312.

[170] *Id.* at 456, 689 P.2d at 314.

[171] *Id.* at 456, 698 P.2d at 313 (citing RESTATEMENT (SECOND) OF CONTRACTS § 205, cmt. A (1981)).

[172] HAW. REV. STAT. § 431:1-102 (1993) provides:

> The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception and practice honesty and equity in all insurance matters. Upon the insurer, the insured and their representatives rests the duty of preserving inviolate the integrity of insurance.

Id.

[173] 73 Haw. 412, 835 P.2d 627 (1992) (holding that mistake as to nature or extent of injuries was not proper basis for rescinding release).

[174] *Id.* at 423, 835 P.2d at 633.

[175] 789 S.W.2d 261 (Tex. 1990).

[176] *Gossinger*, 73 Haw. at 424 n.5, 835 P.2d at 634 n.5.

[177] *Id.*

[178] *Id.* at 414, 835 P.2d at 629.

indemnification agreement.[179] The court granted defendant's motion for summary judgment reasoning that "public policy . . . favors the finality of negotiated settlements[,]"[180] and *Gossinger* was not a case of an insurer unreasonably rushing settlement or delaying payment.[181] In essence, the court reiterated the position that the right factual situation could warrant a finding of bad faith, but that the insured cannot assert bad faith when she in fact rushed the settlement.

In *Best Place*, the Hawai'i Supreme Court admitted that it "implicitly recognized that an insurer may be liable for bad faith under the appropriate circumstances"[182] in the 1989 third-party case of *Colonial Penn Insurance Co. v. First Insurance Co. of Hawaii.*[183] While putting air and water into her car at a service station, the plaintiff in *Colonial Penn* was struck by another car that backed into her and pinned her between the two cars.[184] The insurer relied upon the argument that she was neither in the vehicle nor a pedestrian when injured; hence, her injury was not covered.[185] The court held that the liability carrier did not act in bad faith when it interpreted the language of Hawai'i Revised Statutes section 294-5(d)[186] as permitting a denial of coverage, because there was an open question of law.[187] In doing so, the court implicitly stated that it would recognize bad faith with the right factual situation.

Similarly, in *Stratis v. Pacific Insurance Co., Ltd.*,[188] the I.C.A. did not deny that a cause of action for bad faith existed.[189] Stratis alleged that Pacific Insurance negligently failed to settle a claim on a fire insurance policy.[190] The jury returned a verdict in favor of the insurers.[191] Although there was evidence of

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[179] *Id.* at 415-16, 835 P.2d at 629-30.

[180] *Id.* at 424, 835 P.2d at 633; *see* Sylvester v. Animal Emergency Clinic, 72 Haw. 560, 825 P.2d 1053 (1992).

[181] *Gossinger*, 73 Haw. at 415, 835 P.2d at 629.

[182] Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 125, 920 P.2d 334, 339 (1996).

[183] 71 Haw. 42, 780 P.2d 1112 (1989).

[184] *Id.* at 42, 780 P.2d at 1113.

[185] *Id.* at 42, 780 P.2d at 1114.

[186] *Id.* at 42, 780 P.2d at 1113-14. HAW. REV. STAT. § 294-5(d) (repealed 1987) stated, in relevant part:

> The no-fault insurance applicable on a primary basis to accidental harm to which this chapter applies is the insurance on the *vehicle occupied by the injured person at the time of the accident*, or, if the injured person is a *pedestrian (including a bicyclist)*, the insurance on the vehicle which caused [the] accidental harm to the pedestrian[.]

Id. (emphasis added).

[187] *Colonial Penn*, 71 Haw. at 44, 780 P.2d at 1114 (an injured claimant sued a third-party tortfeasor's insurer for bad faith denial of no-fault benefits).

[188] 7 Haw. App. 1, 739 P.2d 251 (1987) (insurer denied claim on insurance policy).

[189] *Id.* at 8, 739 P.2d at 256.

[190] *Id.* at 3, 739 P.2d 253.

[191] *Id.* at 3-4, 739 P.2d at 253-54.

juror misconduct,[192] the trial court denied a motion for a new trial.[193] On appeal, the I.C.A. did not rule that bad faith does not exist, but instead held that the contested jury instruction did "not state the law with substantial correctness."[194] The I.C.A. remanded the case for an evidentiary hearing on the alleged juror misconduct.[195]

The hurdle remained before Hawai'i courts in their ability to conceptualize a factual situation that would warrant an award of extra-contractual damages for a "regular" breach of the duty of good faith.[196] The courts viewed the duty of good faith as one equal to a contractual term, warranting only payment as provided for in the policy.[197]

3. *Effect of the fiduciary relationship*

Penn America asserted that the universal recognition of third-party bad faith does not support recognition of first-party bad faith.[198] Penn America argued that third-party relationships are "drastically different from first[-]party cases,"[199] and cited *Johnson v. Federal Kemper Insurance Co.*,[200] which stated, in relevant part:

> A first party claim presents an entirely different situation. The insured retains all rights to control any litigation necessary to enforce the claim. Because it involves a claim by the insured against the insurer, rather than a claim by a third party against both the insurer and insured, *there is no conflict of interest situation requiring the law to impose any fiduciary duties on the insurer.* Instead, the situation is a traditional dispute between the parties to a contract.[201]

Furthermore, Penn America argued that the "insurer's obligation [and resulting liability for breach] arises from its possession of a power to make settlement

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[192] *Id.* at 4-5, 739 P.2d at 254-55.

[193] Stratis v. Pacific Ins. Co., Ltd., 7 Haw. App. 1, 4, 739 P.2d 251, 254 (1987).

[194] *Id.* at 10, 739 P.2d at 257 (citing 75 AM. JUR. 2D *Trial* § 590, at 571 (1974))(internal quotations omitted).

[195] *Id.* at 10-11, 739 P.2d at 257.

[196] *See* Genovia v. Jackson Nat'l Life Ins. Co., 795 F. Supp. 1036, 1042 (D. Haw. 1992) (the court emphasized the need for the breach to be willful, reckless, or outrageous as held in Dold v. Outrigger Hotel, 54 Haw. 18, 501 P.2d 368 (1972)); *see also* Parnar v. Americana Hotels, Inc., 65 Haw. 370, 652 P.2d 625 (1982). The apprehension of Hawai'i courts emanated from the theory that recognizing a tort of this nature would "open the floodgates for tort actions based upon the breach of any contract." Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 131, 920 P.2d 334, 345 (1996).

[197] *Id.*

[198] *See* Defendant's Amended Answering Brief, *supra* note 141, at 16.

[199] *Id.*

[200] 36 A.2d 1211, 1213 (Md. Ct. Spec. App.), *cert. denied*, 542 A.2d 844 (Md. 1988).

[201] *Id.*

decisions which effectively bind itself and its insured."[202] The insurer does not hold an "analogous power . . . when it is dealing with a claim by its own insured against itself . . . ."[203]

The *Best Place* court essentially considered the above argument to be misplaced.[204] The court found the argument to be "unpersuasive,"[205] primarily because it was premised upon the presumption that third-party bad faith is based solely upon a theory of agency and the resulting fiduciary duties.[206] According to the court, the fiduciary duty of the insurer is but one component of a much broader duty to act in good faith.[207] Moreover, the role of the insurer in the first-party context enables the insurer to set the terms of the policy, including premium payments and presentment of claims, which is a quasi-judicial role.[208] Although the insurer in the first-party context does not have the same control over the insured's litigation strategies as in a third-party context,[209] "the insurer is [not] free . . . [from the] obligation of good faith . . . since the . . . duty . . . is based on the reasonable expectations of the insured and the unequal bargaining positions [of the parties.]"[210] An insured, therefore, can bring an action of bad faith in tort,[211] even if no fiduciary relationship exists.[212]

Relying upon statutory and case law, the *Best Place* court placed upon *the insurer* the "absolute"[213] duty to act in good faith. [214] In essence, the court re-

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[202] *See* Barker & Barnes, *First-Party Standard*, *supra* note 20, at 19.

[203] *Id.*

[204] Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 129-30, 920 P.2d 334, 343-44 (1996).

[205] *Id.* at 129, 920 P.2d at 343.

[206] *Id.*

[207] *Id.*

[208] *Id.* at 130, 920 P.2d at 344; *see also* Rawlings v. Apodaca, 726 P.2d 565, 570-71 (Ariz. 1986).

[209] *Best Place*, 82 Hawai'i at 130, 920 P.2d at 344.

[210] *Id.* (citing Craft v. Economy Fire & Casualty Co., 572 F.2d 565, 569 (7th Cir. 1978)).

[211] *Id.* "The issue of tort liability arising from a contractual relationship is not new in this jurisdiction." *Id.*; *see* Goo v. Continental Casualty Co., 52 Haw. 235, 473 P.2d 563 (1970) (the court considered merging tort and contract principles but declined because facts were devoid of a finding of bad faith); *see also* Dold v. Outrigger Hotel, 54 Haw. 18, 501 P.2d 368 (1972) (tort damages are allowed for certain willful or reckless contractual breaches).

[212] *Best Place*, 82 Hawai'i at 130, 920 P.2d at 344.

[213] Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1040 (Cal. 1973).

[214] *Best Place*, 82 Hawai'i at 132, 920 P.2d at 346. "[W]e hold that there is a legal duty, implied in a first- and third-party insurance contract, that the *insurer* must act in good faith with its insured[.]" *Id.* (emphasis added). Although "[t]he business of insurance is one affected by the public interest, requiring that *all persons* be actuated by good faith, abstain from deception and practice honesty and equity in all insurance matters[,]" the court chose to impose the duty solely upon the insurer, not the insured. *See* HAW. REV. STAT. § 431:1-102 (1996) (emphasis added); *cf.* William Anderson, *Placing a Check on an Insured's Bad Faith Conduct: The Defense of "Comparative Bad Faith,"* 35 S. TEX. L. REV. 485 (1994).

cognized the duty of good faith and fair dealing in the insurance contract because of the special relationship that exists between the insurer and insured, the implicit recognition of the tort in Hawai'i case law, and the Hawai'i State Legislature's tacit recognition of the tort.[215]

B. Holding

1. Hawai'i Supreme Court adopted negligence standard

In adopting the tort of bad faith in the first-party context,[216] the Hawai'i Supreme Court adopted a negligence standard fashioned after "*Gruenberg* and its progeny."[217] The standard established in *Gruenberg*, and affirmed in *Egan*,[218] permits recovery of compensatory and consequential damages if the "insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract . . . ."[219]

In choosing a standard of reasonableness, the Hawai'i Supreme Court stated that an "insured need not show a conscious awareness of wrongdoing or unjustifiable conduct, nor an evil motive or intent to harm the insured."[220] In essence, the court's standard of the duty of good faith and fair dealing does not require a showing of intentional bad faith.[221] The court explained that "[a]n unreasonable delay in payment of benefits will warrant recovery for compensatory damages[;]"[222] however, conduct amounting to a reasonable "interpretation of the insurance contract," an "erroneous decision," or mistaken judgment will not constitute bad faith or unfair dealing.[223] Finally, although an insurance company "owe[s] an *absolute* duty of good faith and fair dealing to

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[215] *See* JERRY, *supra* note 1, § 25G, at 156.

[216] *Best Place*, 82 Hawai'i at 132-33, 920 P.2d at 346-47. The court stated that "the tort of bad faith is not a tortious breach of contract, but rather a separate and distinct wrong 'which results from the breach of a duty imposed as a consequence of the relationship established by contract'." *Id.* at 131, 920 P.2d at 345 (citing Anderson v. Continental Ins. Co., 271 N.W.2d 368, 374 (Wis. 1978)).

[217] *Id.* at 133, 920 P.2d at 347; *see* Egan v. Mutual of Omaha Ins. Co., 620 P.2d 141, 146 (Cal. 1979), *cert. denied*, 445 U.S. 912 (1980); Stephen S. Ashley, *The Hawaii Supreme Court's Recognition of the Tort of First-Party Bad Faith*, BAD FAITH LAW REPORT, VOL. XII, NO. 6, 115, 118 (August 1996) [hereinafter Ashley, *Hawaii Bad Faith*].

[218] 620 P.2d 141, *cert. denied*, 445 U.S. 912 (1980).

[219] Nichols v. State Farm Mut. Auto. Ins. Co., 306 S.E.2d 616, 619 (S.C. 1983).

[220] *Best Place*, 82 Hawai'i at 133, 920 P.2d at 347.

[221] *Id.* at 132-33, 920 P.2d at 346-47; Ashley, *Hawaii Bad Faith*, *supra* note 217, at 118.

[222] *Best Place*, 82 Hawai'i at 133, 920 P.2d at 347; *see* Gangnes, *Planning to Commit Bad Faith*, *supra* note 16, at 8.

[223] *Best Place*, 82 Hawai'i at 133, 920 P.2d at 347 (citations omitted); *see* Gangnes, *Planning to Commit Bad Faith*, *supra* note 16, at 8.

[its] insureds[,]"[224] the *Best Place* court stated that "[t]he breach of the express covenant to pay claims . . . is not the [*sine qua non*] for an action for breach of the implied covenant of good faith and fair dealing."[225]

A large "majority [of jurisdictions, however,] have adopted the narrower definition of first-party bad faith"[226] articulated in the Wisconsin Supreme Court case of *Anderson v. Continental Insurance Co.*[227] A plaintiff must show that the insurer intended to commit bad faith through both an absence of a reasonable basis for denying benefits of the policy and through the defendant's knowledge or reckless disregard of the lack of a reasonable basis.[228] Therefore, by selecting a negligence standard, the Hawai'i Supreme Court selected the least stringent standard, as followed in only a minority of jurisdictions.[229]

2. *Hawai'i Supreme Court ignored legislative definitions of bad faith*

Although the Hawai'i Supreme Court briefly mentioned the "Unfair Claim Settlement Practices Act"[230] in the *Best Place* decision, the court completely

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[224] *See Best Place*, 82 Hawai'i at 128, 920 P.2d at 342 (emphasis added).

[225] *Id.* at 132, 920 P.2d at 346 (citing Rawlings v. Apodaca, 726 P.2d 565, 573 (Ariz. 1986)).

[226] Ashley, *Hawaii Bad Faith*, *supra* note 217, at 118.

[227] 271 N.W.2d 368, 376 (Wis. 1978).

[228] *Id.*

[229] Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 133, 920 P.2d 334, 347 (1996). The court expressly admitted that "the [*Gruenberg*] court did not enunciate a precise standard for determining insurer bad faith in first-party situations." *Id.* at 132, 920 P.2d 346. *See* Ashley, *Hawaii Bad Faith*, *supra* note 217, at 118; *see also*, Timmons v. Royal Globe Ins. Co., 653 P.2d 907, 914 (Okla. 1982); Nichols v. State Farm Mut. Auto. Ins. Co., 306 S.E.2d 616, 619 (S.C. 1983).

[230] HAW. REV. STAT. § 431:13-103 (1993). The legislature provided several examples of unfair dealing on the part of an insurer, such as:

> (a) (10) (A) Misrepresenting pertinent facts or insurance policy provisions relating to coverage at issue;
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> (B) With respect to claims arising under its policies, failing to respond with reasonable promptness, in no case more than fifteen working days, to communication received from: (i) The insurer's policyholder, or (ii) Any other persons, including the commissioner, or (iii) The insurer of a person involved in an incident which the insurer's policyholder is also involved. The response shall be more than an acknowledgment that such person's communication has been received, and shall adequately address the concerns stated in the communication;
>
> (C) Failing to adopt and implement standards for the prompt investigation of claims arising under insurance policies;
>
> (D) Refusing to pay claims without conducting a reasonable investigation based upon all available information;
>
> (E) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
>
> (F) Failing to offer payment within thirty calendar days of affirmation of

ignored the detailed examples of unfair dealing.[231] The statute provided specific guidance long before the *Best Place* opinion was written;[232] it seems as though it would have been a logical place to start. The federal district court

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liability, if the amount of the claim has been determined and is not in dispute;

(G) Failing to provide the insured, or when applicable the insured's beneficiary, with a reasonable written explanation for any delay, on every claim remaining unresolved for thirty calendar days from the date it was reported;

(H) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;

(I) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by the insureds;

(J) Attempting to settle a claim for less than the amount to which a reasonable person would have believed the person was entitled by reference to written or printed advertising material accompanying or made part of an application;

(K) Attempting to settle the claims on the basis of an application which was altered without notice, or knowledge or consent of the insured;

(L) Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which the payments are being made;

(M) Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

(N) Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(O) Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;

(P) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement; and

(Q) Indicating to the insured on any payment draft, check, or in any accompanying letter that the payment is "final" or is "a release" of any claim if additional benefits relating to the claim are probable under coverage afforded by the policy; unless the policy limit has been paid or there is a bona fide dispute over either the coverage of the amount payable under the policy.

Id.

[231] *See Best Place*, 82 Hawai'i at 125-27, 920 P.2d at 339-41.

[232] *See id.*

ruling in *Genovia v. Jackson National Life Insurance Co.*,[233] however, may have been the reason for the insurance statute's limited use by Hawai'i courts.

The plaintiff in *Genovia* was the widow-beneficiary of two life insurance policies.[234] Mr. Genovia, a life-long smoker, did not check the box on the insurance application indicating whether he had smoked in the last twelve months.[235] After a lengthy investigation by the insurers, who allegedly discovered that he was a life-long smoker and that he had smoked within the preceding twelve months, the insurers denied the benefits and returned the premiums paid.[236] Mrs. Genovia filed suit claiming that the insurers: 1) violated the Unfair Claims Settlement Practices Act (Hawai'i Revised Statutes section 431:13-103); 2) engaged in unfair business practices in violation of Hawai'i Revised Statutes section 480-2; and 3) violated the common law duty of good faith and fair dealing.[237]

The court held that Hawai'i Revised Statutes section 431:13-103 was intended to be a regulatory statute, enforceable only by the insurance commissioner in cases where an insurer repeatedly utilized such unfair practices.[238] According to the court, the statute did not grant private remedies to aggrieved individuals.[239] In fact, the court explicitly stated that a private cause of action could not be brought under Article 13.[240]

Although the Hawai'i Supreme Court passed over the standards set forth in Hawai'i Revised Statutes section 431:13-103 for a less specific definition of bad faith,[241] nothing in the statute prohibits state or federal courts in Hawai'i from using the language of the statute as guidance.[242] In finding that a private

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[233] Genovia v. Jackson Nat'l Life Ins. Co., 795 F. Supp. 1036 (D. Haw. 1992).

[234] *Id.* at 1038.

[235] *Id.* Mrs. Genovia argued that her husband had in fact quit smoking during the time period in question. *Id.* The court ruled that the insurers had not established unequivocally that Mr. Genovia smoked during the time period and denied their motion for summary judgment. *Id.* at 1039-40.

[236] *Id.* at 1038.

[237] *Id.* Plaintiff also sought punitive damages that were denied. *Id.* at 1043.

[238] *Id.* at 1044-45. The court also held that an insurer may not be sued under HRS § 480-2 with regard to its performance in the course of its insurance business. *Id.* at 1045.

[239] Genovia v. Jackson Nat'l Life Ins. Co., 795 F. Supp. 1036, 1044-45 (D. Haw. 1992).

[240] *Id.* at 1045. Essentially, HAW. REV. STAT. § 431:13-107 delegates all enforcement authority exclusively to the insurance commissioner. HAW. REV. STAT. § 431:13-201 provides cease and desist orders for insurer misconduct. HAW. REV. STAT. § 431:13-202 provides administrative penalties for unfair claims practices. *See* HAW. REV. STAT. § 431:13 (1993).

[241] *See* Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 133, 920 P.2d 334, 347 (1996).

[242] *Genovia*, 795 F. Supp. at 1045-46. Moreover, there is a certain irony in the fact that the court in *Genovia* admitted that the "[S]tate of Hawaii recognizes the existence" of the covenant of good faith and fair dealing; however, the court relied on the limitation of the at-will

cause of action for insurer bad faith exists, the *Best Place* court implicitly found *Genovia*'s overall logic invalid.

VI. SECONDARY RECOGNITIONS THAT WILL IMPACT HAWAI'I

A. Hawai'i Recognized Third-Party Bad Faith

1. The recognition

In addition to recognizing bad faith in the first-party context, the Hawai'i Supreme Court recognized a cause of action for third-party bad faith.[243] The court stated

> [t]hat *there is a legal duty, implied in a* first- and *third-party insurance contract,* that the insurer must act in good faith in dealing with its insured . . . . Because the instant case involves a first-party insurance contract, we now address the proper standard of imposing liability in the first-party context. [244]

Although the court was not faced with a third-party factual situation in *Best Place*, the court stated, in another case, that "[a]ccording to Hawaii state law, a breach of the implied duty of good faith gives rise to an independent tort cause of action—*viz.*, the tort of 'bad faith'—*in both the first-party and third-party insurance contexts.*"[245] Thus, it is clear: Hawai'i has recognized the tort of bad faith in the third-party insurance context.[246]

2. The definition: can a third-party sue a liability carrier directly?

Traditionally, in a third-party bad faith action, the insurer defends its insured against a claim by an injured third-party plaintiff.[247] If bad faith arises in the

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employment contract reasoning in *Parnar v. Americana Hotels,* 65 Haw. 370, 652 P.2d 625 (1982) to deny the existence of a tort cause of action for bad faith. *Id.* at 1046.

[243] *See* Rahder v. Royal Ins. Co., 82 Hawai'i 156, 920 P.2d 370 (mem.)(June 20, 1996); Esmena v. State Farm Mut. Auto. Ins. Co., 82 Hawai'i 156, 920 P.2d 370 (mem.)(June 20, 1996). The court, however, recently cited *Best Place* for its recognition of both first- and third-party bad faith. *See* Alzharani v. Pacific Int'l Servs. Corp., 82 Hawai'i 466, 473 n.9, 923 P.2d 408, 415 n.9 (1996); *see also* Hillary Ganges, *Bad Faith Extends to Third-Party Insurers, says Hawaii Supreme Court in Memorandum Opinion,* LAW REPORTER (Consumer Lawyers of Hawaii), July 1996, at 7 [hereinafter Gangnes, *Bad Faith Extends to Third-Party*].

[244] *Best Place*, 82 Hawai'i at 132, 920 P.2d at 346 (emphasis added).

[245] Rahder v. Royal Ins. Co., 82 Hawai'i 156, 156, 920 P.2d 370, 370 (mem.)(June 20, 1996); Esmena v. State Farm Mut. Auto. Ins. Co., 82 Hawai'i 156, 156, 920 P.2d 370, 370 (mem.)(June 20, 1996)(emphasis added).

[246] *See Alzharani*, 82 Hawai'i at 473 n.7, 923 P.2d at 415 n.7.

[247] *See Best Place*, 82 Hawai'i at 124 n.4, 920 P.2d at 338 n.4; *see generally* JERRY, *supra* note 1, § 25G, at 153-55.

settlement of the claim, the first-party insured may assign the claim to the third-party injured.[248] Generally, the third-party cannot sue the first-party's insurer directly because, absent a statutory or contractual right, there is no privity of contract, and, therefore, no duty of good faith is owed to the third-party.[249] In support of this general rule, the *Best Place* court stated in footnote seven that it cited *Colonial Penn*[250]

> as an indication of [its] willingness to support a cause of action based on insurer bad faith and *not for the proposition that Hawai'i would recognize a bad faith cause of action brought by an injured claimant against a third-party tortfeasors' insurance company.*[251]

Although the court stated that it was not citing *Colonial Penn* in recognition of a third-party claim against an insurer directly, the court's failure to define third-party bad faith has created the following issue: whether a third-party plaintiff can ever sue the insurance company directly, without the first-party insured assigning his or her claim. A recent I.C.A. decision indicates the possibility that one can sue without an assignment.[252]

In *Hunt v. First Insurance Co. of Hawaii, Ltd.*, the plaintiff was a customer who slipped and fell in a KTA Super Stores grocery store, in Hilo, Hawai'i.[253] The plaintiff filed suit, alleging breach of the insurance contract between the grocery store and the insurance company, "bad faith breach of the insurance contract, and various violations of Hawai'i Revised Statutes (HRS) Chapters 431 (Insurance Code) and 480 (Monopolies; Restraint of Trade)."[254] On appeal, the I.C.A. held that the plaintiff was an intended third-party beneficiary with enforceable contractual rights in the grocery store's commercial general liability insurance policy.[255] The court affirmed the holding in *Genovia* that no private cause of action exists under HRS Chapter 431.[256] The I.C.A. also held that because Hunt's claim was based on contract rather than tort, "the general

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[248] *See generally* JERRY, *supra* note 1, § 52B, at 303-306.

[249] *See id.* § 84[b], at 548-51; *see also* Olokele Sugar Co. v. McCabe, Hamilton & Renny Co., 53 Haw. 69, 71, 487 P.2d 769, 770 (1971).

[250] Colonial Penn Ins. Co. v. First Ins. Co., 71 Haw. 42, 780 P.2d 1112 (1989).

[251] *Best Place*, 82 Hawai'i at 125 n.7, 920 P.2d at 339 n.7 (emphasis added).

[252] Hunt v. First Ins. Co. of Hawai'i, Ltd., 82 Hawai'i 363, 922 P.2d 976 (Ct. App. 1996).

[253] *Id.* at 365, 922 P.2d at 978.

[254] *Id.* at 364-366, 922 P.2d at 978-79. The policy provided medical payment coverage, i.e., medical expenses, for bodily injury caused by accidents at the grocery store. *Id.* at 365, 922 P.2d at 978. The circuit court granted the defendant's motion for partial summary judgment. *Id.* at 366, 922 P.2d at 979.

[255] *Id.* at 367-68, 922 P.2d at 980-81; *see* David Louie et al., HAWAII INSURANCE & TORT LAW UPDATE 55-56 (1996)[hereinafter HAWAII INSURANCE UPDATE].

[256] *Hunt*, 82 Hawai'i at 371-72, 922 P.2d at 984-85. The court also held that Hunt was not a "consumer" of insurance, within the meaning of Chapter 480-1, and, therefore, could not proceed with such a claim. *Id.* at 373, 922 P.2d at 986.

prohibition on direct action against the insurer as set forth in *Olokele [Sugar Co. v. McCabe, Hamilton & Renny Co., Ltd.*[257] wa]s not applicable.[258] It appears, therefore, that in Hawai'i a third-party may sue an insurance company directly so long as there is some contractual basis, such as a third-party beneficiary relationship.[259]

B. Hawai'i Also Recognized Punitive Damages for Bad Faith

In addition to recognizing the tort of bad faith, the Hawai'i Supreme Court also announced the ability of an injured party to obtain punitive damages for bad faith meeting the standard enunciated in *Masaki v. General Motors Corp.*[260] In *Masaki*, the Hawai'i Supreme Court firmly established that punitive damages "serve the useful purposes of expressing society's disapproval of [and of deterring] intolerable conduct . . . ."[261] Punitive damages may be warranted when: 1) the defendant acted in a wanton or oppressive manner; 2) the defendant acted with such malice as implies a spirit of mischief or criminal indifference; 3) where there has been some willful misconduct; or 4) that entire want of care which would raise the presumption of a conscious indifference to consequences.[262] Furthermore, the court found that the plaintiff must establish the "requisite aggravating conduct on the part of the [insurer]" to recover punitive damages.[263]

Penn America strongly argued against recognition of a "punitive damages bad faith" cause of action;[264] however, the court found no difficulty in recognizing the legitimacy of a claim for punitive damages in the bad faith tort context.[265] The court restricted the definition by stating that "'something more' than mere commission of a tort is required to justify the imposition of punitive damages."[266] Moreover, the plaintiff must establish with

> 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

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[257] 53 Haw. 69, 487 P.2d 769 (1971) (holding that unless statutorily or contractually permitted joinder of or direct action against the insurer is generally prohibited).

[258] *Hunt*, 82 Hawai'i at 369, 922 P.2d at 982.

[259] *Id.*; *see* HAWAII INSURANCE UPDATE, *supra* note 255, at 55-56.

[260] 71 Haw. 1, 780 P.2d 566 (1989).

[261] Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 133, 920 P.2d 334, 347 (1996) (citing *Masaki*, 71 Haw. at 8, 780 P.2d at 571)(quotation omitted).

[262] *Masaki*, 71 Haw. at 11, 780 P.2d at 572.

[263] *Best Place*, 82 Hawai'i at 133, 920 P.2d at 347 (citing *Masaki*, 71 Haw. at 11, 780 P.2d at 572).

[264] *See* Defendant's Amended Answering Brief, *supra* note 141, at 11.

[265] *Best Place*, 82 Hawai'i at 133, 920 P.2d at 347.

[266] *Id.* at 134, 920 P.2d at 348 (citing *Masaki*, 71 Haw. at 12, 780 P.2d at 573).

> or that entire want of care which would raise the presumption of a conscious indifference to consequences.'[267]

The case of *Hawkins v. Allstate Insurance Co.*[268] may offer guidance for the type of conduct that may be considered "something more." In *Hawkins*, the jury awarded a $3.5 million dollars punitive damages award, regardless of the validity of the claims, because the insurer engaged in a routine practice of automatic deductions.[269] The facts of *Best Place* do not appear to present a practice of bad faith, and, therefore, do not appear to rise to a level warranting punitive damages.[270]

VII. CONCLUSIONS AND RECOMMENDATIONS

The "general standard" which the Hawai'i Supreme Court adopted in *Best Place* will likely be "refined" in future cases.[271] Commentators have argued that neither the insurance industry nor society in general, can afford the "bad faith-punitive damages lottery" that permits one or two insureds to recover millions in extra damages arguably paid by innocent premium-paying insureds.[272] A logical effect of the recognition of the tort should be a minimal rise in the cost of insurance for the average insured.[273] Some insurance companies, however, have asserted that insurance may become *so expensive* that many individuals or small businesses will "either elect reduced coverage or forego purchases [and/]or other activities because [they require] insurance . . . ."[274]

Contrary to the prediction of some legal commentators and insurance companies,[275] there is not likely to be an "explosion" of bad faith litigation.[276]

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[267] *Id.* (quoting *Masaki*, 71 Haw. at 11, 780 P.2d at 572).

[268] 733 P.2d 1073, 1083-85 (Ariz.), *cert. denied*, 484 U.S. 874 (1987); *see also* Republic Ins. Co. v. Hires, 810 P.2d 790, 791-93 (Nev. 1991) ($5 million punitive damage award for practice of settling claims of lower-income and middle-income policy holders at amounts much less than claims' value, because they were less likely to contest insurer's decision).

[269] 733 P.2d at 1083-85.

[270] *See* Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 123, 920 P.2d 334, 337 (1996).

[271] HAWAII INSURANCE UPDATE, *supra* note 255, at 51.

[272] Douglas Houser, *Good Faith As a Matter of Law: The Insurance Company's Right to Be Wrong*, 27 TORT & INS. L.J. 665, 666 (1992).

[273] *See* Henderson, *Refining the Standard*, *supra* note 10, at 32.

[274] *Id.* Moreover, this may affect the standard of living for those that must devote a predominant amount of their earnings to insurance premiums. *Id.*

[275] *See* Henderson, *After Two Decades*, *supra* note 77, at 1182; Henderson, *Refining the Standard*, *supra* note 10, at 33.

[276] HAWAII INSURANCE UPDATE, *supra* note 255, at 55; *see also* Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 131, 920 P.2d 334, 345 (1996); *cf.* Kewin v. Massachusetts Mut. Life Ins. Co., 295 N.W.2d 50 (Mich. 1980).

First, no statistical information exists to support the prediction that recognition of bad faith will result in a flood of law suits. In fact, prior to the tort's recognition, many Hawai'i plaintiffs' attorneys already included the count of bad faith in their breach of contract claims against insurance companies. Second, the recognition of punitive damages requires "clear and convincing" evidence that an insurer acted "wantonly or oppressively[;]"[277] therefore, this heightened standard will prevent the creation of a Hawai'i lottery. Furthermore, in addressing the potential concern that bad faith would "open the floodgates for tort actions *based upon the breach of any contract*[,]"[278] the Hawai'i Supreme Court relied upon the special, "atypical"[279] nature[280] of the insurance contract to prevent the extension of the tort to every contract.[281] Moreover, insurance companies have most likely begun to mitigate potential losses by choosing to settle questionable claims. In fact, the threat of a bad faith complaint may be an effective weapon to force insurers into reasonable and valid settlements.[282]

One avenue that some insurance commentators favor is the counterclaim or affirmative defense of comparative or reverse bad faith, as a response to the seemingly one-sided sword of insurer bad faith.[283] Good faith is required by all parties to a contract, irrespective of their bargaining positions.[284] The key difference, however, is the lack of a fiduciary responsibility running from the insured to the insurer.[285] Courts should at least distinguish between the individual policyholder and a policy held by a corporation or business. The fiduciary relationship held by the insurer is simply not the same; the level of bargaining power is equalized.[286] The bargaining power between a business and an insurance company can be equalized with well-paid attorneys.[287]

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[277] *Best Place*, 82 Hawai'i at 134, 920 P.2d at 348.

[278] *Id.* at 131, 920 P.2d at 345 (emphasis added)(citing *Kewin*, 295 N.W.2d 50).

[279] *Best Place*, 82 Hawai'i at 132, 920 P.2d at 346.

[280] *Id.* at 131, 920 P.2d at 345 (citing Braesch v. Union Ins. Co., 464 N.W.2d 769 (Neb. 1991)). "The public interest in insurance contracts, the nature of insurance contracts, and the inequity in bargaining power between the insurer and the policyholder all serve to distinguish insurance contracts from other types of contracts." *Braesch*, 464 N.W.2d at 774.

[281] *Best Place*, 82 Hawai'i at 132, 920 P.2d at 346.

[282] P. Shipstead & S. Thomas, *Comparative and Reverse Bad Faith: Insured's Breach of Implied Covenant of Good Faith and Fair Dealing as Affirmative Defense or Counterclaim*, 23 TORT & INS. L.J. 215, 216 (1987)[hereinafter Shipstead & Thomas].

[283] *See id.*; J. Dobbyn, *Is Good Faith in Insurance Contracts a Two-Way Street?*, 62 N.D. L. REV. 355 (1986); *see also* JERRY, *supra* note 1, § 25G[4], at 161-62.

[284] *See* JERRY, *supra* note 1, § 25G, at 161 (citing RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981)).

[285] *Id.* at 162.

[286] *See* Dolan v. Aid Ins. Co., 431 N.W.2d 790, 791-92 (Iowa 1988).

[287] *See generally* Shipstead & Thomas, *supra* note 282. Up until now the treatment of the parties to insurance contracts has been skewed heavily in favor of the insured in nearly every

Regardless of whether Hawai'i recognizes "insured bad faith," Hawai'i must refine its standards for first- and third-party bad faith to clearly guide both the insurer and insured in determining what is bad faith.

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context; however, the reverse situation that should spark the court's interest is one in which the insured has the power to injure the insurer economically by the exercise of bad faith in interfering with the settlement process. *Id.*

[288] Class of 1998, William S. Richardson School of Law. Special thanks to Federal Magistrate Barry Kurren, Professors David Callies and Hazel Beh, Attorneys William F. Sink and Chuck Narikiyo, and Law Students Elizabeth Thompson and Diane Yuen for their comments and suggestions.

For the Collective Benefit: Why Japan's New Strict Product Liability Law Is "Strictly Business"

The industries in the United States are currently suffering under the burden of product liability, and those of the EC nations are probably going to suffer a burden, if not the same. It therefore follows that with the enactment of product liability legislation in Japan, the Japanese industry too may suffer a greater burden. The question inevitably is, why follow the same path and suffer the same fate of the industries in other industrialized nations?*

I. INTRODUCTION[1]

On July 1, 1994, after some twenty years of debate in government deliberation councils,[2] the Japanese Diet passed a new Products Liability Law ("PL Law"),[3] which has, ostensibly, brought strict manufacturer liability to Japan.[4] The PL Law, which went into effect on July 1, 1995, gives definitions

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* Akio Morishima, *The Japan Experience: The Japan Scene and the Present Product Liability Proposal*, 15 U. HAW. L. REV. 717, 726 (1993). Professor Akio Morishima was Head of the Economic Planning Agency's *shingikai* ("deliberation council") on products liability. He visited the University of Hawai'i, William S. Richardson School of Law in 1993. On *shingikai*, *see infra* note 2.

[1] In this article Japanese names are rendered in American order, first name followed by family name. Translations are the author's, except where indicated. Quotations from Japanese sources are the author's translation unless indicated. Any errors are the author's and are not the fault of the University of Hawai'i Law Review.

[2] *Shingikai* ("deliberation councils") are established by ministries to debate legal revisions and other matters. On *shingikai*, *see* Frank Schwartz, *Of Fairy Cloaks and Familiar Talks: The Politics of Consultation*, *in* POLITICAL DYNAMICS IN CONTEMPORARY JAPAN 217-241 (Gary D. Allinson et al. eds., 1993) (discussing the dynamics of the interaction of bureaucrats, politicians and industry through *shingikai*). *See* discussion *infra* section II. A. 2.

[3] SEIZOUBUTSU SEKININHOU, Law No. 85 of 1994. [hereinafter PL LAW]. Many Japanese book titles, press, and news stories use the abbreviation "PL Hou" for "Products Liability Law" over the ungainly *Seizoubutsu sekininhou*. *See, e.g.*, *infra* notes 24, 29. This article will follow this Japanese trend.

[4] *See* Marc S. Klein, *Megatrends in International Products Liability Law*, C949 ALI-ABA 113, 117 (1994) (claiming Japan had decided to "join the fold" of other nations in adopting strict liability). This article will suggest that asserting that Japan now has "strict liability" for manufacturers creates misunderstandings by applying a Western label to a very different legal system.

of "manufacturer," "defect," and "product,"[5] and sets forth a provision for strict defect-based liability.[6]

Prior to the advent of the PL Law, claims for product-related injuries were brought under the civil code articles for "illegal acts,"[7] which is similar to tort liability, and "obligations," which is similar to contractual liability.[8] Under these provisions, plaintiffs had the difficult task of proving the manufacturer's negligence.[9] This was hampered by a limited system for gathering evidence,[10]

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[5] *See* PL LAW, art. 2, §§ 1, 2, 3. *See infra* Appendix 1 for an adaptation of a tentative Japanese ministry translation.

[6] *See* PL LAW, art. 3. *See infra* Appendix 1 for a translation of article 3.

[7] *Fuhou koui* literally means "illegal acts." *Fuhou koui* are essentially the same as "torts". MINPOU (Japanese Civil Code) [hereinafter CIVIL CODE], art. 709 is a general provision covering all "illegal acts." CIVIL CODE, art. 709 states, "a person who violates intentionally or negligently the right of another is bound to make compensation for the damage arising therefrom." CIVIL CODE, art. 709; *see* YASUHIRO FUJITA, PRODUCTS LIABILITY: AN INTERNATIONAL MANUAL OF PRACTICE: JAPAN 12-14 (1987). No contractual privity is required to bring suit under art. 709.

[8] *Saimu furikou sekinin* has been called the law of "obligations," and is similar to actions for warranty. *See* HIROSHI ODA, JAPANESE LAW 178-186 (1992). Two articles of the code were commonly used for product related injury, CIVIL CODE art. 415 and CIVIL CODE art. 570. *See* FUJITA, *supra* note 7, at 4-6. CIVIL CODE art. 415 defines "*saimu furikou sekinin*" and provides, "if an obligor fails to effect performance in accordance with the tenor and purport of his obligation, the obligee may demand compensation for harm." FUJITA, *supra* note 7, at 6. For CIVIL CODE art. 415 liability, contractual privity is required, lack of fault is a defense, and damages are limited by CIVIL CODE art. 416, though reasonable liquidated damages clauses are usually enforced. FUJITA, *supra* note 7, at 6-8.

CIVIL CODE art. 570 covers "*kashitanpo sekinin*," a remedy for "defective collateral" or any "latent defect" which would not have been discovered by a purchaser exercising an ordinary degree of care. *See* FUJITA, *supra* note 7, at 4. CIVIL CODE art. 570's use is limited in that contractual privity is required; lack of negligence is not a defense; consequential damages are limited; in addition to which the purchaser must have no knowledge of a product defect and must bring any claim within one year. FUJITA, *supra* note 7, at 4-5.

[9] Statistical evidence suggests the difficulty in winning on a negligence claim. For chart summaries of dispositions of most all of Japan's products liability trials *see* MASANOBU KATOU ET AL., SEIZOUBUTSU SEKININHOU SOURAN (Masanobu Katou ed. 1994) (copy on file with author) (involving automobiles, 397-400, 410-412, 421-423; involving machinery, 456-462; involving medicine, 541-545, 558-559, 572-573, 583-591; involving foodstuffs, 650-652, 696-703; involving home appliances, 736-739; involving gas burners & attachments, 761-766; involving real property & fixtures, 794-803, 850-851; miscellaneous, 862-864, 881-883). Compiling the results of the above charts reveals that over half of the CIVIL CODE art. 709 claims brought were recognized by the court out of some 200 suits filed in court since the end of the war. *Id.* at 117. Plaintiffs' success rates are higher in cases evolved from a few famous drug and food incidents, in which widespread injury and extensive press coverage produced public outcry that helped the plaintiffs. *See generally id.* at 507-734 (for detailed litigation history on drug and food product cases). Proving manufacturer's negligence is generally very difficult. *See generally* Masato Nakamura, *Seizoubutsu sekinin soshou no genjou to kadai* [The Present State of, and Issues in Product Liability Litigation], 46 JIYUU TO SEIGI 60, 61-62 (1995) (discussing the difficulties of recovering in negligence for injured parties: cost, time, lack of class actions, lack of a discovery system and the location of information essential to plaintiff in

non-continuous trials,[11] and other systemic barriers.[12] Lone plaintiffs have had a notoriously low success rate in negligence suits, to which the only exception has been when large numbers of plaintiffs are injured by a drug or food.[13] Settlements greatly outnumbered lawsuits because of the mutual benefits to plaintiff and manufacturer of reduced cost, reduced time and risk of resolving

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defendant's hands). Some recent changes in the MINJI SOSHOUHOU (Japanese Code of Civil Procedure) [hereinafter CIVIL PROCEDURE CODE] may lessen the plaintiff's obstacles in court. For an outline of the 1996 legislative amendments to the CIVIL PROCEDURE CODE, *see infra* Appendix 3.

[10] For an article discussing proposed expansions to evidence gathering procedures, *see* Hideyuki Kobayashi, *Shouko shuushuu tetsudzuki no kakujuu* [Expansion of Evidence Gathering Procedures], 571 NBL 56, 572 NBL 48 (1995) (published in two sections) (examining the United States and German system's recent changes, and proposals for wider duty of production, removal of discretion in determining government secrets to the courts, and other methods for balancing the burdens and the functions the evidence gathering system plays). On the 1996 legislative amendments to the CIVIL PROCEDURE CODE, *see also infra* Appendix 3.

[11] The word "trial" is used for convenience. "Trials" in Japan are composed of short meetings every month or so, and Japan has no system of continuous trials as does the United States, despite the attempt to reform the code to achieve a "concentrated" trial. *See* Kohji Tanabe, *The Process of Litigation: An Experiment with the Adversary System*, *in* THE JAPANESE LEGAL SYSTEM 528-530 (Hideo Tanaka ed., 1976) (discussing the attempt to create a continuous trial system through revisions in the code in 1926 and the failure of the revisions to effect change).

[12] Japan has only a limited pre-trial discovery system, and in order to discover documents and evidence, trial motions are generally made from month to month during the "trial" itself. *See* Kohji Harada, *Civil Discovery Under Japanese Law*, 16 LAW IN JAPAN 21, 24-32 (1983) (on the discovery system and methods for obtaining evidence). *See also* Tanabe, *supra* note 11, at 506-548 (discussing the litigation process). For 1996 legislative changes to document production rules in the CIVIL PROCEDURE CODE, *see infra* Appendix 3. *See also* Mutsuo Tahara, *Bunshou teishutsu gimu no han'i to futeishutsu no kouka* [The Extent of the Duty to Produce Documents and the Effect of Non-Production], 1098 JURISTO 61 (1996) (explaining the first legislative changes to the Civil Procedure Code's document production provisions in 70 years).

[13] *See* Nakamura, *supra* note 9, at 62 (noting that especially in design cases where a high level of scientific knowledge is involved, groups of plaintiffs suing for a similar injury from the same product have an advantage over the singular litigant in showing that the product was likely to cause injury because numbers of injuries "speak for themselves" to some extent and allow judges to make factual presumptions more easily). Historically, the courts have set a high duty of care for manufacturer's in drug and food cases, where large groups are injured, which explains the plaintiff's success. *See* Tsuneo Matsumoto, *Terebi hakka jiken Oosaka chisai hanketsu to seizoubutsu sekininhouan* [The Osaka District Court Judgment in the Television Fire Case and the PL Bill], 546 NBL 6, 8 (1994). Without regard to damages won, about 60% of product suit plaintiffs are successful, but this success rate is unevenly distributed, with drug-injury claim plaintiffs 80% successful, and miscellaneous product claims only 30% successful. *See* Nakamura, *supra* note 9, at 61. This article will address *infra* the small number of actual filings as related to the number of potential claims.

the claim in the court system, and the benefit of private proceedings which tailor an individualized, unpublicized resolution.[14]

The PL Law now operates in addition to existing Civil Code provisions[15] and establishes a definition for defect similar to a "danger-utility"[16] and "consumer-expectation"[17] defect standard for product safety.[18] This change was influenced by European law[19] and developments in the United States.[20] The PL Law purports to protect injured plaintiffs by focusing on the defective product itself, rather than on the manufacturer's actions.[21] The shift in focus to the product

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[14] *See* Nakamura, *supra* note 9, at 62. On the reasons behind, and systems for, out of court settlement, *see* Shohzoh Ohta, *Seizoubutsu higai no kyuuzai shisutemu: saibangai funsou kaiketsu, gen'in kyuumei, jouhou shuushuu/bunseki teikyou nado no seido*, 1051 JURISUTO 37, 38-39 (1994) (discussing reasons for settlement such as privacy and convenience but commenting that these may not necessarily advance justice or the law).

[15] KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA [Economic Planning Agency, Social Policy Bureau, First Consumer Affairs Division], CHIKUJO KAISETSU SEIZOUBUTSU SEKININHOU 126 (1994) (official ministry commentary on the PL Law, noting that the PL Law operates as a "special rule" of the Civil Code).

[16] The danger-utility test is a common balancing test, weighing risk of injury versus the utility of the product. *See* W. PAGE KEETON ET AL., PROSSER AND KEATON ON TORTS § 99, at 699 (5th ed. 1984).

[17] A test defining defect with reference to the expectations of a reasonable consumer for safety, as set out in the *Restatement (Second) of Torts* §402A. *See* W. PAGE KEETON ET AL., PROSSER AND KEATON ON TORTS § 99, 698 (5th ed. 1984).

[18] The PL LAW defines *kekkan* ("defect") as involving a "lack of safety that the product ordinarily should provide." PL LAW, art. 2 § 2. There are three types of defects: 1) a manufacturing defect, which is a fault in raw materials or processing or construction; 2) a design defect, in which the design did not sufficiently consider safety; 3) a defect in warning or instruction, from which an inevitable danger exists in relation to the products utility or effect, and about which the manufacturer failed to warn the consumer such that he could avoid or prevent injury. *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 65-66 (official ministry commentary defining "defect").

[19] *See* HIDEYUKI KOBAYASHI, SEIZOUBUTSU SEKININHOU 25 (1995) (naming the 1985 EC Directive on Products Liability as the model for Japan's law). Japan chose the EC Directive, essentially because Japan's legal system is largely modeled after European Civil Law systems, and because Europe has not, and probably will not, experience the explosion of litigation under its products liability law that the United States has under its products liability system; in addition, Japan fears that the European Community would not import from a country without the same legal burdens on industry. *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 24. United States influence was also felt. *See infra* note 20.

[20] *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 19-22 (discussing United States legal development, particularly the advent of *Restatement (Second) of Torts* §402A and subsequent litigation).

[21] *See* PL LAW, art. 1 (stating that the purpose of the law is to protect those injured by products); PL LAW, art. 2 (creating liability based on product defect). For an English translation, *see infra* Appendix 1.

itself is part of an official policy which has been described as a shift from a general rule of *caveat emptor* to a rule of "seller beware."[22]

With the new law Japan aims, in part, to foster harmonization with international legal norms by recognizing, as other industrialized countries have, that mass production, mass consumption, and the increasing complexity of products gives the manufacturer the duty to take responsibility for its products. This "shift" of duty to the manufacturer could potentially create a role for the judiciary in assuring product safety, a role which has traditionally been assumed by government regulation.[23] For the judiciary to actively pursue this role depends upon whether plaintiffs choose to resolve their cases in court. Only one case has been brought in the first year of the PL Law's operation.[24]

Japan's adoption of "strict liability" is, however, not as revolutionary as it may seem on the surface. The law is largely a codification of past cases and as such is primarily a statement of policy or an indication of concern for consumers.[25] Products liability law in Japan will probably not produce the dramatic changes it has in the United States.[26] The PL Law, formed by over

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[22] *See* Tsuneo Matsumoto, *Seikatsusha juushi no kanten kara mita seizoubutsu sekininhou* [The PL Law from the Perspective of Emphasis on People's Lives], 535 KOUSEI TORIHIKI 15, 19 (1995) (noting that the age of mass production, advertising campaigns, and mass consumption has resulted in a new relationship between manufactuer and consumer in which courts place a heavier burden on the manufacturer).

[23] *See* Matsumoto, *Seikatsusha*, *supra* note 22, at 19 (synthesis of many of Professor Matsumoto's points). *Cf.* Hiroshi Sarumida, *United States and Japan: Alternative Approaches to Create Incentives for Product Safety*, 29 CORNELL INT'L L.J. 79, 142-144 (1996) (questioning whether the judiciary will take an active role to produce incentives for industry to reduce risks of product injury as the Unites States judiciary has done).

[24] *See* Tsuneo Matsumoto, *Seizoubutsu sekininhou to saibangai funsou shori: PL hou shikou ichinen o furikaette*, 596 NBL 6, 8 (1996).

[25] The official commentary to the law states that judgments under the law will not change, and that the aim of the PL Law is to help eliminate *baratsuki* ("discrepancies") in order to unify case results in product liability cases that would otherwise be brought under the Civil Code. *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 95. *See also* Andrew Marcuse, *Why Japan's New Products Liability Law Isn't*, 5 PAC. RIM L. & POL'Y J. 365, 398 (1996) (arguing the law is essentially a codification of existing court doctrine while giving good coverage of the legal issues). This author agrees with Marcuse's conclusion that the law is a codification of past case law because such is clearly implied in the official commentary, but this author disagrees with Marcuse's conclusion that "the law will not function as intended," *id.* at 398, because the limited extent of the PL Law's function was likely intended.

[26] Lawrence M. Friedman notes that the most dramatic changes in United States tort law came in products liability and medical malpractice, areas of litigation which had not come into their own before 1900. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 684 (1985). The field we now call "products liability" in the United States probably finds germination in MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916), in which Judge Cardozo struck down the privity barriers to lawsuits against manufacturers. The growing concept of "strict liability" found full expression in Greenman v. Yuba Power Products Inc., 377 P.2d 897 (Cal. 1962) (adopting the *Restatement of Torts (Second)* §402A, finding the defendant manufacturer

twenty years of debate, is perhaps best seen as "*tatemae*."[27] The law will have little effect without other changes, and many scholars have called for reform since the law was passed.[28]

This article will address the puzzle of products liability litigation in Japan, which has had only two hundred product related injury trials since 1945, many of which settled.[29] In contrast, the United States, which has only twice Japan's population, had close to twenty thousand product related injury suits filed in Federal courts in 1990 alone.[30] This discrepancy may be partially explained by

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strictly liable). Some thirty years later, the American Law Institute and the 104th Congress see the system of strict products liability as having grown out of control. *See* Mark A. Behrens, *Products Liability Reform in the 104th Congress*, SB16 ALI-ABA 207 (1996) (concluding that the current United States product liability system is an example of "what is wrong" with the United States legal system). Peter Huber has been an especially vehement critic of the United States product liability system. *See generally* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1990); PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM (1991). Scientists have also been critical of courtroom logic and the inferences drawn from otherwise sound scientific data. *See* John Gerald Gleeson, *Understanding the "Junk" in "Junk Science": A Study in Logic and Scientific Methodology*, 387 PLI/Lit 197 (1990) (available in Westlaw).

[27] "*Tatemae*" describes an official stance on a matter, but not *honne*, which is what one "really thinks." *Tatemae* is "a principle; a rule;... a public position." KENKYUUSHA'S NEW COLLEGIATE JAPANESE ENGLISH DICTIONARY 762 (1983). "*Tatemae*" is a term used concerning laws in other fields. *See* Katsutoshi Takami, *Nihon—kenryoku bunritsuron no tenkai*, 52 HIKAKUHOU KENKYUU 86 (1990) (discussing separation of powers; constitutional law). For a discussion and development of the concept in English, *see* JOHN O. HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 199-200 (1991) (discussing *tatemae* as a metaphor for the operation of law in Japan, typified by a large difference between the written word and actual practice). Law in Japan may be seen as a "public position," an official stance, or a social norm because many laws have no means of coercive enforcement and so must encourage a high degree of voluntary compliance. *See generally* HALEY, *supra* note 27 (for a development of a theory of normative law operating in Japan in concert with non-coercive social controls).

[28] *See, e.g.*, KATOU, *supra* note 9, at 13-24 (proposing several modifications for the law, including the need for a discovery system). On recent changes in the Civil Procedure Code which may improve the pro-plaintiff impact of the PL Law's operation in future, *see infra* Appendix 3 (on 1996 changes to Japan's Code of Civil Procedure).

[29] Different sources count different numbers of cases. *See* KATOU, *supra* note 9, at 117 (1994) (numbering the cases at about 200); *see* MANABU HAYASHIDA, PL HOU SHINJIDAI: SEIZOUBUTSU SEKININNO NICHIBEI HIKAKU 91 (1995) (numbering them at 150). The Ministry of International Trade and Industry numbers the cases at 160 in one chart. TSUUSHOUSANGYOUSHOU SANGYOU SEISAKUKYOKU SHOUHISHA KEIZAIKA, SEIZOUBUTSU SEKININHOU NO KAISETSU 249 (1994) (supplementary materials section). *Cf.* Sarumida, *supra* note 23, at 81 n.12 (19,400 product liability cases were filed in United States Federal courts in 1990, and non-automobile tort cases brought in seven states in 1990 totaled 99,144). For comparison, the total number of civil suits filed in Japan in all courts in 1994 was 2,432,520, of which 1,552,444 were small claims. HEISEI HACHINENDO HANREI ROPPOU 1441 (EIICHI HOSHINO et al. eds., 1995).

[30] *See* Sarumida, *supra* note 23, at 81 n.12.

the different conception of "law" that Japan holds. In addition to analysis of the PL Law,[31] this article examines some of the subtle complexities underlying Western commentators dismissal of the PL Law as a "failure."[32] To understand the Japanese expectations for "success" for the PL Law, one must understand Japan as a country which is still dominated greatly by informal social controls, as opposed to law.[33] An examination of the "non-litigiousness" of the Japanese, often ignored as a mere "myth" which is propped up by legal, procedural, and institutional barriers to litigation, provides an introduction to the question of whether it is realistic to say the PL Law is a "failure" simply because it does not create litigation.[34]

Part II of this article will illustrate how the PL Law evolved with only minor input from consumer groups, and will examine the formative process of the law in Japan. Part III of this article will examine the PL Law's six articles, their language, legal implications, and effects. The discussion will address each article in turn, following the logical progression of the PL Law itself. This will provide an introduction to the legal issues surrounding each article,[35] and mirror

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[31] For English language analysis of the law *see* Sarumida, *supra* note 23; Marcuse, *supra* note 25; Mark A. Behrens and Daniel H. Raddock, *Japan's New Product Liability Law: The Citadel of Strict Liability Falls, But Access to Recovery is Limited by Formidable Barriers*, 16 U. PA. J. INT'L BUS. L. 669 (1995); Anita Bernstein & Paul Fanning, *"Weightier than a Mountain": Duty, Hierarchy, and the Consumer in Japan*, 29 VAND. J. TRANSNAT'L L. 45 (1996); Nancy L. Young, Comment, *Japan's New Products Liability Law: Increased Protection for Consumers*, 18 LOY. L.A. INT'L & COMP. L.J. 893 (1996).

[32] Some commentators argue the law will fail in its operation. *See, e.g.*, Marcuse, *supra* note 25, at 398 (concluding Japan's law will not "function as intended"). This paper will attempt to illustrate that the law will work as foreseeably expected, and that Western observers should not be misled by their own expectations for the manner in which a law should perform.

[33] *See* HALEY, *supra* note 27, at 200 ("Japan is a society ordered more by extralegal and often quite coercive community and group controls than law or government power"); Dan Fenno Henderson, *Comparative Law in Perspective*, 1 PAC. RIM. L. & POL'Y J. 1, 8 (1992) (suggesting the Japanese cannot be "appropriately described as 'law abiding'" because social and group forces order society). *But see* Koichiro Fujikura, *Haley's Authority without Power: Administering Justice in a Consensus-based society*, 91 MICH. L. REV. 1529, 1542-44 (1993) (book review) (suggesting that urbanization and internationalization are changing this aspect of Japan, and that commentators using a social-psychology analysis criticize Haley for relying too much on cultural explanations which confuse the issue and fail to answer fundamental questions). This paper suggests that the social controls are merely stronger versions of social-psychological forces that also exist in the United States, and probably elsewhere.

[34] For the probable origin of the theories trying to dispel the "myth" of Japanese non-litigiousness, *see* John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. OF JAPANESE STUDIES 359, 360 (1978). *See also* Mark Ramseyer, *The Reluctant Litigant Revised: Rationality and Disputes in Japan*, 14 J. JAPANESE L. STUDIES 111 (1988) (commenting on the continuing viability of Haley's original thesis).

[35] The PL Law's articles address: 1) purpose; 2) definitions of fundamental terms; 3) the provision for liability based on defect; 4) defenses and exemptions; 5) time limitations; and 6) the applicability of the Civil Code which underlies the new law. *See* PL LAW, art. 1-6. For an English translation, *see infra* Appendix 1.

the form of much of the official and scholarly Japanese commentary on the PL Law.[36]

Part IV of this article will suggest reasons for the PL Law's enactment despite the fact that its drafters probably foresaw it would have little effect. A sketch of the role of law, as framed by the Japanese legal system and extra-legal social controls, creates a better understanding of how the PL Law will function, and of the respective legal systems of Japan and the United States.[37]

Through discussion of the law and its formation, Part V of this article concludes that the law will not aid consumers in the way a Westerner might expect because of its pro-business roots and the lack of supporting systems of law. The PL law will probably fail to help consumers because it does not change the social, psychological, and economic pressures, nor the Japanese values which limit the Japanese individual's willingness and ability to sue.[38]

II. BACKGROUND: THE LEGISLATIVE PROCESS AND THE ROLE OF LAW IN JAPAN

In order to understand the present PL Law it is necessary to examine the process by which it and most other legal changes take place in Japan. The process of developing consensus and formulating legislative proposals is largely undertaken by ministerial bureaucrats, who may serve both the elected Diet's purposes and their own.[39] The active involvement of the executive branch in legislation is, however, balanced by the need to gain consensus with the major political parties and other ministries.[40] Given the nature of the drafters of the law, and the climate in which it was drafted, one might expect the new law will have little effect on the manufacturing industry's production power or

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[36] *See, e.g.*, KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15 (an official commentary which analyzes the PL Law article by article); KATOU, *supra* note 9, at 24-39 (scholarly commentary discussing each article in order).

[37] For articles addressing the importance of learning about Japanese law, *see* Kenneth L. Port, *The Case for Teaching Japanese Law at American Law Schools*, 43 DEPAUL L. REV. 643 (1994); John O. Haley, *Educating Lawyers for the Global Economy*, 17 MICH. J. INT'L L. 733 (1996) (book review) (review of a text which seeks to broaden United States lawyers' understanding of the operation of law in Japan); David Broiles, *When Myths Collide: An Analysis of Conflicting US-Japanese Views on Economics, Law, and Values*, 1 TEX. WESLEYAN L. REV. 109 (1994) (arguing that Japan challenges the United States' myths about itself, and that examining Japan without moral or legal chauvinism might teach the United States about its own nature); Henderson, *supra* note 33 (stressing the important role of comparative law in the United States-Japan relationship, and stressing the dangers of relying wholly on direct translation for one's understanding of Japan).

[38] For a discussion of a convincing social-psychology based approach to law in Japan, *see* Fujikura, *supra* note 33, at 1540-42.

[39] *See* Mamoru Seki, *The Drafting Process for Cabinet Bills*, 19 LAW IN JAPAN 168, 172-78 (Daniel H. Foote trans., 1986) (noting that between the first and 100th sessions of the Diet, 67% of all bills introduced, and 85% of those enacted originated in the cabinet).

[40] *See* Seki, *supra* note 39, at 174, 184 (on *nemawashi*, or consensus gathering).

international competitiveness.[41] The present six article PL Law [42] had its conception in 1975 with a proposal from a group of scholars who began studying the issue in 1972.[43] As the official Ministry *kaisetsu* ("commentary") on the PL Law notes,[44] the development of the strict liability system in the United States[45] and Europe both influenced the development of the Japanese law.[46] The European Community Council Directive on defective products of 1985 and the United States' Second Restatement of Torts were the models for the ultimate

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[41] The Ministry of International Trade and Industry [hereinafter MITI] has control of many aspects of industrial policy, and was able to influence the PL Law's development greatly. On MITI, *see generally* CHALMERS JOHNSON, MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925-1975 (1982) (describing MITI as the behind-the-scenes director of the Japanese industrial economy). MITI would seem to have a conflict of interests between its policy of protecting business and its goal of advancing consumer protection.

[42] For the author's adaptation of a tentative translation from the ministries in charge of the law's development, *see infra* Appendix 1. For original translations *see* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 140-142; TSUUSHOUSANGYOUSHOU SANGYOU SEISAKUKYOKU SHOUHISHA KEIZAIKA, *supra* note 29, at 184-188 (main text section).

[43] The origins might equally be said to have begun in the litigation of several food and drug cases, but the *Seizobutsu Sekinin Kenkyuukai* [Products Liability Research Group], a scholarly group convened in 1972, wrote a proposal, [*Seizoubutsu Sekininhou Youmou Shian*], presented in 1975, largely in response to the American Law Institute's introduction of the RESTATEMENT OF TORTS (SECOND) §402A, and the United States' court's adoption of its logic. On the origins of Japan's PL Law, *see* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 11-18. For the 1975 proposal, *see* KATOU, *supra* note 9, at 901. For a brief history and reasons for development of the PL Law, *see* KOBAYASHI, *supra* note 19, at 1-5. *See* Morishima, *The Japan Experience*, *supra* note "*", at 723-37 (discussing the basics of the law). On foreign influence and the complete history of development of the PL Law, *see* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 11-50 (outlining the development of the law and the debates surrounding it).

[44] "*Kaisetsu*" are official ministry commentaries on the law, which have been quoted by the courts, and which are mainly based upon the ministry controlled *shingikai* deliberation council discussions, making the ministry a *de facto* source of "legislative intent." Interview with Professor Yoshiharu Matsuura, Faculty of Law, University of Osaka, in Kyoto (May 29, 1995). This "ministerial intent" is a byproduct of the ministries' drafting the majority of legislation approved by the Diet. *See* Seki, *supra* note 39, at 168, 171 (noting that between the first and 100th sessions of the Diet, 67% of all bills introduced, and 85% of those enacted originated in the cabinet; noting also that the ministries are often better able than Dietmembers to handle the technical aspects of drafting for consistency with other legislation).

[45] *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 19-22 (discussing the development of the United States body of law). Japanese sources generally note Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1962), as being the first case to take manufacturer liability out of the realm of contract and into strict tort liability. *See, e.g.*, KATOU, *supra* note 9, at 329.

[46] *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 24 (discussing European legal influence).

Japanese PL law.[47] Japan feared that a PL Law modeled after the United States' law might cause a "litigation crisis" and hurt Japan's international economic competitiveness.[48]

The discussion of issues in the PL Law progressed through various Ministry *shingikai* ("deliberation councils"), private groups of scholars, and political groups.[49] Debate on issues surrounding the PL Law continued on and off for some twenty years until the law passed on June 22, 1994,[50] under the threat of

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[47] *Council Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products*, EUROPEAN COMMUNITY COUNCIL DIRECTIVE No. 374 (1985). *See* KATOU, *supra* note 9, at 912-21. Translated into Japanese in KATOU, *supra* note 9, at 905 (Hideyuki Kobayashi trans.). *See also* TSUUSHOUSANGYOUSHOU SANGYOU SEISAKUKYOKU SHOUHISHA KEIZAIKA, *supra* note 29, at 49-50 (noting that the initial drafts of the PL Law had several fundamental provisions found in the EC Directive). Japan likely sought to emulate the civil law systems of Europe for reasons of compatibility, and not the American RESTATEMENT OF TORTS (SECOND) §402A, mainly because Europe had not experienced the "litigation crisis" which Japan perceived in the United States, *see infra* note 48, (though there was, nevertheless, influence of the United States on Japan and Europe). *See* KOBAYASHI, *supra* note 19, at 25 (citing the EC directive as model for Japan's PL Law and discussing the individual articles and the scope of the PL Law as compared to the 1985 EC Directive).

[48] The Japanese ministry's official commentary links the adoption of the RESTATEMENT OF TORTS (SECOND) §402A (1965) by United States courts to the United States' *soshou kiki* ("litigation crisis") which, "made firms in risky fields [of production] withdraw [from the market], and which ultimately can be thought to have had a great influence on the United States' international competitiveness." *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 20. The Japanese ministry sees product injury litigation as having started developing very early in the United States. *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 19 (official commentary noting that in the United States, "from 1916 consumers have been able to pursue liability of manufacturers directly for all products"). [Translator's note: though unstated in the original, the date probably refers to Judge Cardozo's decision in MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916)]. This article suggests that Japan's fear of a litigation crisis is, however, not realistic or logical, given the fact that Japan is a civil law system with limited court capacity and no discovery system. Given the many barriers to litigation, *see* Nakamura, *supra* note 9, at 61-62 (on barriers to suits), it seems unlikely that a "litigation crisis" would occur in Japan. Recent changes in the Civil Procedure Code may, however, make litigation easier, *see infra* Appendix 3.

[49] For a basic list of the groups debating PL Law issues, *see* KOBAYASHI, *supra* note 19, at 16. For a chart comparing the United States *Restatement of Torts* §402A, the 1985 EC Council Directive, and the various Japanese discussion committee proposals for the PL Law, *see* KOBAYASHI, *supra* note 19, at 188-231 (Appendix II).

[50] One example of these issues is the degree of proof the plaintiff must bear and the possible use of factual presumptions to lighten the burden of persuasion on a plaintiff. For a discussion, *see* Ken Kawai, *"Nihongata seizoubutsu sekinin seido no arikata ni kansuru kenkyuu" seika houkoku: kekkan no sutei mondai* [A Report on Results of the "Research [Project] Concerning Japanese-Style Products Liability"], 5 NIRA SEISAKU KENKYUU 8 (1992) (National Institute for Research Advancement) (copy on file with author).

a no-confidence vote and call for general elections.[51] The passage was perhaps due to Japan's gradually increasing awareness of the need to "harmonize" its law with the European market, lest an imbalance of law influence competition and trade.[52] The ruling coalition's fear of opposition parties' growing strength also may have forced the law's passage, which was surrounded by political panic and changing leadership.[53]

The reasons for the law's enactment are as follows. First, consumer safety is of increasing importance in an era of mass production, in which consumers have little information about increasingly complex products.[54] Second, shifting the burden of guaranteeing safe products from government to manufacturers,

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[51] For a quick history of the progress of the PL Law through the Diet, *see* HAYASHIDA, *supra* note 29, at 1-3. The Diet session for 1994 was to continue until June 29, 1994. In the presence of worry over a no confidence vote, which could have come before or after the budget passed, it was feared that the PL Bill would not pass. However, the law passed with one week to spare. *See* HAYASHIDA, *supra* note 29, at 2-3.

[52] *See* Morishima quote *supra* page 879 (commenting on the burden of PL liability and why Japan should accept it). Japan's government worried there might be foreign pressure to change Japan's PL system, probably because the lack of domestic strict products liability was seen as an unfair competitive advantage in the international market place, and the closing of other markets, such as the EC, would affect Japan's largely export-based economy. *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 23-24, 55 (listing harmonization with international legal norms as one of the goals for the law, and noting the EC itself united and is seeking to unify its legal structures so that legal inequalities would not affect trade).

[53] Opposition parties, such as the Social Democratic Party of Japan and Japan Communist Party, view the PL Law as a consumer law, and probably believe manufacturers and bureaucracy should have a smaller role in shaping the law. This is evidenced by these parties' PL Law proposals, which contain provisions that are greater threats to industry. For the Socialist Party proposal, *see* KATOU, *supra* note 9, at 941 (with similar provisions for presumptions to shift the burden of persuasion to the manufacturer, and with, as with the Communist Party proposal, no *kaihatsu kiken* ("State of the Art") defense). For the Communist Party proposal for the PL Law, *see* KATOU *supra* note 9, at 946, 948 (Communist party proposal including, *inter alia*, a provision which requires the court to presume the existence of defect, and to shift the burden of persuasion to the manufacturer; and provisions for *real* pre-trial discovery, requiring the manufacturer to produce documents). The ruling Liberal Democratic Party continued to be struck by scandal and was extremely unstable; Prime Minister Morihiro Hosokawa resigned on April 8, and his replacement, Tsutomu Hata, was himself replaced by the Social Democratic Party Chairman, Tomiichi Murayama, on June 29, 1994, which was a concession to the socialist party. *See* Yomiuri Shinbun, *Review of the Year; a year of blood, toil, tears and sweat—the top 10 domestic news stories for 1994*, THE DAILY YOMIURI, Dec. 25, 1994, at 3. Thus, the Communist and Socialist Parties' provisions may have been excluded because they might hurt the industry ties of the ruling coalition government, especially those of its Liberal Democratic Party heads, and no consensus upon them could be gained.

[54] These reasons are listed in KOBAYASHI, *supra* note 19, at 1-2. For official reasons and explanations for the *mokuteki* ("goals") of the PL Law, *see* PL LAW, art. 1. The official commentary mirrors Kobayashi's summation. *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 53-55. These goals are discussed *infra* in section III. A.

by means of *kisei kanwa* ("relaxing government regulations"), is "absolutely" necessary to Japan's elimination of non-tariff trade barriers.[55] Though the main official goal of the law is ostensibly to increase the protection for injured product users and consumer safety,[56] due to the limits on the judiciary's power, little incentive is provided for manufacturers to produce safe products in compensation for the loosening of regulatory controls.[57]

A. How Legislative Process and Ministry Ties with Industry Affect the Product: A Pro-Consumer Law?

1. Law as a "tatemae" social norm

Admittedly, it may seem that the pro-consumer aspect of the PL Law is not merely "*tatemae*," an official policy spin on an issue, when official commentary plainly states that the PL Law has several purposes other than aiding consumers, such as "harmonization" with international legal norms. But, the establishment of the law has caused much chaos and misunderstanding, especially among smaller companies.[58] This chaos has arisen in the attempt to prepare corporate strategies to deal with possible increased litigation costs and the risk of successful plaintiff judgments for product-related injury.[59] This

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[55] As a third reason, Kobayashi repeats the reason of "harmonization" and unification of international law in an age of global trade. *See* KOBAYASHI, *supra* note 19, at 2.

[56] *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 54.

[57] The PL Law may "open the door" for the judiciary to take control, but judicial lead-taking in reform is not likely. *See* Sarumida, *supra* note 23, at 143-144 (concluding the judiciary will not take up the slack in incentives to produce safe products resulting from the lessening of regulations and government oversight in promoting product safety without an overhaul of civil procedure and the courts to make judicial remedies more accessible). The role of the judiciary in civil law countries is traditionally passive. *See* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 34-38 (1985).

[58] *See, e.g., PL hou shikou tomadou chuushoukigyou: kosutozou ya keiyaku henkou mo* [Mid and small size companies lost at the enactment of the PL Law: increased costs and contract modifications], KOBE SHINBUN, July 6, 1995, at 8; *PL hou taiou chiguhagu: kigyou piripiri, keikoku hyouji ni shinkei, anzen sekkei wa teusu ni; gyousei barabara, madoguchi no jichitai nouhau busoku* ["PL Law response unprepared: corporations on pins and needles with worries over warnings, weak safety design; administration in chaos, lack of know-how in local government [complaint] offices"], NIPPON KEIZAI SHINBUN, June 8, 1995, at 3.

[59] On corporate strategy's influence on contracts, see the three part round-table discussion with Tohshi Miyajima et al., *Torihiki kihon keiyakusho ni okeru PL hou: sekininbuntan keiyakujoukou no kentou* [The PL Law in basic transaction contracts: a debate on contract clauses establishing a division of liability [between component manufacturers and finished product manufacturers]], 578 NBL 6, 8, 579 NBL 19, 580 NBL 44 (1995) (published in three sections)(discussing generally industry law departments' and manufacturers' confused response

corporate reaction is probably caused by the fear that the government is empowering consumers to create a "litigation crisis" in Japan, or at least expand manufacturer liability. The PL Law may reveal its "*tatemae*" nature if litigation fails to materialize, but it will already have been voluntarily implemented to some degree by manufacturers at that point.[60]

Apart from the codified purposes of the law, examined below, are two other aspects which must be considered in judging whether the corporate chaos and real-world confusion caused by the law are justified. First, is the degree to which the consumer perspective was considered in both the process of the law's formulation and in its ultimate enactment. Second, is the PL Law's actual effect in simplifying the process for bringing consumer lawsuits in the courts.

If consumer perspectives were not considered in the formative process, and did not result in a law which lessens the existing burden on plaintiffs suing under the Civil Code, then the law can truly be said to be *tatemae*, a bit of "puffing" of a government product.[61] If the corporate chaos which resulted due to the fear of strict liability is unjustified, the law is *tatemae*.[62]

A law which is *tatemae*, or a statement of policy, can still have effect, or at least promote societal change. While there was only one suit based on the PL Law brought in its first year of operation, the number of settlements for product-related injuries increased.[63] In addition, the number of inquiries made at government and private "PL Centers,"[64] which hear and attempt informal dispute resolution between product users and manufacturers, has been quickly

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and misunderstandings about the PL Law). For a discussion of the changes in manufacturing contracts under the PL law, *see supra* 578 NBL 6, 10-12 (discussing product manufacturers' attempts to foist all liability on component manufacturers through contract (in contravention of the PL LAW, art. 4, § 2, which provides a special defense for component manufacturers who exactly comply with the component buyer's specifications and design), and noting perhaps the "largest change of the PL Law": its inclusion of *yunyuusha* ("importers") in the class of *seizougyousha* ("manufacturers")).

[60] This effect of voluntary compliance is typical of Japanese "*tatemae*" law; for an explanation in English, *see generally* HALEY, *supra* note 27 (promoting a general thesis of the role of law as *tatemae* or normative law).

[61] "Puffing" is an expression of opinion by a seller not made as a representation of fact, or an exaggeration by a salesperson concerning the quality of goods which is not considered a legally binding promise. BLACK'S LAW DICTIONARY 1233 (6th ed. 1990).

[62] Of course, larger firms replete with international legal departments skilled in litigation in the United States and Japan, and knowledgeable about the law, were not "quaking in their boots" at the law's enactment. Letter from Matsushita Works Legal Department, Section Manager (Aug. 2, 1996) (on file with author).

[63] *See* Matsumoto, *Saibangai funsou*, *supra* note 24, at 7. The private nature of settlements does not allow one to know whether settlement amounts have risen, and the one year increase may be statistically insignificant.

[64] To put the PL Law and the role of law in Japan in perspective, one needs to note the existence of myriad government centers set up in many localities to hear claims and start resolution of disputes. For coverage of these centers, an example of which are the *Kokumin Seikatsu Sentaa* [Japan Consumer Information Centers], *see infra* Appendix 2.

increasing.[65] This is the probable result of an increasing awareness of consumer interests enforced by the policy statement of the PL Law.

2. *The process of enactment: the lack of consumer involvement in the drafting and enactment of the PL Law*

Consumer views were not well represented in the formation of the law, thus, speculation that the PL Law was not designed for consumers is reasonable.[66] The lack of consumer involvement in the legislative process is explained by two factors. The first is the nature of the process and ministry-industry ties. The second is the nature of the consumer movement.

The legislative process is largely guided and informed by ministries, which draft most legislation in Japan and whose bills have a higher pass rate than Diet bills.[67] One of the central means for developing legislation and for beginning *nemawashi*,[68] a traditional process of gathering consensus, is the *shingikai*.[69] The *shingikai* is a council of representatives from many fields with specialized knowledge concerning the legislative issue assigned to it.[70] *Shingikai* are attached to ministries which create and dissolve them *ad hoc*.[71]

Shingikai have been criticized as being a vehicle used to silence criticism of the bureaucracy in advance.[72] The real delineation of their function probably falls somewhere between seeking legitimacy through honest polling of opinion, and the attempt to preempt criticism by creating the appearance of inclusion in

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[65] *See* Matsumoto, *Saibangai funsou*, *supra* note 24, at 7. Many of the inquiries are merely general ones about the PL system. *See infra* Appendix 2.

[66] For a list of participants in the *shingikai* (ministry deliberation council) for the PL Law, *see Seizoubutsu sekinin seido o chuushin to shita sougoutekina shouhisha higai boushi/kyuuzai no arikata ni tsuite*, DAI 14 JI KOKUMIN SEIKATSU SHINGIKAI SHOUHISHA SEISAKUBUKAI HOUKOKU(II) [14th Report of the Social Planning Council, Consumer Policy Section] 64 [hereinafter CONSUMER SHINGIKAI REPORT 14] (KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA [Economic Planning Agency, Social Policy Bureau, First Consumer Affairs Division] ed., 1994) (containing two consumer representatives out of seventeen total representatives, the remainder of which are from industry and other fields).

[67] *See* Seki, *supra* note 39, at 168.

[68] Literally "digging round the roots," a metaphor for carefully seeking unanimous consent for a branch cause without losing the roots. For an example of the use of the term, *see* Seki, *supra* note 39, at 174, 184.

[69] For an intelligent discussion of the dynamics of the interaction of bureaucrats, politicians, and industry through *shingikai*, *see generally* Schwartz, *supra* note 2.

[70] On *shingikai*, *see generally* Schwartz, *supra* note 2; JOHNSON, MITI, *supra* note 41, at 47-48.

[71] Ministries gained the authority to create and dissolve *shingikai* in 1949 with the enactment of the National Administrative Organization Act, after which they tended to "multiply like bacteria." Schwartz, *supra* note 2, at 219.

[72] *Shingikai*, perhaps due to their lack of independent staffs, and inability to discuss other than ministry approved topics, have also been called mere "gimmicks." *See* JOHNSON, MITI, *supra* note 41, at 48.

a democratic process.[73] The ministry *shingikai* are a target of critics of the bureaucrat-industry relationship in Japan.[74] In reality, outrageous use of bureaucratic power is curtailed to some degree by the citizens' expectations that the government will act on their behalf and by the requirement that the Diet ultimately approve any bills the ministries submit.[75]

The Social Policy Council *Shingikai*,[76] whose non-binding recommendations contributed greatly to the law's final form, was composed of representatives from business, housewives associations, the insurance industry, academia, and other special groups such as the Drug Side Effect Victim's Relief Foundation, and the President of the Local Horse Racing Association.[77] The *shingikai*

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[73] *See generally* Schwartz, *supra* note 2 (concluding that *shingikai* moderate the conflicts between state and society, public and private, with all the efficiency which can be had when the goal is gaining consensus among several parties with often disparate points of view). *Shingikais'* function may be nothing more than working as "mechanisms of systemic interaction" which allow ministries to respond to societal concerns. *See* Schwartz, *supra* note 2, at 217.

[74] *See, e.g.*, JOHNSON, MITI, *supra* note 41 (criticizing and analyzing MITI and its connections with industry); KAREL VAN WOLFEREN, THE ENIGMA OF JAPANESE POWER 23-24 (1989) (generally critical of Japan's [government-industry] "System" for its "suppression" of individuals, judgments made on the basis of values Wolferen claims are "universal"). Some authors, especially Wolferen, seem primarily concerned with moral criticism of Japan and are critical of such ministry-industry ties as sources of corruption. However, they can also be seen as an evolution of a native social order which need not fit within a foreign conception of government.

[75] Professor Matsuura notes that ministries, while having control over vast amounts of information, have little money, and have tremendous jurisdictional squabbles amongst themselves, which does not comport with the common picture of bureaucracy's monolithic control over industry, Diet, and means of dispute resolution. Yoshiharu Matsuura, Faculty of Law, Osaka University, Lecture at Doshisha University, Kyoto (May 29, 1995). *See also* Margaret McKean, *State Strength and the Public Interest, in* POLITICAL DYNAMICS IN CONTEMPORARY JAPAN 72-104 (Gary D. Allinson et al. eds., 1993) (analyzing the interaction of corporate interests with government and concluding Japan's state is weak). McKean argues that Japan does not have a strong state at all, but one which "follows [corporate interests and industry] when it can, coordinates when it must, and deregulates when it cannot coordinate." *Id.* at 103. *See* Seki, *supra* note 39, at 184-186 (noting that "scrupulous preparation and considerable persuasive powers [on the part of the ministries] may be needed to convince [Diet members] and win their approval," and that bureacrats are not all-powerful).

[76] The *Keizai Kikakucho Kokumin Seikatsukyoku Shouhisha Gyousei Daiikka* [Economic Planning Agency, Social Policy Bureau, First Consumer Affairs Division] is part of the Economic Planning Agency that is attached to the Prime Minister. It edited and published 14 reports of *iken* ("recommendations") by the *Kokumin Seikatsu Shingikai* [Social Policy Council] by 1994 on the state of Japan's system for compensating those injured by products, with a concentration on the products liability system. On Japan's other semi-private compensatory systems for injured consumers, *see infra* Appendix 2.

[77] *See* CONSUMER SHINGIKAI REPORT 14, *supra* note 66, at 64. The head of this council was Professor Akio Morishima of Nagoya University. For Morishima's comments on the PL Law, *see* Morishima, *supra* note "*". Professor Matsuura has noted that the Horse Racing

included two decidedly pro-consumer representatives among the seventeen members, both high ranking members of *Fujinkai* ("housewives' groups").[78] Despite the heavy industry representation on the PL Law deliberation committee, the bureaucratic elite may have an incentive to urge industry to compromise and establish safety standards.[79] In short, if consumer's needs are not answered, then consumer forces may gain strength and thwart ministry and industry interests.

Two other practices provide examples of the closed, mutually beneficial, exclusive nature of the ministry-industry ties. These practices are extralegal and non-transparent. One is *gyousei shidou*, ("administrative guidance") in which ministries exert informal influence over industry to try to direct its practices in the name of uniting the national economy.[80] Another example is *amakudari* ("descending from heaven") which is a term describing the angelic

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Association President was related to the Sasakawa family. Yoshiharu Matsuura, Faculty of Law, Osaka University, Lecture at Doshisha University, Kyoto (May 29, 1995). One can only speculate why a Horse Racing Association President was a member of this PL Law *shingikai*, though it is clear that gangsters have formed ties with the business-industrial sector. *See* DAVID. E. KAPLAN & ALEC DUBRO, YAKUZA: THE EXPLOSIVE ACCOUNT OF JAPAN'S CRIMINAL UNDERWORLD 169-182 (1986) (explaining "*soukaiya*," used to force shareholders meetings closed in as little as five minutes to prevent stockholder votes and their questioning the board of directors); *see also* Eduardo Recio, Comment, *Shareholder's Rights in Japan*, 10 UCLA PAC. BASIN L.J. 489, 499 (1992) (on *soukaiya* and, *inter alia*, their extorting money from corporations). Japan's largest securities firm Nomura has also allegedly paid money to *soukaiya* related firms. *Nomura shouken ga soukaiya shinzoku kigyou ni 7000 man en kyouyo* [Nomura Securities gives 70 million yen to *sokaiya* related firms], ASAHI SHINBUN, Apr. 16, 1997 (pagination unavailable).

[78] Professor Matsuura noted that these "housewives" groups were probably also wives of men belonging to the industry perspective, and that there might be a conflict of interest. Yoshiharu Matsuura, Faculty of Law, Osaka University, Lecture at Doshisha University, Kyoto (May 29, 1995).

[79] *See* Sarumida, *supra* note 23, at 127.

[80] Administrative guidance is the term for the informal system of control ministries use to "guide" action on the part of corporations and organizations under their jurisdiction. *See generally* Yoriaki Narita, *Administrative Guidance*, 2 LAW IN JAPAN 45 (James L. Anderson trans., 1968) (finding administrative guidance is a necessary process with inherent problems of consent running to coercion, ill adaption of administrative guidance to resolve certain problems, and a lack of clear operating standards or policy). Whether or not to follow a ministry's informal "suggestions" is technically up to the recipient. *See* Kazuo Yamanouchi, *Administrative Guidance and the Rule of Law*, 7 LAW IN JAPAN 22, 22 (Peter Figdor trans., 1974) (exploring possible consitutional problems with administrative guidance, which operates without statutory authority). The informal nature of the guidance means that it is usually not justicable by the courts, and ministry's informal coercion is, thus, largely beyond review. *See* Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUMB. L. REV. 923, 932-35, 954 (1984) (hailing administrative guidance as a flexible means of management, but noting that administrative guidance's informality is a weakness as well as a strength). *See also* Russell A. Yeomans, *Administrative Guidance: A Peregrine View*, 19 LAW IN JAPAN 125 (1986).

bureaucrats' descent to private industry posts, often posts formerly under their jurisdiction.[81] *Amakudari* occurs despite laws which ostensibly prevent public officials from profit-making in former areas of expertise.[82]

For many Japanese corporations, informal guidance, protection, and information provided by the ministries are a frequent part of operations.[83] Informal ties and extensive negotiation and consultation form the bridges for the flow of key information between industry and ministry.[84] This negotiation and consultation is necessary to the effectiveness of ministry's suggestions to industry.[85] The strength and pervasiveness of ministry-industry ties may have produced the pro-industry composition of the PL Law *shingikai*.

The other explanation for the lack of consumer voices on *shingikai* may be that consumers have not formed a *gyoukai*, a term used by Yasunori Sone to mean "all the entities (firms, enterprises, and trade associations) that fall under

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[81] On *amakudari*, (literally "descending from heaven"), indicating the practice of reemploying retired bureaucrats in big business, *see* CHALMERS JOHNSON, JAPAN: WHO GOVERNS 141-156 (1995).

[82] On "*amakudari*" and the laws seeking to prevent it, *see* JOHNSON, *supra* note 81, at 143 (noting that lax enforcement of Japan's NATIONAL PUBLIC SERVICE LAW, art. 103 (Law No. 120 of 1947, amended by Law No. 222 of 1948), which prohibits public service personnel from taking positions with profit-making enterprises with which such persons were closely connected through their public agency, still allows *amakudari* as a possibility, and that such positions are often provided for public employees failing to be promoted by the time they reach a certain age by their superiors, in order to soften the landing upon leaving public service). The yearly number of *amakudari* has been publicly reported since 1988, and seems to respond to public opinion, as evidenced in 1996 by the reduction in *amakudari* moving to the financial world, especially the number going to banks after Japan's savings and loan crisis. The number shrunk to one third of the previous year. *See Kyonen no amakudari, jishuku de 55 nin heru* [Last year's *amakudari*, 55 less due to self-restraint], ASAHI SHINBUN, Mar. 27, 1997 (pagination unavailable).

[83] Frequent communications between business and bureaucrats seem to be mutually beneficial, allowing business to engage in forming regulations and bureaucrats to extend their influence beyond strictly legal limits. *See generally* Young, *supra* note 80, at 935. The "guidance" is tolerated because it promotes collective action which advances economic policy, which in turn confers a public benefit. *See* Yamanouchi, *supra* note 80, at 22-23. For an account of the famous Sumitomo Metals Incident, in which Sumitomo's president rebelled and caused great political strife before complying with a "recommendation" to decrease production, *see* JOHNSON, MITI, *supra* note 41, at 268-271 (noting this incident triggered the reformation of the whole steel industry, and the placement of an *amakudari* bureaucrat who took over the presidency of Sumitomo).

[84] "Administrative guidance" is, perhaps, the prime example of the informal connections made between industry and ministry which allow the flow of information necessary to the process of intrusive negotiation and consultation which take place in informal administrative regulation. *See* Young, *supra* note 80, at 983.

[85] *Id.* (administrative guidance depends upon extensive bureaucrat involvement in consultation and negotiation with those who they seek to regulate).

the legal jurisdiction of a particular ministry."[86] Sone's general theory is that *gyoukai*, which are large, well-funded organizations, are part of a polity in which *gyoukai* "serve as influential political mediators for many sectors of society."[87] The weakness of the consumer movement itself, represented largely by housewives groups which do not have a large national cross section, and by other groups who do not agree on goals,[88] may mean that consumers did not have an organized presence strong enough to gain *shingikai* representation.[89]

Housewives' groups exclude men by nature, and this limits the groups' numbers and strength.[90] A further irony of the strength of pro-industry representation on the ministry *shingikai* responsible for the PL Law proposal is the probable conflict of interest that housewives who represent consumer interests may have with their husbands, who are likely to be workers in industry.[91] The consumers' seeming inability to publicize and stress their interests is also apparent at the individual level in the seeming unwillingness to sue.

3. The PL Law's role in enabling lawsuits: law as a "tatemae" social norm

The number of lawsuits arising from product related injury in Japan is extremely low. To explain this extreme lack of litigation requires one to look beyond the anti-litigation effects of Japan's legal system. Many explanations for non-litigiousness explore only "institutional" barriers to litigation, such as the lack of a system of discovery and punitive damages in Japan, as well as high court and attorney fees.[92] Institutional explanations are hard pressed, however,

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[86] Yasunori Sone, *Structuring Political Bargains: Government, Gyoukai, and Markets, in* POLITICAL DYNAMICS IN CONTEMPORARY JAPAN 295-306 (Allinson & Sone eds., 1993).

[87] *Id.* at 305.

[88] *See* CHIEZOU [THE ASAHI ENCYCLOPEDIA OF CURRENT TERMS] 489 (1996).

[89] *See generally* Bernstein & Flanning, *supra* note 31 (arguing that the legal process does not advance consumer interests and that consumers are "missing players" in the products liability law context; article explains lack of "consumer sovereignty" in Japan with cultural reasons). *See* Sone, *supra* note 86, at 306 (concluding that non-*gyoukai* are disenfranchised groups in the Japanese system).

[90] Husbands, of course, do not join "housewives committees." The *fujinkai's* (or *fujin dantai*, literally "women's groups") very name excludes men, the half of the population with more influence in the government and industrial sectors.

[91] This irony was pointed out in a Yoshiharu Matsuura, Faculty of Law, Osaka University, Lecture at Doshisha University, Kyoto (May 29, 1995).

[92] "Institutionalists" argue essentially that procedural barriers prevent lawsuits from occurring. *See, e.g.*, Haley, *The Myth, supra* note 34, at 360 (arguing that institutional barriers and lack of court capacity in the Japanese system provides disincentives for a "rational litigant" to sue, and that inherent Japanese national characteristics have less to do with Japanese non-litigiousness than these institutional barriers); Mark J. Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE. L. J. 604, 604 (1985); *see also* Mark J. Ramseyer, *Reluctant Litigant supra* note 34, at 114 (arguing that predictability and other factors make refraining from litigation "rational"); FRANK UPHAM,

to account for the fact that only some 150 to 200 products liability suits have been brought in court since the end of World War II, of which many settled.[93]

These low litigation figures exist despite large numbers of injuries every year.[94] The *shingikai* reports include mention of several thousand incidents where actual injury to life or limb, or risk of injury due to explosion, fire, breakage, rotting, etc., occurred due to allegedly faulty products.[95] One may assume that many other incidents have occurred which were not reported. There is a potential wellspring of complaints from which very few actual suits have emerged.

For example, the third annual phone consultation network, the "Defective Product 110 Line,"[96] was run by the *Nichibenren*[97] in 1992 to offer free consultation for 34 localities. The network collected a record 1,044 calls in six days while operating for only about six hours per day at any given location.[98] These numbers suggest that Japanese manufacturers' products cause questions and complaints, but that these complaints do not lead to litigation.

To understand why litigation has not developed and why many corporations voluntarily comply with some laws that have no coercive effect, a look at the role of law in Japan is necessary. Both of these effects are byproducts of a law that is "*tatemae*."[99]

The role of law is partially illuminated by the Japanese judiciary, which is smaller and more passive than the judiciary in the United States, especially in

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LAW AND SOCIAL CHANGE IN POSTWAR JAPAN (1987) (arguing, essentially, that the government actively controls dispute resolution procedures to reduce litigation).

[93] *See* Nakamura, *supra* note 9, at 62 (noting that the whole picture of product liability litigation is not revealed solely through coverage of trials which have gone to a verdict, and that even after the enaction of the PL Law, the number of settlements will be greater than the number of verdicts).

[94] *See generally Seizoubutsu sekinin seido o chuushin to shita sougoutekina shouhisha higai boushi/kyuuzai no arikata ni tsuite*, DAI 13 JI KOKUMIN SEIKATSU SHINGIKAI SHOUHISHA SEISAKUBUKAI HOUKOKU(II)[13th Report of the Social Planning Council, Consumer Policy Section], 120-29 [hereinafter CONSUMER SHINGIKAI REPORT 13] (KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA [Economic Planning Agency, Social Policy Bureau, First Consumer Affairs Division] ed., 1994) (in *shiryou* [supplementary materials] section). Hospitals deal with several thousand product associated injuries every year. *Id.* at 121.

[95] *See* CONSUMER SHINGIKAI REPORT 13, *supra* note 94, at 122-23.

[96] Translator's note: a *Kekkan Shouhin 110 Ban* ["defective product 110 line"] might be thought of as a type of emergency line, in this case for product related injury and inquiries about claims or product liability issues. *See also infra* note 98.

[97] *Nippon bengoshi rengokai* is The Japan Federation of Bar Associations, usually abbreviated *Nichibenren*.

[98] For results from the phone network, *see* CONSUMER SHINGIKAI REPORT 13, *supra* note 94, at 149-151.

[99] For an explanation of the "law as *tatemae*" theory, *see* HALEY, *supra* note 27, at 199-200. An apparent benefit of "[l]aw as *tatemae*," is that it, "promotes autonomy as outward compliance and the effectiveness of social controls lessen the need to develop stronger means of coercive law enforcement." *See* HALEY, *supra* note 27, at 199.

defining major social issues.[100] The ambiguity and flexibility of the Civil Code's general provision for torts has allowed the judiciary in Japan some latitude in defining the substantive content of tort law, but the judiciary is still generally passive.[101] The inactivity of judges in making law is a feature of most civil law countries.[102]

Looking at non-legal forces, which may have greater control over individual behavior than law, offers another explanation of why Japanese do not sue.[103] Examination of these unquantifiable social forces, which contribute to what some call the "myth of consensus," helps to explain the orderliness of Japanese society, and the lack of litigation, in a way that "institutionalist" explanations based on legal barriers cannot.[104]

Japanese commentators traditionally explain low litigation levels with the idea that Japanese do not engage in conflict because of Confucian-based[105] cultural values, and the emphasis of *wa* ("harmony") in social relations.[106] In

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[100] The judiciary is widely acknowledged as being "passive." Yoshiharu Matsuura, Faculty of Law, Osaka University, Lecture at Doshisha University, Kyoto (May 29, 1995) (lecture titled "The Guardian of Law in Japan") (lecture outline (in English) on file with author). *But see* John O. Haley, *Judicial Independence in Japan Revisited*, 25 LAW IN JAPAN 1 (1995) (suggesting, from a wider perspective overlooking other civil law systems, that Japan's judiciary must be recognized as having maintained a cautious autonomy).

[101] *See* ODA, *supra* note 8, at 208. CIVIL CODE, art. 709 is a general provision covering negligence and intentional torts which merely states that "a person who violates intentionally or negligently the right of another is bound to make compensation for the damage arising therefrom." On CIVIL CODE, art. 709, *see supra* note 7. Courts define exactly what constitutes negligence. On Tort law in Japan, *see generally* TOORU IKUYO AND SHIN'ICHI TOKUMOTO, FUHOU KOUIHOU (1993). For the basics of Japanese Tort law in English, *see* ODA, *supra* note 8, at 207-31.

[102] For a discussion of the role of judges in the civil law tradition, *see* MERRYMAN, *supra* note 57, at 34-38 (noting the judicary's function in civil law systems is to interpret the code, not to make law).

[103] Many scholars note that the Japanese abide by forces other than law to a great extent. *See, e.g.*, Henderson, *Comparative Law*, *supra* note 33, at 8; *see* HALEY, *supra* note 27, at 199-200.

[104] *See* Ramseyer, *The Costs*, *supra* note 92.

[105] Confucian belief, which influenced Japan much as it did China, puts great emphasis on social relationships and obligations, as well as concepts of rite [*li*], humanity [*jen*], reciprocity or altruism [*shu*], loyalty or conscientiousness [*chung*], learning [*hsueh*], and others. *See generally* WING-TSIT CHAN, A SOURCE BOOK IN CHINESE PHILOSOPHY 14 (1963); HERBERT FINGARETTE, CONFUCIUS-THE SECULAR AS SACRED (1972) (analyzing Confucius' ANALECTS).

[106] Such theories probably found their origin or classic formulation in Takeyoshi Kawashima's writings. *See generally* TAKEYOSHI KAWASHIMA, NIHONJIN NO HOH ISHIKI [JAPANESE LEGAL CONSCIOUSNESS] (1967); Takeyoshi Kawashima, *The Legal Consciousness of Contract in Japan*, 7 LAW IN JAPAN 1, 2 (Charles R. Stevens trans., 1974). Kawashima, in Haley's words, believed, "... the endurance of a traditional concern for preserving cooperative personal relationships makes unwanted any definitive delineation of rights and duties through litigation." *See* Haley, *The Myth*, *supra* note 34, at 360 (espousing essentially that Japanese still hold internalized Confucian notions of social order which socially devalue litigious conflict).

contrast, Western commentators have emphasized structural impediments to litigation as the cause of low litigation levels, rather than a "myth" of national Confucian consensus.[107] Examples of institutional impediments are, high attorney and court fee structures which grow in proportion to the amount claimed,[108] few lawyers and judges per capita,[109] and limited court powers to enforce judgments.[110] Commentators criticizing the "myth" of social controls

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However, Kawashima might be the first to suggest that Japan is in flux, and has gradually embraced democracy and a Western concept of rights. *See* Takeyoshi Kawashima, *The Status of the Individual in the Notion of Law, Right, and Social Order in Japan, in* THE JAPANESE MIND, 262, 276-277 (Charles A. Moore ed., 1967).

[107] *See, e.g.*, Haley, *The Myth, supra* note 34, at 360; Ramseyer, *The Costs, supra* note 92, at 608.

[108] Attorney and court fees depend upon, and increase in correspondence to, the amount of damages sought. An example: a plaintiff seeking ten million yen ($100,000 at ¥100=$1) in damages must pay about $576 dollars in court costs and $8450 in attorney's fees (including retainer). A one million yen claim ($10,000 at the same exchange rate), requires $86 in court costs, and $1,350 in attorney's fees. For fee tables allowing this calculation, *see* HAYASHIDA, *supra* note 29, at 92, 96. *See also* Professor Richard Miller, *Apples and Persimmons: The Legal Profession in Japan and the United States*, 39 J. LEGAL EDU. 27, 33-34 (1989) (describing fee structures). In Japan the general rule is that the loser pays all court costs; in addition, if a plaintiff "precipitiously, and without any provocation from the adversary, initiates litigation (e.g., without offers to negotiation) [she] may be required to bear all or part of the expenses of the proceedings, even if [she] wins." TAKAAKI HATTORI & DAN FENNO HENDERSON, CIVIL PROCEDURE IN JAPAN, §§ 10.01 & 10.02, 10-2, 10-4 (1985). Motions which prolong things "unnecessarily" may also cause the winner to be required to pay. *See* CIVIL PROCEDURE CODE, art. 90, *translated in*, II EHS LAW BULLETIN SERIES: JAPAN, LA 20 (1992).

[109] *See* Sarumida, *supra* note 23, at 99 (estimating the ratio of attorneys to population in Japan at 1:8,569; noting that in the United States the ratio is about 1:356, with about 850,000 lawyers total (ABA estimate)). As of 1995, Japan had 2,821 *saibankan* (judges), 2,092 *kensatsukan* (Public Prosecutors), and 15,110 *bengoshi* (barristers; licensed to advocate in court). *See* HEISEI, *supra* note 29, at 1441. But, comparisons of numbers alone are misleading. *See* Miller, *supra* note 108, at 28 (noting the commonly accepted translation of "lawyer" does not describe the panoply of legal workers in Japan, and stressing that simple number comparisons are inadequate before cultural comparative complexities). "*Bengoshi*," often translated as "lawyer," is essentially a litigator. "Lawyers," in the United States, in comparison, fill functions taken by *shihoushi* ("judicial scriveners") and many others in the Japanese system. *See* Miller, *supra* note 108, at 28-29. *See generally* Gino Dal Pont, *The Social Status of the Legal Profession in Japan and the United States: A Structural and Cultural Analysis*, 72 U. DET. MERCY L. REV. 291 (1995) (explaining aspects of Japanese legal education and the historical development of the legal profession).

[110] For example, Japanese courts lack contempt power to enforce judgments, and in actions against the government by private citizens can provide only declaratory relief; there is no provision to order administrative agencies to take a course of action. Haley, *The Myth, supra* note 34, at 387. One of the best examples of court powerlessness is the cases dealing with malapportioned voting districts in which the Japanese Supreme Court found huge discrepancies in the values of votes unconstitutional, but did nothing. For English translations of malapportionment cases, *see* HIROSHI ITOH AND LAWRENCE W. BEER, THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961-70 53-57 (1978) (translation

have emphasized these institutional factors as the real control on litigation levels.[111] One Western scholar goes so far as to maintain that Japan's government controls litigation levels by actively engaging in macro dispute management, diffusing conflict where possible, and providing *ad hoc* dispute resolution procedures for special problems.[112]

Institutionalist theories of a government "conspiracy to power" attribute almost superhuman qualities to the bureaucratic system and ignore the cultural and psychological explanations for citizens' inaction.[113] There are forces other than bureaucratic control involved. One scholar has suggested that the Japanese cannot even properly be called "law abiding" at all, so strong are the social controls that order society.[114] Thus, to frame social forces or national character as a "consensual myth," or as a logical tautology which says nothing more than "we Japanese do not sue because we are Japanese," is to miss the point entirely.[115] To dismiss societal explanations because they are "not terribly informative"[116] borders on ignorance and "orientalism," or "legal chauvinism."[117]

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of Koshiyama v. Chairman Tokyo Metro. Election Supervision Comm'n, 18 MINSHUU 270 (Sup. Ct. G.B., Feb. 5, 1964)). The lack of a equitable civil contempt power is typical in Civil Law systems. *See* MERRYMAN, *supra* note 57, at 54-55.

[111] *See* Haley, *The Myth*, *supra* note 34, at 387.

[112] *See generally* UPHAM, *supra* note 92 (maintaining that the Japanese government actively seeks to control and stifle disputes as they arise; Upham provides case studies on pollution, burakumin, and women's equal employment rights). Upham's view is termed "bureaucratic informalism," because Upham argues the bureaucracy works through acts which are not judicially cognizable acts to control the pace of social change in Japan. Yoshiharu Matsuura, *Law and Bureaucracy in Modern Japan*, 41 STAN. L. REV 1627, 1629 (1989).

[113] *See* Matsuura, *supra* note 112, at 1636 (commenting that Upham's theories of the importance of law to government as a tool for controlling social change in Japan may "swing the pendulum" too far away from traditional explanations for the role of government and the non-litigiousness of the Japanese).

[114] *See* Henderson, *Comparative Law*, *supra* note 33, at 8.

[115] On "legal chauvinism," *see* Robert Leflar, *Informed Consent and Patients' Rights in Japan*, 33 HOUS. L. REV. 1, 14-15 (1996) ("the more temerarious [presumptuous; recklessly daring] of the rational choice analysts, dismissing entire disciplines with a wave of the magic wand of rational maximization, may find themselves at a loss to explain aspects of a society in which not only money and power matter").

[116] *See* Ramseyer, *The Costs*, *supra* note 92, at 607 (suggesting that institutional, including legal, barriers to litigation strip potential litigants of ability to sue, thereby propping up Japan's "non-litigious ethos," thereby assuring the continued legitimacy of bureaucratic rule). Ramseyer seems to suggest that if the institutional bars disappeared, people would use the courts. This article suggests that the strength of the social-psychological barriers to litigation which support and express the Japanese "non-litigious ethos," *id.*, might keep Japanese individuals from utilizing public courts as a means of dispute resolution to some extent even if institutional barriers were removed. In any case, the "institutional" and "societal" are arguably one and the same.

[117] *See* EDWARD W. SAID, ORIENTALISM (1979) (depicting and characterizing "Orientalism," as an intellectual/academic institution of British imperialism which sought to explain and define the Middle East). The British sought to explain the Arabian world in British terms, e.g., "The

Japan's "cultural myth" is probably just a "beneficial fiction" or a "noble lie" that nurtures Japan.[118] Myths provide meaning and self-justification in the face of harsh daily economic realities and tight quarters.[119] Housing conditions are poor.[120] Most urban homes are tiny, and most rural homes lack central heating, insulation, flush toilets, and yards or garages.[121] Possessions are usually crammed into narrow spaces, and while there is growing material wealth, there is little "elbow room."[122]

In living conditions such as this, an anti-conflict ethic is not a myth, but is a necessity which has been placed on a pedestal with the virtues. The creation of a coping "myth" about oneself or one's people is classic human behavior which might be best described by the concept of "cognitive dissonance."[123] Demanding situations may produce "cognitive dissonance," which is resolved by a process of self-justification, rationalization, and a search for meaning that can change belief and behavior in individuals, and create "large commitment for small reward."[124] Cognitive dissonance appears to be a homeostatic mechanism which reinforces customary and social methods of enforcement in systems ruled by consensus, as is the case with Japan.[125]

Arabs exist only as an occasion for the tyrannical observer: '[Their] world is *my* idea.'" *Id.* at 310. Professor Leflar, noting the danger of imposing Western categories of thought on Japan, has observed: "Any exploration, by one steeped in American legal culture, of the relation of law to social change in Japan is imperiled by the twin hazards of what Lawrence Beer has termed 'cultural insularism' and 'legal chauvinism.'" *See* Leflar, *supra* note 115, at 13-14.

[118] ARTHUR SCHLESINGER, THE DISUNITING OF AMERICA 47 (1992). Schlesinger also notes the existence of a nationalist phenomenon in Japan's wholesale erasing of history. *Id.* at 50-51.

[119] The area of Japan is 1/25th of the United States, and it has about one half the population. JETRO, THE U.S. AND JAPAN IN FIGURES III: BUSINESS AND ECONOMICS 1 (1994).

[120] *See* Martin Bronfenbrenner & Yasukichi Yasuba, *Economic Welfare, in* THE POLITICAL ECONOMY OF JAPAN: THE DOMESTIC TRANSFORMATION 106-107 (Kozo Yamamura & Yasukichi Yasuba eds., 1987) (addressing the "'postage stamp'-size lots [and] dangerously narrow roads" along with the "rabbit hutch" size dwellings in the urban settings where most of the population lives; noting the countryside offers more space, but less convenience; noting that in 1978 less than 46% of Japan had flush toilets; "We cannot say categorically that Japanese housing conditions are improving"; "Urban Japanese are forced to devise different lifestyles . . . ").

[121] Only the very wealthiest, e.g., successful doctors, have yards, and the spacious houses in the countryside are usually surrounded by fields used for rice or produce, while floor space per dwelling is about 10 square meters smaller than West Germany. *See* Bronfenbrenner and Yasuba, *supra* note 120, at 107.

[122] Most readers have probably heard of the Tokyo train stations where "packers" walk the platforms and press stragglers into trains. During rush hour one may often have one's arms pinned to one's side.

[123] *See* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957).

[124] *See generally* Elliot Aronson, *Persuasion via Self-Justification: Large Commitments for Small Rewards, in* THE SOCIAL ANIMAL 135-151 (Elliot Aronson ed., 1987) (describing the effects of cognitive dissonance on personal beliefs through experimental examples).

[125] *See* Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUMB. L. REV. 1110, 1117-1118 (1982) (noting that States, in the international system where consensus and custom create order, may act in retaliation towards other States which do not

For those seeking definition of concrete pressures that prevent individuals from litigating, it should be noted that psychological experiments strongly indicate that social forces such as peer pressure,[126] authority,[127] and role playing have profound effects on individual behavior and belief.[128] Peer pressure may cause an individual to misstate his concrete observations, such as which of two lines drawn on a card is longer.[129] Such pressure may easily adjust a person's outlook on less concrete matters, such as the benefits of taking time away from one's company work to sue.

In short, strong socio-psychological forces promote Japanese individuals' compliance with social norms, which discourage assertiveness and litigation. These forces are not mythological, but are well-evidenced in social-psychological studies.[130] Self-justification and rationalization by national myth

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conform to international norms; States complying with custom will retaliate against another State's violations of custom, by sanctions and other means, in order to remove cognitive dissonance caused by their voluntary compliance; fear of other States' retaliation against a violation of custom provides a means for a self-ordering system). Social ordering may take place in small groups of individuals where one individual breaks a custom that would destroy the group were all individuals to break it. Others in the group may act to punish the offender to rationalize their own compliance with the custom.

[126] *See* Solomon E. Asch's, *Opinions and Social Pressure, in* READINGS ABOUT THE SOCIAL ANIMAL 13-22 (Elliot Aronson ed., 1984) (study on peer pressure's effect on individual's observations and opinions; where subjects followed several confederate "subjects" who gave pre-decided wrong answers to an inquiry to a group, the great majority of subjects conformed to the group response; the inquiry was merely to say which of three lines on a card was the same length as a previously shown card; the length was made obvious so there was no room for visual error or argument, yet, most of the time the subjects picked the choice the group picked).

[127] For Stanley Milgram's famous study, *see* Stanley Milgram, *Behavioral Study of Obedience, in* READINGS ABOUT THE SOCIAL ANIMAL 23-36 (Elliot Aronson ed., 1984)(26 of 40 subjects, when verbally prodded by a confederate "scientist" in a white coat with a clipboard, continued to administer what subjects believed were electric shocks to a human confederate "subject," up to the maximum "voltage" range marked as dangerous, even after confederate "subjects" had *stopped* screaming, begun at a lower voltage, in apparent pain). This study caused much debate, coming as it did on the heels of the United States' experience with Nazi Germany concentration camps. The experiment caused apparent stress (shown by profuse sweating, trembling, and stuttering) in many subjects (one individual even had a Grand Mal seizure and was hospitalized) but neither the stress, nor the social teaching that one should not injure another, produced disobedience in any significant degree. *Id.* at 33.

[128] *See* Craig Haney et al., *A Study of Prisoners and Guards in a Simulated Prison, in* READINGS ABOUT THE SOCIAL ANIMAL 52-67 (Aronson ed., 1984) (randomly selected "prisoners" and "guards" manifested behavior of real guards and prisoners; the guards' private conversations were secretly monitored and revealed talk of "problem prisoners"; the "guards" actually harrassed the "prisoners," who felt real senses of guilt; while planned for one week, the experiment was stopped after a few days because of psychological danger to the participants and the need for debriefing).

[129] *See* Asch, *supra* note 126.

[130] *See* Milgram, *supra* note 127; Asch, *supra* note 126; Haney, *supra* note 128 (Stanford Prison Study).

in order to create meaning is probably another expression of that which Professor Fujikura terms "collective benefit."[131] In other words, given that the creation of law and order must be given priority in Japan due to the country's size and population, perhaps a myth has been created so that social ordering takes place in "an atmosphere of harmony and compromise" which seeks to benefit all, rather than simply empower the individual.[132]

The *kaisha* ("corporation") itself can be seen as a model for *shakai* ("society"), despite its inherently juridical, or legal, nature.[133] Corporations have been described as governed by a "complex of relationships embedded in the larger socio-political order."[134] Corporations are legally bound to act in good faith and avoid injury to each other's honor and reputation, and society at large is similarly bound by unwritten values fostering social harmony.[135] The degree to which the powers that be are willing to submit corporations to consumer actions for damages is a fair indication of the weight allowed law, as opposed to the weight of relational social controls. That the PL Law has a statement of purpose explicitly bowing to corporate goals indicates that corporations are societal units with strong influence.

In conclusion, it must be noted that relational, social, and political forces work not only on the level of legislative democratic process, but also at the individual level. On social impediments to litigation, one Japanese scholar has noted that:

> In modern Japanese society, in which the five day work week has not been completely instituted, in which one cannot take enough of one's *nenkyuu* [paid holidays] in a row,[136] and, of course, in which working overtime for no pay is a constant condition, it should be easily understood just how difficult it is to take a half a day or a day off from work to use an alternative dispute resolution system. How would one even go about requesting such a thing to one's workplace in the first place?[137]

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[131] *See* Fujikura, *supra* note 33, at 1541.

[132] *See id.*

[133] Author's note: the same two Chinese characters can be reversed to write "company/corporation" or "society."

[134] *See* Curtis J. Milhaupt, *A Relational Theory of Corporate Governance: Contract, Culture, and the Rule of Law*, 37 HARV. INT'L L.J. 3, 21 (1996).

[135] *See* Milhaupt, *supra* note 134, at 41-42 (all contracting parties, including corporations, have a requirement to act in good faith).

[136] From the author's own experience working in Japan, taking *nenkyu* ("paid leave") for many days in succession is "simply not done," even in a high school where there is little profit motive and bi-annual bonuses are based on seniority. Long indulgence in paid holidays is seen, perhaps, as injurious to the place of employment. The unwritten rule among teachers at the schools where the author worked was to use paid holidays when sick, instead of utilizing the contractual right to sick leave.

[137] Thus, group economic considerations also enforce these social traditions/values. *See* Ohta, *supra* note 14, at 43. In the recession of today these working conditions still exist, and even the traditional "lifetime employment" is under attack. *See* Hilary E. MacGregor, *Japan's*

These observations, concerning the pressures faced by an individual thinking of participating in the products liability alternative dispute resolution system, suggest equally well the potential social costs of going to court. The new PL Law will not change the operation of these social forces. Thus, the statement of purpose in article one of the PL Law may guide promotion of consumer goals, but will guide it through the gate of corporate interests.

III. RECONCILING THE LANGUAGE OF THE LAW

A. Article One: Goals Other Than Consumer Protection?

1. A healthy economy through manufacturer liability: conflict over "harmonization" of goals

Article one of the PL Law contains a statement of purpose that includes a clause which expresses the intent that the PL Law aid the economy.[138] Thus, the government's concerns for the national economy have found their way into the PL Law.[139] Under the present wording of the PL Law's statement of purpose,[140] some consumer groups fear that corporations, the engines of industry which propel the Japanese economy, will gain protection in the courts through free-handed judicial interpretation of the PL Law's pro-economy purpose.[141]

Commentators have also expressed concern about the pro-economy statement of purpose.[142] The law's statement of purpose is that it:

> relieve the injured person by setting forth liability of the manufacturer, etc. for damages when the injury [to] life, . . . body or property is caused by a defect in a product, and thereby to contribute to the stabilization and improvement of the people's life and to the *sound development of the national economy.*[143]

When it was made public, the last line of article one became the subject of controversy among the Japan Federation of Bar Associations and consumer

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Jobless Generation, LOS ANGELES TIMES, May 4, 1996, *avaliable in* Westlaw, 1996 WL 5266082.

[138] *See* PL LAW, art. 1. *See infra* Appendix 1 for translation. PL LAW, art. 1 contains a pro-economy statement of purpose which has drawn criticism. *See* PL Law, art. 1; KATOU, *supra* note 9, at 25-26.

[139] *See* PL Law, art. 1, cl. 2. *See infra* appendix 1 for translation.

[140] *See* PL Law, art. 1. *See infra* appendix 1 for translation.

[141] *See* KATOU, *supra* note 9, at 25-26.

[142] *See id.*

[143] PL LAW, art. 1 (emphasis added); tentative English translation from KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA *supra* note 15, at 140 (phrasing slightly altered by author). For the pro-economy language of the original, *see* PL LAW, art. 1 (*"motte, kokumin seikatsu no anteikoujou to kokumin keizai no kenzen na hatten ni kiyo suru koto o mokuteki to suru"*).

groups.[144] These groups stressed that the emphasis on economic development in the wording of article one would lead to a judicial interpretation of the law that favored the very manufacturers who were supposed to be the target of liability.[145]

There is historical precedent for fear of the government's "harmonizing" goals for industrial and economic development with citizen's interests.[146] In particular, the final section of article one's statement of purpose[147] has been criticized for its peculiar similarity to the Fundamental Act for Environmental Pollution Prevention,[148] which was abandoned by the Diet in 1970 after great social debate and protest.[149] The Pollution Prevention Law came on the heels of many large scale pollution cases, including the infamous Minamata cases,[150] which involved mercury effluent that caused widespread nervous system injury among those who ate fish which swam in the water polluted by the effluent.[151]

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[144] Compare PL LAW art. 1's last line to the Japan Federation of Bar Association's Model PL Law Proposal's article one statement of purpose, in which there is no pro-economy clause. *See* KATOU, *supra* note 9, at 929 ("This law establishes the manufacturer's special duty to compensate for injury caused by a product's defect, and by establishing a policy to guarantee fulfillment of that obligation [to compensate], makes its goal to plan assistance for, and prevention of, damage due to product defects") (original in Japanese). The present law does not address *yobou* (prevention) on its face.

[145] *See* KATOU, *supra* note 9, at 25-26.

[146] *Keizai chouwa* ("economic harmonization") involves, in both the environmental and the PL Law context, a pro-economy statement of purpose which contradicts the main goals of the law. The goal of fostering a strong economy and making profits may conflict with the primary goal of making products safe. *See* KATOU, *supra* note 9, at 25 (discussing the criticism of the inclusion of a pro-economy clause in the Environmental Pollution Prevention Law as being pro-industry, and discussing the parallels to the present PL Law's seemingly self-contradictory statement of purpose).

[147] *See supra* note 143.

[148] KOUGAI TAISAKU KIHONHOU, Law No. 132 of 1967. On the tragedies of pollution in Japan, *see* UPHAM, *supra* note 92, at 28-77.

[149] *See* KATOU, *supra* note 9, at 25 (discussing how social protest forced the Diet to change the language of the environmental law to remove the pro-industry purpose of the law in promoting the national economy). *See also* UPHAM, *supra* note 92, at 28-30.

[150] For case studies on the "Big Four" pollution cases, *see* UPHAM, *supra* note 92, at 28-77 & 234 n.1 (discussing, *inter alia*, the Minamata case, one of the "Big Four" pollution cases, which began in the mid-1950's when Chisso Corporation dumped effluent containing methyl mercury into the sea, and residents of Minamata City in Kumamoto Prefecture ate fish which had absorbed the mercury). *See also* Shiro Kawashima, *A Survey of Environmental Law and Policy in Japan*, 20 N.C. J. INT'L & COM. REG 231, 239-242 (1995) (discussing major pollution cases and legal responses to pollution disasters in English).

[151] For a description of mercury's terrible effect on one boy's nervous system and the background of social protest surrounding the pollution which came with quick industrialization, *see* MIKISO HANE, PEASANTS, REBELS, & OUTCASTES: THE UNDERSIDE OF MODERN JAPAN 262-265 (1982).

The environmental law contained an "economic harmonization" clause similar to that in the present PL Law. Both seek seemingly incompatible goals, for example, industrial growth through environmental protection. The pro-industry "economic harmonization" clause in the Pollution Prevention Law was criticized as an escape route from liability which courts could use to exonerate offending corporations.[152] The long history of popular struggle and the intractability of government and industry in providing compensation for mercury effluent injury are cause for wariness for present PL Law critics.[153]

The official position of the Economic Planning Agency, concerning the PL Law's purpose, is that pressing for protection of the injured is the best means to encourage the economy's "healthy" development.[154] At least one Japanese lawyer-professor seems to accept this official position.[155] This lawyer cites the Automobile Accident Compensation Law ("Auto Law"),[156] which contains the contradictory purposes of promoting both the "healthy" flow of autos,[157] and the elimination of most auto accident litigation through creation of a system to guarantee compensation for injury.[158] Examining the Auto Law illustrates the counterargument to the criticism that the PL Law's self-contradictory purpose is pro-industry rather than pro-plaintiff.

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[152] For a review of the social stir the "harmonization clause" caused and the subsequent fate of the Fundamental Act for Environmental Pollution Protection in 1970, *see* Kawashima, *Survey*, *supra* note 150, at 242-46.

[153] In fact, in 1996, settlements were still being reached on Minamata, which occured some forty years before. *See, e.g.*, Toshirou Kojima, *Minamatabyou mondai no seijiteki kaiketsu*, 1088 JURISTO 5 (1996) (discussing Minamata settlements). On criticisms and fears of article 1 of the PL Law, *see* KATOU, *supra* note 9, at 25-26.

[154] Thus, the Economic Planning Agency does not recognize any self-contradiction in the PL Law's promoting both *kenzen na* ("healthy") economic development and product safety. For the official commentary, *see* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 54-55 (stating essentially that consumers' being able to buy in safety will promote a strong economy).

[155] *See* KOBAYASHI, *supra* note 19, at 27 (taking note of the claim that the PL Law's interpretation in court will be biased towards companies, but presenting the argument that the type of economic development which is likely to be promoted by the law is "healthy" development).

[156] JIDOUSHA SONGAIBAISHO HOSHOUHOU [AUTOMOBILE ACCIDENT COMPENSATION ACT], Law No. 97 of 1955.

[157] On the Automobile Accident Compensation Act and its success in limiting litigation, *see* Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 LAW AND SOCIETY REVIEW 651 (1990) (arguing for a model of careful dispute management in order to create the non-litigious society, in this case by providing the means for out of court settlement of auto accidents).

[158] *See generally* Tanase, *supra* note 157 (examining the Automobile Accident Compensation Act as a successful model for government management of disputes, which maintains low numbers of court cases originating in accidents).

Protection of the injured is the Auto Law's central purpose, as is the PL Law's.[159] The secondary goals of "healthy" development under it are quick, fair dispute resolution and lessening the costs of expensive conflict resolution over auto accidents, for example, in the use of the courts.[160] The Auto Law has largely succeeded in eliminating litigation around auto accidents. While this decreases dispute resolution costs, it does not necessarily mean the settlements pursuant to the law are fair. The counterargument to citing the Auto Law as an example of "success" in terms of preventing injury and creating fast, fair settlements, or in making the injured whole, is that the results are relatively unknown.[161]

Ideally, the PL Law will operate under a philosophy similar to the Auto Law's concept of protection and "healthy" development. The PL Law aims to protect injured parties, raise the level of product safety, prevent and provide solutions for product-related accidents, and aid the "international harmonization of economic society."[162] Japan's process for formulating the PL Law seems to have allowed a more explicit opportunity to weigh the PL Law's benefit to the consumer against the burden it places on the economy than is to be found in the United States, where products liability law is largely case law driven.[163] The PL Law's provisions seem to be weighed more heavily towards national economic interests, if one were to judge from the lack of effect the law has had in the courts.[164]

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[159] JIDOUSHA SONGAIBAISHO HOSHOUHOU, Ch. 1, art. 1.

[160] *See* KOBAYASHI, *supra* note 19, at 27.

[161] For background on the Automobile Accident Compensation Act in English, *see* Tanase, *supra* note 157 (keeping litigation out of the courts prevents accurate assessment of the fairness of compensation for auto related injury).

[162] *See* KOBAYASHI, *supra* note 19, at 27.

[163] Admittedly, this may be a generalization, but a very similar, conscious weighing process of industry versus plaintiff's interests can also be seen in the suggested revisions for the procedures for gathering evidence. *See* Hideyuki Kobayashi, *Shouko shuushuu tetsuzuki no kakujuu* [Expansion of Evidence Gathering Procedures], 571 NBL 56, 60 (1995) (part I of II) (on balancing the burdens of cost, time and trouble to the company and plaintiff; questioning whether the costs inherent in the wide powers granted to private parties by the United States discovery system are "suitable" for Japan or not; noting that the United States' 1993 Federal Rules of Civil Procedure revisions were a response to the costs of the discovery system). Japan often bases its reforms on the reforms of foreign countries (e.g., the United States and the EC, as with the PL Law). Thus, in the author's opinion, Japan might be said to weigh the potential effects of legislative proposals against the experience of other countries, while adjusting for the differences in its own legal system. This process allows a more conscious weighing of benefits and burdens.

[164] As of the one year anniversary of the PL Law's going into effect, only one suit had been brought based upon it. *See* Matsumoto, *Saibangai funsou*, *supra* note 24, at 8. Of course, it is probably too early to judge whether this is representative of the PL Law's long term effects.

The Japanese goal of creating a collective benefit rather than individual compensation can be seen in the PL Law,[165] which aims to comport with Japanese non-litigious values.[166] The PL Law's inclusion of a pro-industry clause seems to be aimed at preserving government-industry ties such as administrative guidance, *shingikai*, and *amakudari*, all of which allow government control over industry's response to international competitive pressures.[167]

Japan's creation of a products liability system involved more than just easing the burden on users injured by products in suing for their injuries.[168] Observations of thirty years of litigation in the United States fostered an awareness of the costs of legal conflict to international competitiveness, and of the need for "harmonization" with international norms, both of which have been couched in the language "healthy national economy."[169] Regardless of theories of interpretation of the PL Law's purpose, one is still left to wonder why a consumer protection law need contribute to the advancement of the national economy.[170]

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[165] On collective benefit, *see* Fujikura, *supra* note 33, at 1541 (pointing out that culture not only acts in microprocesses to inhibit the individual from litigation, as Haley argues, but also shapes structural macroprocesses in the legal system in order to create a system which operates for collective benefit, valuing the whole nation's economy before individual rights).

[166] Takeyoshi Kawashima was one of the first to espouse the theory that Japanese were by their nature not litigious. On Kawashima, *see supra* note 106.

[167] Logically, the PL Law's aim to promote harmonization with international legal norms is part of a greater concern with the law's influence on international trade and Japan's place in the world. *See generally* JOHNSON, MITI, *supra* note 41 (detailing throughout its length MITI's role in guiding and supporting industry to mold Japan into a top international economic power).

[168] Diet session questions and answers included much on the economic effect of the law and made clear that more than aiding the injured was under consideration. *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 40-50 (listing questions involving, e.g., foreign legal systems, whether the PL Law will "harmonize" Japan's legal systems with its international partners in trade, and the effects on industry).

[169] During the question-answer period in the Diet, the ministries proposing the PL Law had to answer several questions: on international "harmonization" of product liability laws; whether a *ranso shakai* ("litigious society") would develop; the effect on small and mid-sized companies; whether presumptions of defect would be allowed by law; and the cost of insurance's effect on commodity prices. For the questions and responses, *see* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 40-50 (most questions concerning the economic effect of the PL Law). Scholars are also concerned about a litigation crisis. *See* Tsuneo Matsumoto, *Brief Country Reports: Japan*, 15 U. HAW. L. REV. 577-582 (1993) (stressing Japan's fear of the costs, economic and otherwise, of litigation and products liability suits).

[170] The central goal of the PL Law is ostensibly to relieve the burden of proving manufacturer malfeasance and make recovery for injured plaintiffs easier by means of a strict liability regime. *See* TSUUSHOUSANGYOUSHOU SANGYOU SEISAKUKYOKU SHOUHISHA KEIZAIKA, *supra* note 29, at 2, 60.

B. Article Two's Definitions and Terms Which Narrow its Scope

Article two of the law lays out definitions of *seizoubutsu* ("products"),[171] *seizougyousha* ("manufacturers"),[172] and *kekkan* ("defect").[173] "Products," the subject of the law, include manufactured or "processed"[174] "moveable" products.[175]

Services and incorporeal items such as electricity or software[176] do not fall under the category of "moveables,"[177] and are, thus, outside the law's scope.[178] Only software that is integrated or bundled into computer driven products might be interpreted as subject to the law if the software is found to be part of the physical product.[179]

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[171] *See* PL Law, art. 2 § 1.

[172] "Manufacturer" is a convenient translation for *seizougyousha*, which also includes: importers and processors (e.g., of food), PL LAW, art. 2 § 3, cl. 1; those who put a *shimei nado no hyoushi* (trade name or mark) on a product such that the consumer might confuse it for the mark of the manufactuer, PL LAW, art. 2 § 3, cl. 2; or one who from involvement in importation, manufacture, etc., can be recognized as the actual manufacturer, PL LAW, art. 2 § 3, cl. 3. The last definition of "manufacturer" is unique to Japan, and evolved from the lessons of the SMON drug case. Letter from Tsuneo Matsumoto, Faculty of Law, Hitotsubashi University, to the author (Jan. 16, 1997). On the SMON cases, *see infra* notes 214, 226.

[173] *See* PL LAW, art. 2 § 2.

[174] PL LAW, art. 2 § 1 (*kakuu sareta*). One commentator has taken issue with the concept of "processing," noting that, although the law does not cover "unprocessed" agricultural, forestry, marine goods or livestock, there may be some question as to farm raised fish, produce raised in artificial lighting or soil, and some other items where technology blurs the line between "natural" and "processed." *See* Tsuneo Matsumoto, *Seizoubutsu no igi to han'i* [The Meaning and Scope of Products], 1051 JURISTO 23, 23-24 (1994). A contrary view exists which notes that the distinction between "naturally" produced and "man made" items may be blurred by processes such as cultivation, breeding, hatchery, and genetic engineering, but this view is a pragmatic one which finds that, in the near future, even items in this ambiguous area will fall outside the coverage of the law because courts will defer to the ministry's intent to exclude such items. *See* Shinzaburou Nagata, *Seizoubutsu Sekininhou no Kaisetsu*, 46 JIYU TO SEIGI 6, 6-7 (1995).

[175] PL LAW, art. 2 § 1 (*dousan* ("moveables") indicates most anything but real property and some fixtures).

[176] *See* KOBAYASHI, *supra* note 19, at 35.

[177] *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 57-58.

[178] The PL Law only covers "moveables." *See* PL LAW, art. 2 & 3.

[179] *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 59. This author's opinion is that this is probably not an economically viable option for a plaintiff in Japan, given the lack of a pro-plaintiff pre-trial discovery system, the requirement of expert testimony and complex testing techniques to uncover software code defects. For research into software and information industry issues raised by the PL Law, *see*

Fudousan ("real property"), which is one of the largest sources of products liability injury claims,[180] is not covered under the PL Law.[181] The failure to include coverage for real property is seen by some commentators as a failure to answer consumer needs.[182] Fixtures which become part of real property are also outside of the scope of the law,[183] except for elevators, glass, and machinery in buildings, which may be subject to exception.[184]

The PL Law acts as a special provision of the existing Civil Code.[185] Claims for real property or fixture-related injury must still be based on Civil Code article 717, in which the "possessor" of the land will be held primarily liable for negligence and the owner will be strictly held for damages in absence of the possessor's negligence.[186] Thus, it seems that case law interpretations of article 717 effectively impose the duty on the land owner to inspect for manufacturer's defects in most all fixtures and buildings.[187] Article 717 often imposes the liability for third person injuries on non-negligent realty owners, or even

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generally HIKAKUHOU KENKYUU SENTAA, JOUHOUSANGYOU TO SEIZOUBUTSU SEKININ NI KAN SURU CHOUSA KENKYUU (June, 1992) (copy on file with author).

[180] Drug and food related claims are the other large categories for claims. For charts on numbers of claims in various categories, *see* KATOU, *supra* note 9, at 117-18. *See* the MITI *Sangyou Kozo Shingikai* [Manufacturing Industry Structure Delberation Council] report, *in* KATOU, *supra* note 9, at 1092 (noting suits from real property related injury are the second greatest origin of claims among non-food/non-drug products, and that plaintiffs are fairly successful (*but see infra* notes 186, 188)).

[181] Japan has followed the EC in removing real estate from the scope of the law for reasons of "international harmonization." *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 59-60.

[182] *See* KATOU, *supra* note 9, at 19 (noting 48 of the 200 product liability suit judgments have involved real property).

[183] *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 59 (noting "fixtures" are as defined under Civil Code article 86).

[184] Litigation under the Civil Code focused on *koteisei*, or whether the item was fixed, but the official commentary notes that if the defect existed at the time of delivery, then even if the elevator, glass, etc., is found to be a fixture and part of real property, the manufacturer may be subject to liability. *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 64.

[185] This means past cases may be used in applying the PL Law. *See* Mikiyoshi Hayami, *PL hou teikyou gyoushu-hitekiyou gyoushu no sekinin to houmu senryaku*, 591 NBL 36, 38 (1996).

[186] *See* CIVIL CODE, art. 717 (*Tochi Kousakubutsu Sekinin*), imposing primary liability on negligent *sen'yuusha* (possessors/controllers of real property) for *kashi* ("fault") in affixing or maintaining fences, buildings, trees etc. *See* 7 Minshuu 443 (Osaka Ct., Jun. 7, 1928) (holding that even an owner who bought the land without negligence and believing no defect existed, will bear liability if such a defect actually exists). *See* HEISEI, *supra* note 29, at 375.

[187] *See* KATOU, *supra* note 9, at 136 (noting that the problem with real estate/fixture cases brought under Civil Code article 717 is that there are an overwhelmingly large number of suits brought not against the manufacturer, but against the *consumers* of the product).

lessees, even though that injury is caused by a manufacturer defect.[188] Owners may seek indemnity against the manufacturer in some cases.[189]

Blood, usually exempt from strict liability under blood shield laws in most states in the United States,[190] including Hawai'i,[191] or treated as a service,[192] is covered under the Japanese PL Law as a "processed" moveable. The PL Law will not apply to the present litigation over HIV infected blood in Japan because the claims by infected hemophiliacs have been brought as negligence actions under different code provisions.[193]

In short, article two's definitions of key concepts are narrowly tailored, and do not allow increased coverage in a key area. Injuries caused by defect in real property or fixtures, common causes of injury and litigation, are not covered by the PL Law.[194] Landowners will still be held strictly liable for defects under Civil Code article 717.[195] In addition, the PL Law's potentially vague definitions may fail to simplify issues for the plaintiff and only prolong litigation.

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[188] Where the consumer possesses or controls the defective product he will likely be held liable, even if he is a lessee. *See* KATOU, *supra* note 9, at 136; *see* 1066 HANREI JIHOU 106, (Urawa D. Ct., May 19, 1982) (holding a lessee of a defective product liable for injury caused). *See* KATOU, *supra* note 9, at 819-20.

[189] *See* CIVIL CODE, art. 717 § 3 (allowing the owner of the product to sue for indemnification where fault lies in another).

[190] *See, e.g.*, TENN. CODE ANN. § 47-2-316(5).

[191] *See* Smith v. Cutter Biological, Inc., 72 Haw. 416, 823 P.2d 717 (1991) (finding that HAW. REV. STAT. § 327-51 (1985) precludes strict but not negligence actions, and that a market share liability theory allowed the action to go forward though the actual tort-feasor could not be identified).

[192] *See, e.g.*, Fisher v. Sibley Memorial Hospital, 403 A.2d 1130 (D.C. App. 1979).

[193] Present litigation regarding HIV (Human Immunodeficiency Virus) infected blood, brought by hemophiliacs against the government and the companies which produced blood clotting factor VIII, is based on the KOKKA BAISHOUHOU [National Compensation Law], Law No. 125 of 1947, (making local or national government directly liable for intentional or negligent public exercise of authority by public employees which causes injury), and on negligence claims under CIVIL CODE, art. 709, provisions unconnected to the PL Law. *See* Takehisa Awaji, *Ketsueki Seizai to PL Hou*, 1097 JURISUTO 29 (1996). For an analysis of the new PL Law as it relates to HIV infected blood product litigation and for a background on such litigation, *see HIV Sosho to Seizoubutsu Sekininhou*, 589 NBL 47 (NBL eds., 1996). For the transcript of a round table discussion by lawyers involved with the present HIV infected blood litigation, *see* Awaji et al., *Ketsueki/ketsueki seizai to sono anzen/kyuuzai taisaku*, 1097 JURISUTO 8 (1996). *See also* Yutaka Tejima, *Tort Compensation in Japan: Medical Malpractice and Adverse Effects from Pharmaceuticals*, 15 U. HAW. L. REV. 728, 734-35 (1993).

[194] *See supra* note 178.

[195] *See supra* notes 186-87.

C. *Article Three: The Development of Defect In Case Law and Hope for the New PL Law*

1. Defect

Article three, as the main provision for liability, is the heart of the PL Law. Article three creates strict liability for manufacturers by allowing plaintiffs to sue manufacturers for injury caused by a defect in their products without having to show negligent conduct of the manufacturer.[196] Article three states:

> Manufacturers, etc., shall be liable for damages caused by injury to life, body or property by a defect in his delivered product which he manufactured, processed, imported or on which he placed the representation of name, etc. as described in subsection 2 or 3 or section 3 of Article 2. However, the manufacturer, etc., is not liable when only the defective product itself is damaged.[197]

This simple proposition has caused some degree of corporate chaos by shifting the plaintiff's case from the elements of negligence to defect, injury and causation, and the focus from corporate actions and knowledge to the product itself.[198]

Careful reading of the official commentary, the ministry's "legislative intent," reveals that the law, despite the ostensible change from "negligence" to "strict," was not designed to change the negligence regime's judicial decisionmaking.[199] The official commentary notes that gradual abstraction and objectification[200] of the standards for negligence have taken place along with

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[196] *See* PL LAW, art. 3 (which provides that a showing of an injury causing "defect" is enough to create liability).

[197] *Hikiwatashita*, or "delivered," means essentially that possession of the good is intentionally passed from the hands of the manufacturer to another; thus, goods which are stolen or lying in dumpsters are not covered, and the provision does not require consideration be given for the product, thus, consumers and "users" are both covered. *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 96-97.

For damage which occurs to the product itself, claimant is limited to existing Civil Code remedies, either CIVIL CODE, art. 415, or CIVIL CODE, art. 570. *See supra* note 8. The translation above is slightly altered by the author from the ministry's tentative version, to correct usage and grammar. For original ministry translation, *see* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 141.

[198] On corporate chaos, *see supra* note 58.

[199] *Kaisetsu*, or commentary on laws, is occasionally cited by courts and given deference by the court as a type of legislative intent, though ministries are usually the drafters. *See supra* note 44.

[200] *Kyakkanka* ("objectification") and *chuushouka* ("abstraction") refer to the change in court interpretation of level of duty of care from standards specific to individuals (subjective) to a *tsuujounin* ("ordinary person") standard, which is more abstract and "objective." *See* Hayami, *supra* note 185, at 36.

the growth of a "considerable" duty of care required of defendants.[201] The Economic Planning Office which produced the commentary proposes that the purpose of the law, concomitant with its goal of making a simpler, clearer, and easier to understand system, is to eliminate the "*baratsuki*," or disparity in the outcomes of various cases, under a negligence regime.[202] The official commentary notes that "in actuality, the judgments [under this high negligence standard] are the same as in a case if defect liability were to be used."[203]

Thus, we are told, the concept of defect and strict liability is really nothing new, but has been developing for years. This admission is the truth behind the "*tatemae*" of the law, which purports to ease the burden on plaintiffs. As one lawyer has noted, "establishing negligence is not as hard as it is said to be, and conversely, it is not logical to think that establishing defect is going to be so easy."[204]

The plaintiff must overcome the lack of a United States-style discovery system in suits for damages in which products are increasingly complex, and in which an expert witness industry does not exist.[205] Plaintiffs must also contend with a lack of procedural boons such as punitive damages,[206] jury trials,[207] and continuous trials.[208] The *shingikai* which developed the PL Law

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[201] *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 95.

[202] *See id.*

[203] *See id.*

[204] *See* Hayami, *supra* note 185, at 39.

[205] Japan's CIVIL PROCEDURE CODE provisions for expert witnesses provide the following [author's outline/summary]: Anyone with requisite learning or experience to aid the court has an obligation to testify. CIVIL PROCEDURE CODE, art. 302; The court shall designate expert witnesses. CIVIL PROCEDURE CODE, art. 304; Parties may object to the court's designated expert witness. CIVIL PROCEDURE CODE, art. 305. Japan probably sought to avoid the "battle of the experts" and "junk science" when constructing its PL Law. *See* CONSUMER SHINGIKAI REPORT 13, *supra* note 94, at 367 (*Shingikai* addressing whether Peter Huber's depiction of litigation gone wrong, (on Huber's commentaries on the United States PL system, *see supra* note 26) might not take place in Japan) (questioning whether experts will be used by plaintiff to try to establish new theories of causation).

[206] Punitive damages are treated as "criminal" remedies in civil law systems, as shown in a key case accentuating not only the differences in punitive damages but also standards of review on appeal, Northcon I et al., v. Marusei Kougyou K.K., 1376 HANREI JIHOU 79, (Tokyo D. Ct., Feb. 18, 1991) (Japanese court refusing to enforce a damage award from a California court against a Japanese corporate defendant under CIVIL PROCEDURE CODE, art. 200(3), under which punitive damage awards were found not to comport with Japanese "public order and good custom").

[207] Japan had a quick prewar 1923 experiment with jury trials for serious criminal cases with the BAISHINHOU [Jury Act], which went into effect in 1928 and was suspended permanently in 1943, but a jury trial right has never existed for civil cases, unlike the United States guarantees under the Seventh Amendment. *See* Tanabe, *supra* note 11, at 508-09 & n.10. There is some evidence to suggest juries may not be any more sympathetic to plaintiffs in products liability

makes it clear in its reports that the law will not function to aid plaintiffs without a fact-finding body, development of alternative dispute resolution systems to handle smaller claims, and information gathering services.[209] The last resort for plaintiffs seems to be the hope for a liberal use of factual presumptions of defect upon a minimal *prima facie* showing such that the burden of proof is shifted to the manufacturer.[210] Whether to include a provision in the PL Law mandating presumptions of negligence and causation[211] has been the debate of governmental and non-governmental discussion groups alike.[212] Such a judicial practice could overcome the

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cases, however. *See* Kevin M. Clermont & Theodore Eisenberg, *Trial By Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1126 (1992) (study finding that judges, not juries, give more consistent and higher damage awards to products liability plaintiffs, implying that common beliefs that judges are less sympathetic to plaintiffs than juries may be misplaced, but failing to make any clear findings due to the variegated variety of juries nationwide). For a brief comment on the United States' trend towards incredible lightening of burdens of proof, junk science, and "sympathetic juries," *see* TOUICHIRO KIGAWA, SEIZOUBUTSU SEKININHOU NO RIRON TO JITSUMU 203 (1994).

[208] A law promoting continous trials, which would force more thorough case preparation upon lawyers, does not work in actual practice. *See generally*, Tanabe, *supra* note 11, at 506-548 (including discussion of Japan's trial practice and how the lack of a single continuous trial fails to drive lawyer preparation as in the United States).

[209] *See, e.g.*, CONSUMER SHINGIKAI REPORT 14, *supra* note 66, at 39-44 (the *shingikai's*, final report on the state of the consumer injury prevention/compensation system, with products liability getting central coverage).

[210] The ministry commentary notes that a provision requiring that the court make such presumptions of existence of defect (from the time the product was "delivered" out of the manufacturer's hands) or of causation would be unfair, and finds that use of such presumptions under judicial discretion is the fair way for them to be applied. *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 99-100 ("no universal rule of experience exists [which supports such a provision]").

[211] A code provision mandating presumption of the existence of defect at the time the product was delivered into the stream of commerce, where it is shown by plaintiff to be in a substantially unchanged state and subject only to reasonable use up to the time of the injury, was a hotly contested issue, and eventually decided against. *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 99-100. *Cf.*, Communist Party proposal of 1994, article 5 & 7, for the law in KATOU, *supra* note 9, at 946, 948 ([Communist party proposal] including, *inter alia*, a provision which would require the court by law to assume defect and shift the burden of persuasion to the manufacturer where injury resulted from normal, foreseeable use of the product; provisions for discovery requiring the manufacturer to produce documents); for the *Shakaitou* [Socialist Party] proposal of 1992, *see* KATOU, *supra* note 9, at 941 (with similar provisions for presumptions to shift the burden of persuasion to the manufacturer, and with, as with the Communist Party proposal, no "State of the Art" or "danger of development" [*kaihatsu kiken*] defense). On the burdens of proof under the PL Law, *see generally* Ichirou Kasuga, *Shoumei sekinin* [Burden of proof], 1051 JURISUTO 37 (1994).

[212] *See, e.g.*, Kawai, *Nihongata*, *supra* note 50 (analyzing the plaintiff's burden of proof and concluding that a PL law should not codify the elements plaintiff must prove to establish

difficulties faced by plaintiffs, who litigate without easy access to the manufacturer's information under the present Code of Civil Procedure.[213]

The use of presumptions to lessen plaintiffs' burdens of production have precedent, but their use is rare.[214] The cases under which these negligence standards developed are the famous Kamine Oil and SMON cases, which involved large numbers of plaintiffs.[215] The Kamine Oil cases were brought by some 700 plaintiffs injured by industrial polychlorinated biphenyl[216] ("PCB") which leaked into cooking oil as it was being processed.[217] The claimants joined the small company which produced the oil, the manufacturer of the PCB containing processing chemicals, and the government.[218] The central issues for the plaintiffs were showing that PCB was toxic,[219] that it caused their injury, and the route it took, and the negligence of the manufacturer.[220] The Fukuoka District Court allowed a presumption of negligence against the manufacturer because the manufacturer recommended the use of a toxic substance as a

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liability; nor should a PL law contain a presumption of negligence clause; nor should it contain a provision establishing a United States-style discovery system only for products liability cases).

[213] The first revision of the Japanese Code of Civil Procedure in some 70 years, passed into law by the 136th Diet, makes some alterations to laws on document production, but the changes under the law will take some time to enact completely. For coverage of the revisions to the CIVIL PROCEDURE CODE, *see* Kohzou Yanagita, *Shinminji soshouhou ni tsuite*, 1098 JURISUTO 17 (1996) (part of special coverage on the CIVIL PROCEDURE CODE revisions in 1098 JURISUTO 8-103). For a summary of the changes in the Civil Procedure Code, *see infra* Appendix 3.

[214] *See* Matsumoto, *Terebi*, *supra* note 13, at 8 (noting that, aside from the Osaka ruling, 1439 HANREI JIHOU 29 (Osaka D. Ct., Mar. 29, 1994) (plaintiffs win damages for television caused fire and water damage), this factual presumption has been allowed in the "SMON" cases, (ingestion of a drug "*kinohorumu*" caused a disorder labeled Subacute Myelo-Optico-Neuropathy, characterized in its extreme form by loss of the use of lower extremities, blindness and death, in about 11,000 patients; patients began to appear in 1955, and as of 1991 99,7% of the cases had been settled), and in some claims in "*Kamine*" cases, 866 HANREI JIHOU 21 (Fukuoka H. Ct., Oct. 5, 1977) (PCB in rice oil injures some 700 people); 910 HANREI JIHOU 33, (Fukuoka D. Ct., Nov. 14, 1978).

[215] *See* Matsumoto, *Terebi*, supra note 13, at 8.

[216] Polychlorinated Biphenyls are highly toxic industrial chemicals, possibly carcinogenic, and were banned in the United States in 1976 pursuant to the Toxic Substance Control Act, 15 U.S.C. § 2601 (1976). *See, e.g.*, Marc. W. Trost, *The Regulation of Polychlorinated Biphenyls Under the Toxic Substances Control Act*, 31 A.F. L. Rev. 117 (1989). The quick summary in text above is compiled from FUMIO NAGASE, SEIZOUBUTSU SEKININHOU NO KAISETSU 9-10 (1995); KATOU, *supra* note 9, at 643-679 (covering the Kamine oil cases in detail). There were several Kamine cases brought in several different courts by plaintiffs from 23 prefectures. *See* KOBAYASHI, *supra* note 19, at 10-11.

[217] For a diagram of the processing equipment, *see* KATOU, *supra* note 9, at 647.

[218] For chart summaries, with holdings for each defendant, which organize the results of this complex litigation, *see* KATOU, *supra* note 9, at 650-52.

[219] *See* NAGASE, *supra* note 216, at 9.

[220] *See* KATOU, *supra* note 9, at 659.

coolant in a food-manufacturing process.[221] In this case the manufacturer was unable to rebut the presumption with proof that the danger was unforeseeable, but while losing at the District Court level, the manufacturer prevailed on appeal.[222] The results of the Kamine litigation are complex, due to the number of claims and defendants, but the Fukuoka High Court found the oil manufacturer liable for negligence and criminally negligent behavior.[223] However, the PCB manufacturer was found to have exercised a minimum duty of care and obtained a reversal upon appeal.[224]

Everyone hopes this type of case, which took seventeen years to resolve, will not occur under the PL Law. The PL Law, however, makes no changes in institutional barriers to litigation, and consequently does not greatly ease a plaintiff's burdens.[225] Though factual presumptions were also allowed in the famous SMON cases, aiding recovery for painful drug side effects and death for some eleven thousand plaintiffs, the prospects for the use of presumptions by an individual plaintiff are unclear.[226]

In a recent groundbreaking decision, the Osaka District Court used a presumption of defect for an individual plaintiff in a case arising from allegedly defective consumer goods.[227] Liberal judicial use of presumptions to shift the burden of production to the manufacturer is a practice some hope will help plaintiffs obtain compensation in cases involving consumer goods.[228]

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[221] 866 HANREI JIHOU 22, (Fukuoka D.Ct., Oct. 5, 1977). For a chart summary of the holdings, *see* KATOU, *supra* note 9, at 650-52.

[222] *See* NAGASE, *supra* note 216, at 9-10 (citing 1191 HANREI JIHOU 28, (Fukuoka H. Ct., May, 15, 1986)).

[223] 33 SOUMU GEPPOU 1055, 1191 HANREI JIHOU 28 (Fukuoka D. Ct., May 15, 1986) (finding the oil manufacturer liable). 1036 HANREI JIHOU 35 (Fukuoka D.Ct., Jan. 25, 1983) (finding criminal liability for the oil company plant head).

[224] 33 SOUMU GEPPOU 1055, 1191 HANREI JIHOU 28 (Fukuoka D.Ct., May 15, 1986) (reversing the PCB chemical manufacturer's liablity). The defendant and government settled on March 10, 1988 for some eleven billion yen and three billion yen respectively, meaning each plaintiff received only the equivalent of some seventy thousand dollars in compensation. *See* NAGASE, *supra* note 216, at 10.

[225] *See infra* discussion of the PL Law's article 6, which allows existing Civil Code provisions to supplement the PL Law (which has only 6 articles), at III. F.

[226] On SMON, *see* KATOU, *supra* note 9, at 508-54 (covering the SMON litigation in detail).

[227] Taishi Kensetsu Kougyou K.K. v. Matsushita Denki Sangyou K.K., 1439 HANREI JIHOU 29 (Osaka D. Ct., Mar. 29, 1994). *See* discussion *infra* at III. C. 2.

[228] *See* Matsumoto, *Terebi*, *supra* note 13, at 7 (hailing this judgment's use of factual presumptions as the proper form for judgments under the PL Law). This author believes that unless the judiciary takes the active role being assigned to it the PL Law will not aid plaintiffs, and that this problem was foreseeable.

2. *The Matsushita television fire case*

The most recent products liability case which received extensive coverage in legal journals was *Taishi Kensetsu Kougyou K.K. v. Matsushita Denki Sangyou K.K.*., or the Matsushita television fire case ("Matsushita").[229] This case seemed to embody the expectations of plaintiffs in a PL Law. The judgment was issued a few months prior to the passage of the PL Law. In *Matsushita*, the Osaka Court used a presumption of fact to shift the burden of production on negligence and causation to the defendant, as in the SMON cases.[230] An examination of *Matsushita* demonstrates the possibilities for the new PL Law, but also its potential pitfalls for plaintiffs. Courts may draw on the *Matsushita* case in application of the PL Law because the new law is part of the Civil Code, and cases involving product-related injury filed under article 709 of the Civil Code such as the Matsushita case may be used in determining the application of the PL Law.[231]

The facts of the case are as follows.[232] Plaintiff, a real estate corporation, sued Matsushita Electric,[233] a consumer products manufacturer, for damages caused by negligence in designing a television set.[234] The television, a gift used for eight months,[235] caused a fire in the plaintiff's second floor real estate office at about four p.m. on March 8, 1988.[236] The set was in constant use, and on this day a witness saw smoke and or flame suddenly emerge from the set, pulled the plug, set off the fire alarm, and exited the building.[237]

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[229] 1493 HANREI JIHOU 29, 842 HANREI TAIMUZU 69, (Osaka D. Ct., Mar. 29, 1994).

[230] *See* Matsumoto, *Terebi*, *supra* note 13, at 8.

[231] *See* Hayami, *supra* note 185, at 38. Japan is a civil law system, so though case precedent technically has no legal weight, there exists a "de facto" *stare decisis*, and many courts follow larger city courts, at least in a general pattern. Interview with Osaka District Court Judges, in Osaka District Courthouse (May 31, 1995). One year after the PL Law went into effect, no court has followed it and few cases have even been brought. Letter from Yuichi Osaki, Matsushita Works Legal Department, Foreign Legal Affairs Head, to the author (Oct. 8, 1996). However, it is probably premature to draw conclusions from events after only one year since the PL Law went into effect. On *stare decisis* in Civil Law systems, *see* MERRYMAN, *supra* note 57, at 34-36.

[232] For summaries of the facts of *Matsushita*, *see* 1493 HANREI JIHOU 29 (Osaka D. Ct., Mar. 29, 1994); Matsumoto, *Terebi*, *supra* note 13, at 8; KOBAYASHI, *supra* note 19, at 73-74; HAYASHIDA, *supra* note 29, 89-91.

[233] Known better in the United States by the name National/Panasonic.

[234] The suit was a negligence action filed under CIVIL CODE, art. 709 (*fuhou koui sekinin*) and CIVIL CODE, art. 415 (*saimufurikou*). *See* 1493 HANREI JIHOU 29, 35.

[235] Because the television was a gift, the plaintiff was, thus, a "user" of the product and not a "consumer," and no privity was required by the court. *See* 1493 HANREI JIHOU 29.

[236] *See* Matsumoto, *Terebi*, *supra* note 13, at 8.

[237] 1493 HANREI JIHOU 29, 29.

Defendant denied liability, presenting the following arguments.[238] First, of 80,000 units shipped, none had ever been reported as the cause of a fire.[239] Second, the unit had been safety inspected and approved under MITI regulations.[240] Third, in rigorous tests the unit had been confirmed as unable to cause a fire.[241] Fourth, plaintiff's misuse, pulling on the cord, probably caused a short circuit.[242]

The court, faced with the testimony of a witness who was probably in a state of panic at the sight of the fire, and with the only physical source of evidence of defect burned by the alleged defect, elected to make a "factual presumption."[243] The plaintiff typically bears the legal responsibility for proving all the elements of his case "to the point where the judge is convinced of the existence of all the elements," but judges have wide discretion in applying this standard.[244]

In *Matsushita*, the court assumed that the television set was faulty using a reasoning process not unlike *res ipsa loquitur*, which is used at common law to shift the burden of proof or to reach a jury.[245] The court made rebuttable presumptions that the television had a defect; that the defect existed at the time the television was placed in the stream of commerce; and that the manufacturer was negligent for placing a defective television into the stream of commerce.[246]

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[238] *See* 1493 HANREI JIHOU 29, 36; Matsumoto, *Terebi*, *supra* note 13, at 8.

[239] *See supra* note 238.

[240] On defendant's contentions, *see supra* note 238. On MITI, *see supra* note 41.

[241] *See supra* note 238.

[242] *Id.*

[243] For a discussion of *jijitsujou no suitei* ("factual presumptions") which shift the burden of production, *see* Matsumoto, *Terebi*, *supra* note 13, at 9-10. *See generally* Kawai, *supra* note 50, at 9.

[244] *See* TEIICHIRO NAKANO et al., MINJISOSHOUHOU KOUGI [Civil Procedure Law Lectures] 287-88 (1986). Some have translated the level of causation plaintiff must show as "beyond reasonable doubt," *see* Behrens and Raddock, *supra* note 31, at n.56 (citing NAKANO *supra* this note). Use of a United States criminal evidentiary standard such as "reasonable doubt" may only cause confusion. The *Matsushita* case, in which plaintiff won due to several major shifts in the burden of production, shows the discretion of the court to change the mechanics of production and proof. *See* Matsumoto, *Terebi*, *supra* note 13, at 9-10 (noting the Osaka District Court made a presumption which shifted the burden to the defendant to show both defect and causation, though the evidence was destroyed and the defendant would obviously not be able to bear this burden of production). Japanese judges seem to have discretion to adjust this standard since they are the final arbiter. In a very similar United States case, also involving a fire allegedly caused by a Matsushita television, an American plaintiff failed to meet the "preponderance of the evidence standard" with similar design evidence and expert testimony. *See infra* note 251.

[245] *Res ipsa loquitur's* use in shifting the burden of proof is rare, but recognized. *See* W. PAGE KEETON ET AL., PROSSER AND KEATON ON TORTS § 40, at 258-59 (5th ed. 1984) (a minority of courts apparently allows this shift).

[246] *See* Matsumoto, *Terebi*, *supra* note 13, at 11-12.

It was then up to the defendant to prove otherwise, but the defendant abandoned its case and even decided to forego appeal, hampered by the same lack of physical evidence as the plaintiff.[247]

The presumptions allowed in this case are all the more dramatic in light of the fact that an old Meiji Era law provides that where the damages sought are caused by fire, the level of negligence which must be shown is "gross negligence."[248] The reason for this Meiji Era provision is that, due to climate and the narrow space between houses, the spread of fire is to be expected to a certain degree.[249] How this provision might interact with the PL Law, however, is unclear.[250] It is interesting to note, however, that a court in the United States did not allow this same presumption in a similar case involving another fire alleged to have been caused by a Matsushita television set.[251] The Osaka court, in effect, held Matsushita strictly liable, given Matsushita's obvious inability to produce concrete evidence to counter plaintiff's witness.[252]

Under a strict application of the PL Law, the outcome could have been different. The PL Law may require the plaintiff to establish *kekkan bui no tokutei* ("the location of the defect").[253] If the court were to have required this showing, plaintiff would probably not have prevailed because the television set was destroyed in the accident.[254]

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[247] *See* Matsumoto, *Terebi*, *supra* note 13, at 6. The court awarded some ¥4,400,000 (about $32,600 at that time), and interest, in damages. *See* 1493 HANREI JIHOU 29, 49 (1994).

[248] SHIKKA NO SEKININ NI KANSURU HOURITSU [LAW CONCERNING LIABILITY FOR LOSS DUE TO FIRE], Law No. 40 of 1900. *See* IKUYO AND TOKUMOTO, *supra* note 101, at 183 (noting that the Meiji law requires a showing of *jukashitsu*, gross negligence, for liability for fire damage).

[249] *See* IKUYO AND TOKUMOTO, *supra* note 101, at 183.

[250] For a brief discussion on the interaction of the Meiji law requiring "gross negligence" for fire damage and the PL Law, *see* 1439 HANREI JIHOU 29, 33 (1994). For a case on the interaction between CIVIL CODE, article 717 and the Meiji law, *see* 11 MINSHUU 609, (Osaka Ct., Apr. 11, 1932).

[251] Horton v. W. T. Grant Company, 537 F.2d 1215 (4th Cir. 1976) (Matsushita television set was destroyed in fire, as in the Osaka Matsushita case; expert testimony on wire routing was found insufficient to show defect existed). Unlike this case, the Osaka case had witness testimony, but the United States case involved a death, not just property damage. *Id.*

[252] *See* Matsumoto, *Terebi*, *supra* note 13, at 7 (noting the result in *Matsushita* is a "simulation" of the ideal operation of a strict PL Law).

[253] *See* KOBAYASHI, *supra* note 19, at 49. This is not an absolute requirement, and the conditions under which it will be required are unclear. Letter from Tsuneo Matsumoto, Faculty of Law, Hitotsubashi University, to the author (Jan. 16, 1997).

[254] An observation heard in from Professor Yoshinobu Tai. Interview with Yoshinobu Tai, Faculty of Law, Doshisha University, in Kyoto (July 1995). To see whether plaintiffs must prove the location of the defect will require waiting to see which of two competing viewpoints (there is another interpretation which finds this showing unnecessary) will prevail in court. Letter from Tsuneo Matsumoto, Faculty of Law, Hitotsubashi University, to the author (Jan. 16, 1997).

There was some evidence that the television monitor in *Matsushita* contained a high voltage circuit which caused the manufacturer to recall twelve television monitor models due to the danger of smoke or fire.[255] This indicates a possible general design defect in the set. However, were this evidence unavailable, the plaintiff would probably not have been able to show a manufacturing defect because the set was destroyed.[256] Given this, the manufacturer's evidence that the set passed a government safety inspection and that there were 80,000 of the same units in homes and offices without any registered complaint might trump plaintiff's non-specific evidence.[257] The plaintiff had only general proof, such as a Fire Department report that the set seemed to be the cause of the blaze, and the fact that televisions are statistically common fire-starters.[258] Plaintiff would certainly have difficulty proving a defect existed at the point the product left the hands of the manufacturer, as required under a strict reading of the PL Law.[259] Given the shift of the ministry focus from the manufacturer's conduct to the product itself under the PL Law, the fact that no television remained as evidence might mean the plaintiff could not recover.[260]

Professor Tsuneo Matsumoto, who views *Matsushita* as a "simulation" of how the new PL Law should work,[261] predicts that proof of causation will become an even more important issue when the duty of care of the manufacturer is swept away.[262] Thus, unless this case provides a *de facto* precedent[263] for shifting to the manufacturer the burden of proffering concrete

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[255] *See* 1493 HANREI JIHOU at 36 (Osaka D. Ct., Mar. 29, 1994).

[256] A defect in a product due to faulty manufacturing or construction may exist in only a few units. Where the unit is destroyed, the plaintiff will have a difficult task in showing defect because she cannot refer to the manufacturer's plans to show defect, as in the case of a design defect.

[257] On the defendants' evidence, *see* Matsumoto, *Terebi*, *supra* note 13, at 7. The comment that plaintiff's lack of concrete evidence here might keep him from winning arose in a conversation with Professor Yoshinobu Tai. Interview with Yoshinobu Tai, Faculty of Law, Doshisha University, in Kyoto (July 1995).

[258] On the evidence of causation, *see* 1493 HANREI JIHOU at 31.

[259] *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 97 ("In order to make the manufacturer, importer, etc., liable for compensation, it is necessary that a defect existed in the said product at the time the product changed hands, or namely, when it left the manufacturer's, importer's, etc., control").

[260] The court in the United States reached the same result. *See* Horton v. W. T. Grant, 537 F.2d 1215 (4th Cir. 1976) (finding no proof of defect in a fire allegedly caused by a Matsushita television).

[261] *See* Matsumoto, *Terebi Hakka*, *supra* note 13, at 7.

[262] *See id.* at 12.

[263] Japan is a Civil Law system with no *stare decisis*; the Court's role is merely to interpret the code, and its decisions are not law. *See* MERRYMAN, *supra* note 57, at 22, 34-36. But, the hierarchical nature of judicial society results in a *de facto* following of precedent. Interview, Osaka District Court Judges, Osaka District Courthouse (May 31, 1995).

evidence of causation, plaintiffs will probably continue to lose as they have under the negligence regime.[264] Because the new PL Law includes no provision mandating presumptions which shift the burden of production, plaintiffs' future success under the new law may fairly be said to be within the judges' discretion.

D. Article Four: Defenses

Article four of the PL Law creates a defense of kaihatsu kiken, which is essentially a "state of the art" defense, but which might be more literally translated as "developmental risk."[265] The provision is essentially a "state of the art" defense, exempting a manufacturer for damage caused by defect where: 1) given the extent of scientific and technical knowledge; 2) at the time the product left the manufacturer's control; 3) it was impossible to discover the existence of a defect.[266]

In addition, there is a special provision in article four, section two, which aims to exempt component and raw material manufacturers where the defect produced is solely the result of following the design of another manufacturer,[267] as long as there is no other negligence.[268] This provision offers exemptions

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[264] This is the author's argument, and it assumes a discovery system will not develop. *See* Matsumoto, *Terebi, supra* note 13, at 12 (stressing that the shifting of the duty to provide a concrete explanation of causation will remain important under a strict liability system).

[265] For the *kaihatsu kiken* provision, *see* PL LAW, art. 4 § 1. Essentially, the provision provides a defense where the existence of a defect could not have been known with the scientific or technological knowledge of the time at which the product was delivered. *See infra* Appendix 1 translation. *See* W. PAGE KEETON ET AL., PROSSER AND KEATON ON TORTS § 99, at 701 (5th ed. 1984) ("It is generally agreed that a product cannot be regarded as defectively designed when sold simply because after the sale and prior to the time of a claimant's injury, there was a technological breakthrough of some kind making it possible to eliminate a risk of harm . . . ."). The literal translation of *kaihatsu kiken* is something like "developmental risk," which conveys the defense's policy of promoting technological development.

[266] PL LAW, art. 4 § 1. The time standard, the level of knowledge existing when the object entered the stream of commerce, lessens the burden for the plaintiff compared to the United States' standard, which is usually restricted to knowledge existing at the time of design. *See* W. PAGE KEETON ET AL., PROSSER AND KEATON ON TORTS § 99, at 701 (5th ed. 1984) (" . . . courts have almost universally held that the feasibility of designing a safer product must be determined as of the time the product was designed." (footnote omitted)).

[267] "Solely" is "*moppara.*" *See* PL LAW, art. 4 § 2. The official ministry Engligh translation renders this as "substantial," *see* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 141, but *moppara* can mean "completely" or "solely." KENKYUSHA NEW COLLEGIATE DICTIONARY 1240 (3rd ed. 1983). This author believes there may be the possibility for discretionary judicial interpretation of this term.

[268] *See* PL LAW, art. 4 § 2. For example, if a defective television causes a fire, the manufacturer of the component which short circuited will, presumably, not be liable if they

from liability to small and mid-size manufacturers who produce parts for larger name brand corporations.

The potential liability of smaller firms under the PL Law was a large concern for both the firms and the ministries because of the keiretsu structure of much of the Japanese economy, in which smaller companies generally center around and produce parts for a single large corporation.[269] The provision exempting component manufacturers further evidences concern for the national economy, largely made up of smaller companies.[270] During a question period in the Diet regarding the PL Law, concerns were raised about the need of a support system for smaller companies.[271] A Liberal Democratic Party committee inquiry into the economic problems of Japan's products liability system found a provision such as the one exempting component manufacturers to be necessary to meet the needs of smaller companies because of their lesser resources, small or non-existent legal departments, and weak organization.[272] In contrast, the kaihatsu kiken defense provision was not included in the pro-consumer model law proposals of the Tokyo and Japan Federation of Bar Associations, or in those of the Communist and Socialist Parties.[273]

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exactly followed the part buyer's design specifications and were not negligent in manufacturing the component.

[269] *Keiretsu* are business groups which usually center on a bank, and include a major industrial manufacturer, around which smaller corporations associate, and for which they produce parts. *See* JAMES C. ABEGGLEN & GEORGE STALK, JR., KAISHA: THE JAPANESE CORPORATION 162 (1985).

[270] The Japanese assert structural differences and that their economy possesses special qualities, but it is unclear how different the percentages and ratios of small companies to large are in the United States and Japan. But, whether the differences are real or simply part of "*Nihonjinron*," Japanese theories of Japan's uniqueness, the large number of small manufacturers and lack of legal resources in such manufacturers to cope with tort liability was a concern for law makers. *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 46 (Diet questioning whether policy measures should be taken to prevent the law's being too heavy a burden on small and mid-size firms, to which the ministry spokesman replied there was a special defense in article 4 § 2, and that measures would be taken during the year before the law went into effect). In any case, many expressions of concern for smaller companies exists. *See Shuugiin/sangiin shoukou iinkai ni okeru fuzai ketsugi* of June 15, 1994, *in* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 143-144 (a Diet committee resolution expressing special concern for the PL Law's effect on small to mid-size companies).

[271] *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 46.

[272] *See Jiyuuminshutoh keizai/bukka mondai chousakai seizoubutsu sekinin seido ni kan suru koiinkai chuukantorimatome*, *in* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 153 (an Oct. 8, 1991 Liberal Democratic Party report of 22 issues concerning the PL Law).

[273] *See* KATOU, *supra* note 9, at 926-928, 929-931, 941-944, 946-949 (the *Nichibenren* (Japan Federation of Bar Associations) proposal contains a provision for small companies, but

Some see the kaihatsu kiken defense as providing a shield to manufacturers from the effect of the PL Law in cases in which manufacturers have not been negligent in assessing the potential for defect.[274] The "state of the art" defense may effectively eviscerate any "strictness" of the PL Law by returning to a negligence standard, and transforming the PL Law into negligence in the guise of strict liability.[275] It is no exaggeration to say the success or failure of the PL Law will greatly depend upon the interpretation of the kaihatsu kiken defense.[276]

The policy arguments for establishing such a liability exemption provision are that if companies are made to pay for the unexpected costs of undetectable defects, then research, development, and technical advances will be impeded, and consumers would be likely lose out on the benefits of such advances.[277] In addition, the ministry commentary suggests that in the absence of a kaihatsu kiken defense, there could be increased litigation focusing on the question of whether forseeability is an element to be considered in assessing the existence of defect.[278] The ministry states that this litigation would only slow the flow of relief to injured plaintiffs.[279] The ministry asserts that installation of a kaihatsu kiken defense benefits the plaintiff by shifting the burden of proving that a defect was unforseeable to the manufacturer.[280] This burden-shift ostensibly speeds up the judicial decisionmaking process.[281]

The ministry arguments seem disingenuous, however, since the range of use for a kaihatsu kiken defense is probably limited. Clearly, the exemption will probably not apply to manufacturing defects, which have little to do with scientific foreseeability.[282] The defense will probably be used in high-technology fields and in areas where the products may change composition and have different effect when taken into the body, such as with food or

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not for large). The Bar Associations are typically consumer advocates, as evidenced by their protests over the language in article 1 of the PL Law. *See supra* notes 138, 144.

[274] *See* KOBAYASHI, *supra* note 19, at 41 n.11 (citing a four part analysis of the PL Law based on case law by Professor Uchida 494 NBL 6, 495 NBL 38, 496 NBL 14, 497 NBL 31 (1992)).

[275] *See* KOBAYASHI, *supra* note 19, at 41.

[276] *Id.*

[277] *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 108.

[278] *See id.* at 108-09.

[279] *See id.*

[280] *See id.*

[281] *See id.*

[282] *See* KOBAYASHI, *supra* note 19, at 51 & n.28.

medicines.[283] In addition, allowing the defense may actually create litigation as to when the defense should apply.[284]

Given that the liability exemption would not be likely to swallow the general rule, or, in other words, that the occasions in which the defense would come into play would probably cost far less to corporations than suits where it would not, it would seem that abandoning the exemption for complete strict liability and mandating that manufacturers insure themselves would more quickly aid consumers. The ministry commentary notes that the estimated cost increase for consumers due to the law and the price of insurance, presented in testimony before the Diet, is only five thousandths of a percent.[285] As previously discussed, the entry hurdles for any plaintiff: high mandatory lawyer and court fees, a lack of courts, the lack of a discovery system,[286] punitive damages, and the lack of a preponderance of evidence standard, are probably the main bars to quick recovery.[287] Until these systemic bars to litigation are addressed, worrying that the lack of a corporate defense to liability will increase the burden on plaintiffs is similar to worrying about a car's finish when its tank is empty and its tires are flat. While the ministry's concern is real, it ignores the brunt of the problem.

In sum, the kaihatsu kiken defense will probably not advance the ministry's objective of protecting plaintiffs from excessive litigation. The defense may, in fact, be a cause of litigation that slows the flow of relief to the injured. In addition, the kaihatsu kiken defense and the special exemption for small to mid-size manufacturers seem largely motivated by concerns for the national economy.

E. Article Five: Time Limitations

Article five establishes the time frame for potential plaintiffs to bring suit under the PL Law.[288] The purposes for the provisions are generally the same as in tort law.[289] The limitations period urges quick clarification of the

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[283] The conceivable exceptions are cases where the product is tied to a defect in the design of the manufacturing process itself, such as in genetically engineered products. *See* KOBAYASHI, *supra* note 19, at 51.

[284] *See* KOBAYASHI, *supra* note 19, at 50-51.

[285] *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 43.

[286] Changes in the CIVIL PROCEDURE CODE have been made, but they will take years to implement. For a discussion of the changes to the CIVIL PROCEDURE CODE, *see infra* Appendix 3.

[287] *See supra* notes 10, 11, 12, 244. *See also infra* Appendix 3.

[288] *See* PL LAW, art. 5 (*kikan no seigen*). *See infra* Appendix 1 for translation.

[289] *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 118.

existence of liability, and limits suits to those which are brought by an injured party within a given time frame after learning of the injury and injuring party.[290]

Under the PL Law, the general rule is that actions must be brought within three years from the time the plaintiff learns of the injury and the identity of the person with the duty to compensate, and within ten years of the product's leaving the manufacturer's hands.[291] In cases involving repeated use or build-up of effect, or cases where there is a latent period involving no symptoms, the time is calculated from the appearance of symptoms of injury.[292] This provision addresses problems associated with past toxic tort litigation which involved incremental accretion of toxic drugs in the body. It seems to be a unique Japanese provision, not to be found in the 1985 European Community Directive.[293] In previous cases involving a time lapse prior to discovery of the injury, the judiciary in Japan has been flexible and allowed plaintiffs to recover.[294] This provision obviates the need for reliance on judicial discretion.[295]

Japan's Socialist party, Communist parties, and many others proposed a twenty-year limitations period from the time the product left the manufacturer's hands.[296] This proposal was probably based on the Civil Code article 724 provision, which also sets a twenty-year limit.[297]

Though the average lifespan of products may vary, the legislature passed the ministry's suggested ten-year limit,[298] which was probably considered not to unduly prejudice consumer interests.[299] Thus, the time limitations, especially article five, section two for latent symptoms, are perhaps the one set of provisions of the PL Law which seems to consider the needs of injured consumers over those of industry.

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[290] *See id.* at 118-19.

[291] *See* PL LAW, art. 5 § 1.

[292] PL LAW, art. 5 § 2.

[293] *See* Matsumoto, *Seikatsusha*, *supra* note 22, at 17.

[294] *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 123 (citing 458 HANREI TAIMUZU 118 (Tokyo D. Ct., Sept. 28, 1981)).

[295] *See* KATOU, *supra* note 9, at 34, 275, 277, n.1, 2, 3, 4 (noting four cases where Civil Code time limitations for bringing causes of action have been asserted by defendant manufacturers, but not recognized as an exercise of court discretion).

[296] *See* KATOU, *supra* note 9, at 276.

[297] CIVIL CODE, art. 724. *See also* KATOU, *supra* note 9, at 276.

[298] The ministry proposal was based on foreign PL Law provisions (e.g., the European Community Directive). *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 121.

[299] *See* KATOU, *supra* note 9, at 276.

F. Article Six: Operation of the PL Law Under the Civil Code

The new PL Law is an addition to the Civil Code, and operates as a special provision of the fuhou koui ("tort") law.[300] Negligence claims may still be brought in conjunction with PL Law claims.[301] In the "gaps" for which the PL Law has no provisions, such as damages, the existing century old Civil Code provisions act to supplement the PL Law.[302] For example, plaintiffs may bring article 709 tort claims if the PL Law's ten-year limit has passed, because time limitations for article 709 claims are still established by Civil Code article 724.[303]

Under article six, existing Civil Code provisions also control the form of damages which can be awarded.[304] Thus, plaintiffs will recover only damages proven highly probable to have been caused by the defect at issue, which can be a high standard to meet.[305] The burden of proof for torts and damages in Japan is considered equivalent to a "beyond a reasonable doubt standard" by some.[306] Though this is probably a misleading translation, plaintiffs will generally need to show a high probability of causal relation between defect and damages.[307] As seen in Matsushita, however, the judiciary is not beyond making factual presumptions of negligence and causation which effectively limit this burden of persuasion on the plaintiff.[308] Rules of causation may be altered on a case by case basis.

There is no punitive damage provision in Japan because such provisions are generally considered a remedy for criminal acts, and because civil punitive damage awards run counter to the Japanese system's compensatory aims, and thus, run counter to Japanese "public order and good custom."[309] An argument

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[300] *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 126.

[301] *See* KATOU, *supra* note 9, at 35; KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 126-27 (noting the PL Law is an addition to negligence actions (under CIVL CODE, art. 709)).

[302] MINPOU [CIVIL CODE], Law No. 98 of 1897 (multiple partial amendments omitted). Regarding recent amendments, *see infra* Appendix 3.

[303] *See* KATOU, *supra* note 9, at 35.

[304] *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 126 (citing as examples articles 417 and 722 § 1).

[305] *See* Matsumoto, *Seikatsusha*, *supra* note 22, at 16 (on *soutou ingakankei*).

[306] *See generally* Behrens and Raddock, *supra* notes 31, 244.

[307] *See* NAKANO, MINJISOSHOUHOU, *supra* note 244, at 287-88 (noting that the standard is high, but largely discretionary).

[308] *See supra* notes 227, 244.

[309] Punitive damages are viewed as "criminal" remedies in Japan's civil law system, and do not promote the compensatory goals of the system; for a Japanese court case discussing punitive damages, *see supra* note 206.

for treble isharyou[310] ("consolatory damages") damages to compensate plaintiffs for mental suffering, or for particularly reckless or rash acts was presented to the Tokyo High Court in the famous chloroquine products liability cases,[311] but it was not accepted because of its "punitive" nature.[312]

Some criticism suggests that the present allowable damage categories contradict the ostensible purpose of the PL Law.[313] Professor Matsumoto criticizes Japan's pro-business damage provision allowing recovery of lost profits in particular, citing this as evidence that the PL Law was never intended to aid "consumers"[314] as that term is commonly understood, but instead intended as special tort provision for all injured parties.[315] Professor Matsumoto notes that Japan has not limited plaintiffs by refusing to include a damage award cap, for which some European Community members have opted.[316] Professor Matsumoto also asserts, however, that the pro-business nature of the Civil Code

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[310] *Isharyo* is a general category of consolation award for *seishinteki na songai*, or mental suffering. *See* CIVIL CODE, art. 710 (*hizaisanteki songai no baishou*) (providing that tortfeasors must pay damages for mental suffering, in addition to compensation for injury to property rights, and other non-monetary damages). *Isharyo* must be paid for mental suffering caused by injury to "body, freedom, reputation/honor" and "property rights." CIVIL CODE, art. 710. Such injury is assessed and compensated for in money damages. CIVIL CODE, art. 417. *Isharyo* awards are commonly in the 500,000 yen to two million yen range, and rarely exceed twenty million yen ($200,000 at 100 yen/dollar). *See* Nobutoshi Yamanouchi & Samuel J. Cohen, *Understanding the Incidence of Litigation in Japan: A Structural Analysis*, 25 INT'L LAWYER 443 (1991), *reprinted in part in* COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 106 (Kenneth L. Port ed., 1996).

[311] The *Kurorokin* (chloroquine) litigation involved a drug manufacturer which continued to market a drug with negligible effect even after it learned potential side effects included blindness, and injuries for which the plaintiffs appealed to the court for a mass award of *isharyou*, *see supra* note 310, to compensate for, *inter alia*, years of hospital visits, alterations to their homes, and mental suffering. The court explicitly denied the request. For a history of the *Kurorokin* litigation, *see* KATOU, *supra* note 9, at 555-569. For interesting commentary and comparison to United States punitive damages law, *see* Norio Higuchi, *Seisaiteki isharyouron ni tsuite* [Concerning the Theory for Sanctionary Mental Suffering Damages], 911 JURISUTO 19 (1988)(Professor Higuchi notes that while the division drawn between civil and criminal law in the United States arguably helps to maintain the constitutionality of civil punitive damages and criminal punishment, the same division is made in Japan to disallow punitive damages altogether).

[312] 1271 HANREI JIHOU 3, 666 HANREI TAIMUZU 91 (Tokyo H.Ct., Mar. 11, 1988). *See* KOBAYASHI, *supra* note 19, at 83-85.

[313] *See* Matsumoto, *Seikatsusha*, *supra* note 22, at 16-17.

[314] Translator's note: Professor Matsumoto probably intends a meaning of *shouhisha* [consumer] similar to the United States notion of "consumer": "Users of the final product . . . to be distinguished from manufacturers and wholesalers or retailers." BLACK'S LAW DICTIONARY 316 (6th ed. 1990).

[315] *See* Matsumoto, *Seikatsusha*, *supra* note 22, at 16-17.

[316] Portugal, Germany and Spain are mentioned as having adopted a damage cap option. *See* Matsumoto, *Seikatsusha*, *supra* note 22, at 16.

damage provisions creates the danger of hurting consumers by restricting damage awards if and when future courts actively seek to develop theories which might erase the benefits given to business by the PL Law.[317] Other commentators also see this PL Law provision, which allows business losses, as one of the more unusual provisions in the world.[318] In the United States, purely economic losses are not available under strict liability claims in most state courts.[319]

A more pressing concern for injured plaintiffs is that the discretionary application of Civil Code article 722 section 2 on "comparative negligence" still allows the court to reduce damage awards where the plaintiff is negligent.[320] Under a "strict liability" regime it is possible that successful plaintiffs will have damage awards reduced by their own comparative negligence. Many political and legal groups proposed in their model PL Laws a modification of Civil Code article 722 section 2, using very similar wording to article 722, but allowing only gross negligence on the part of the plaintiff to reduce damages at the court's discretion.[321] These modifications did not pass, and the court may still consider any level of plaintiff's negligence in awarding damages.

The problem for plaintiffs is really one of inconsistency in policy and legislation, thus demonstrating the "tatemae" quality of the law. For example, the ministry commentary suggests that a "state of the art" defense is necessary in fairness to manufacturers in order to alleviate plaintiff's having to bear the burden of proof on foreseeability.[322] But, seemingly unconsidered by the ministry are provisions to limit spurious litigation regarding alleged plaintiff misuse of products when there is little proof, or provisions to establish that only plaintiff's gross negligence will affect damage awards, and these remain loopholes in the law.[323]

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[317] *See* Matsumoto, *Seikatsusha*, *supra* note 22, at 17.

[318] *See* KATOU, *supra* note 9, at 254.

[319] *See, e.g.*, Clark v. International Harvester Company, 581 P.2d 784, 793 (Idaho 1978).

[320] *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 127 (noting that the type of "negligence" considered for comparative negligence is "the injured party's lack of caution" in a wide sense, and not the type of negligence the plaintiff must prove). *Kashitsu sousatu* (comparative negligence) is established by CIVIL CODE, art. 722 § 2 ("when the injured party is also negligent the court can consider this when setting the amount of damages").

[321] *See* KATOU, *supra* note 9, at 924, 930 (law proposals allowing only *kadai na kashitsu* (gross negligence) to decrease awarded damages).

[322] *See supra* text accompanying notes 277-84.

[323] *See* KEIZAI KIKAKUCHO KOKUMIN SEIKATSUKYOKU SHOUHISHA GYOUSEI DAIIKKA, *supra* note 15, at 108-9 (on reasons for danger of development defense). *See also supra* note 320 (noting that negligence considered "comparative negligence" includes a wider range of acts than the negligence a plaintiff must prove to establish liability).

Negligence in using a given product will probably remain unchanged as the heavily contested issue it was before the enactment of the PL Law, and damage awards may be reduced as a result.[324] Thus, while the PL Law's strict liability provision may reduce the plaintiff's burden by allowing for liability based on defect, article six undercuts that effect. Article six undercuts article three through the continued use of Civil Code provisions which preserve the incentive for manufacturers to litigate issues such as comparative negligence, which are burdensome to plaintiffs. In addition, where the manufacturer can successfully show comparative negligence in plaintiff's use of the product, plaintiff's award will still be reduced. These realities reduce the PL Law to the status of little more than a policy statement.

IV. WHY DID JAPAN ENACT A PL LAW WHICH WILL HAVE LITTLE EFFECT?

The formative process of the PL Law was guided largely by both the Economic Planning Agency and the Ministry of International Trade and Industry, two bureaucratic institutions whose mission is to aid the economy.[325] The representation of consumer interests on the shingikai that debated the issues in drafting the PL Law was a minority.[326] The Diet also seemed concerned about the economic effects of several provisions in the PL Law.[327]

Examination of each provision of the law reveals that it is decidedly pro-business. Article one of the PL Law states that its purpose is to create a "healthy economy."[328] Article two establishes definitions which do not include real property and fixtures in the coverage of the PL Law.[329] Article two definitions thus exclude one of the largest causes of injury, and maintain the status quo, in which landowners are often held strictly liable for injury to third parties caused by another's defective product.[330] The ministry commentary to article three, which purports to create strict liability for injury caused by manufacturing defect, admits the holdings under the law will not change, and that the provision codifies past case law.[331] Article four's defense provisions allow business, if not a complete defense, at least a means and motive to

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[324] *See* Matsumoto, *Seikatsusha*, *supra* note 22, at 17 (the cause of accident and whether the accident was due to defect or misuse of the product have been the main issues litigated in many PL cases thus far).

[325] Lecture by Yoshiharu Matsuura, Faculty of Law, University of Osaka, Kyoto (May 29, 1995). The two main government commentaries on the PL Law are from these two administrative agencies. *See supra* notes 15, 29.

[326] *See supra* text accompanying notes 76-79.

[327] *See supra* discussion section III. A.

[328] *See* PL LAW, art. 1. For translation, *see infra* Appendix 1.

[329] *See supra* note 181.

[330] *See supra* notes 180, 186.

[331] *See supra* note 25.

prolong litigation on the application of those defenses.[332] Article five allows plaintiffs a fair amount of time to bring claims, but this means little if claims remain difficult to bring.[333] Article six maintains existing damage provisions and allows comparative negligence to reduce damage awards, providing a continuing incentive to manufacturers to litigate the issue.[334] It is no wonder only one suit has been brought based on the PL Law in its first year of operation.[335]

These provisions demonstrate why some Western commentators have concluded the PL Law will "fail."[336] The PL Law may be called a failure because it will probably not affect corporations.[337] But with twenty years to ponder its design, the drafters of the PL Law are likely to have foreseen this result.

To understand the importance of the PL Law, one must go beyond the attempts to shine a Western light on a system of law to see how it functions so that one can understand the role of the PL Law in a country where internalized social forces still have wide control.[338] Japan, though ever in flux, is still in a state bent on collective survival. Japan seems to have a predilection for personalized, consensual solutions, enforced by trust, collective self-interest, and systemic elements.[339] Japanese do not sue, and the PL Law is not likely to encourage them. Professor Morishima plainly asks the question, why should Japan suffer the burden of litigation as have other countries?[340]

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[332] *See supra* discussion section III. D.

[333] *See supra* discussion section III. E.

[334] *See supra* discussion section III. F.

[335] *See supra* note 24.

[336] *See, e.g.*, Marcuse, *supra* note 25, at 398.

[337] This author has been informed that the law hardly has large international corporations "quaking in [their] boots." Letter from Foreign Legal Affairs Dept. Head, Matsushita Denko, to author (Aug. 2, 1996). The effect may be proportionately harder on small or mid-size companies with no legal departments than it is on an international conglomerate (such as Matsushita), which are used to ligitation, and even used to United States systems of pre-trial discovery. *Id.*

[338] This "light" image is inspired by Dan Rosen, *The Koan of Law in Japan*, 18 NTHN. KY. L. REV. 367, 397-98 (1990). On social controls, *see* sources *supra* notes 27 & 33, 34.

[339] For a collection of analyses of Japan's alternative dispute resolution systems and their role in either lowering litigation rates and satifying claims, or perhaps simply creating the appearance of harmony, *see* KENNETH L. PORT, COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 457-489 (1996). For information on extra-legal compensatory systems unique to Japan, *see infra* Appendix 2. The United States had a similar period in its history when Connecticut favored consensual, personalized solutions, perhaps because the colony, bent on survival, could not afford to have conflict. *See* Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L.REV. 443 (1984).

[340] For Akio Morishima quote, *see supra* page 879. The American Law Institute's Mark Behrens admits the United States' products liability law has negative economic effects. *See* Behrens, *Products Liability Reform*, *supra* note 26, at 221 (noting consumers pay unreasonable "products liability taxes").

Before exposure to foreign product liability systems, Japanese may never have considered suing manufacturers in tort for product related injuries.[341] Yet, the Japanese PL Law is a native product, with twenty years of observation and study behind it, explicitly aimed at creating a "healthy economy."[342] That a "healthy economy" is a collective benefit, and not a benefit to the individual consumer, is consistent with what is probably a general paradigm for the role of law in Japan.[343] A different, and perhaps more descriptive understanding of the PL Law can be made only if one abandons the Western concept of what a "successful" law is.

Western commentators may dismiss the PL Law as a weak attempt to aid consumers or as lip service to the purported goal of international harmonization of legal systems.[344] But, to dismiss Japan's PL system is, perhaps, a "legal chauvinism" which fails to see that Japan includes the cost of conflict in its PL equation. To ignore this is to miss Japan's hints about the current state of the United States products liability system, which one commentator in the American Law Institute claims is "an example of what is wrong, not right, with our [legal] system."[345]

V. CONCLUSION

The legal reality behind the PL Law belies its ostensible purpose. The PL Law contains an explicit pro-economy purpose. It contains a concept of "defect" which excludes coverage of historically large areas of litigation, such as real property. Unreformed by the PL Law, Civil Code provisions still hold property owners strictly liable for third party injury, even when caused by manufacturer defects. A kaihatsu kiken, or "state of the art" defense, in conjunction with damage reductions for comparative negligence, create incentives for manufacturers to litigate, and thereby eviscerate the gains offered to plaintiffs by "strict" liability. In addition, "institutional" and social barriers to litigation remain unaddressed, and continue to thwart potential plaintiffs.

Some United States commentators are critical of Japan and think its PL Law will "fail." Yet, one Japanese scholar, critical of the law himself, sees the PL

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[341] Zentaro Kitagawa, *The Perspective from Japan, First World Congress on Product Liability*, 242 (Hollenshead & Quarles eds., 1977) (Proceedings Volume).

[342] *See* PL LAW, art. 1.

[343] On "collective benefit," *see* Fujikura, *supra* note 33, at 1541.

[344] *See* Marcuse, *supra* note 25, at 398.

[345] *See* Behrens, *supra* note 26, at 221; James A. Henderson Jr., *Why Creative Judging Won't Save the Products Liability System*, 11 HOFSTRA L. REV. 845 (1983) (arguing judges need clearer legal rules to begin to achieve consistent and sensible decisions).

Law's enactment as a great step forward for consumers.[346] Another sees the PL Law as a small, incremental step in a lengthy process of getting business to change its modes of operation.[347] To reconcile these views requires one to realize that the role of law in Japan is different from its role in the United States.

Japan's new PL Law is one example of Japanese laws which, perhaps because they find their conception in foreign law, create misleading expectations in observers of Japan. Japan's new PL Law is tatemae, essentially a policy statement. Despite expectations one may hold as an outside observer, Japan's social forces and legal process have crafted a native law which is a mask for our consideration.

Glenn Theodore Melchinger[348]

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[346] Professor Matsumoto concludes the PL Law itself is nothing special, but the fact that the PL Law was created is a huge step. Letter from Tsuneo Matsumoto, Faculty of Law, Hitotsubashi University, to the author (Jan. 16, 1997).

[347] The concept of "incremental" change from Professor Yasutomo Morigiwa. Lecture by Yasutomo Morigiwa, Faculty of Law, Hitotsubashi University, Honolulu (Mar. 15, 1997).

[348] Class of 1998, William S. Richardson School of Law. The author wishes to express his thanks to, in no particular order, Professor Yoshinobu Tai of Doshisha University, Professor Ronald Brown (for being the first victim), Professor Richard Miller, Professor Jon Van Dyke, Professor Dan Rosen of Loyola University, and Yuichi Osaki of the Matsushita Legal Department, for his helpful comments. In addition, the author thanks his Law Review staff editors, especially Toni, Peter, and Stacey for their patience and tolerance of his Japanese citations, and all his Japanese language professors for helping give him the tools to research this article. The author would especially like to thank Professor Tsuneo Matsumoto for giving his time to read this article, for his invaluable corrections and suggestions, and for his articles, cited throughout.

APPENDIX 1: ENGLISH TRANSLATION OF THE PRODUCT LIABILITY LAW

The Product Liability Law

Article 1 [Purpose]

The purpose of this Law is to [offer relief to] injured persons by setting forth the liability of a manufacturer, importer, etc., for damages when injury to a person's life, body, or property is caused by a defect in a product, and thereby to contribute to the stabilization and improvement of citizen's lives, and to the healthy development of the national economy.

Article 2 [Definitions]

(1) As used in this Law, the term "product" means [tangible] moveable property manufactured or processed.
(2) As used in this Law, the term "defect" means lack of safety that the product ordinarily should provide, taking into account the nature of the product, the ordinary foreseeable manner of use of the product, and other circumstances concerning the product.
(3) As used in this Law, the term "manufacturer, etc." means any one of the following:
    1. any person who manufactured, processed, or imported the product as business (hereinafter called just "manufacturer");
    2. any person who, by putting his name, trade name, trade mark or other feature (hereinafter called "representation of name, etc.") on the product presents himself as its manufacturer, or any person who puts the representation of a name, etc. on the product in a manner mistakable for the manufacturer;
    3. apart from any person mentioned in the proceeding subsections, any person who, by putting the representation of name, etc. on the product may be recognized as its manufacturer-in-fact, in the light of a manner concerning manufacturing, processing, importation or sales, and other circumstances.

Article 3 [Product Liability]

The manufacturer, importer, etc. shall be liable for damages caused by the injury, when it injures another's life, body, or property by a defect in its delivered product which it manufactured, processed, imported or put the

representation of its name, etc. upon, as described in subsection 2 or 3 of section 3 of Article 2. However, the manufacturer, importer, etc., is not liable when only the defective product itself is damaged.

Article 4 [Exemptions]

In cases where Article 3 applies, the manufacturer, importer, etc., shall not be liable under Article 3 if it proves:

1. that the state of scientific or technical knowledge at the time when the product left the manufacturer's control was not such as to enable the existence of the defect in the product to be discovered; or
2. in a case where the product is used as a component or raw material of another product, that the defect is substantially produced by compliance with the instruction concerning design given by the manufacturer of the said other product, and that the manufacturer was not negligent in the production of the defect.

Article 5 [Time Limitations]

(1) The right for damages provided in Article 3 shall be extinguished due to time limitations if the injured person or his legal representative does not exercise such right within three years of becoming aware of the damage, and of the party liable for the damage. The same rule applies upon the expiration of ten years from the time when the product left the control of the manufacturer.
(2) The period in the latter sentence of section 1 of this Article shall be calculated from the time when the damages arise, in cases in which such damage is caused by substances which are harmful to human health when they remain or accumulate in the body, or in cases in which symptoms for damage appear after a certain latent period.

Article 6 [Application of the Civil Code]

Other than under the provisions of this law, the liability of a manufacturer for damages caused by a defect in its product shall be subject to the provisions for the Civil Code (Law No.89, 1896).

Supplementary Provisions

1. Enforcement Date, etc.
   This Law shall come into force the day after one year from the date of the promulgation, and shall apply to the products delivered by the manufacturer after this Law comes into force.
2. Partial Amendment of the Law on Compensation for Nuclear Damage
   The Law on Compensation for Nuclear Damage (Law No.147, 1961) shall be partially amended as follows:
   In section 3 of Article 4 of that Law, "and the Law relating to the Limitation of the Liability of shipowners (Law No.94, 1975)" shall be amended as, "the Law relating to the Limitation of the Liability of shipowners (Law No.94, 1975) and the Product Liability Law (Law No.85, 1994)".

This translation is adapted from the official ministry "tentative translation" in KEIZAI KIKAKUCHO SHOUHISHA GYOUSEI DAI IKKA, CHIKUJOU KAISETSU SEIZOUBUTSU SEKININHOU 140-142 (1995) (some grammatical changes and unnatural phrasing changed with reference to the original Japanese PL Law).

APPENDIX 2: OTHER ORGANIZATIONS AND COMPENSATORY SYSTEMS COPING WITH PRODUCT-RELATED INJURY

Other than courts, Japan has several legal and quasi-legal compensation systems and organizations which often go undiscussed. In reality, the PL Law is merely the last resort in seeking compensation for product related injury. A basic understanding of these other systems fills in the picture of the Japanese approach to product-related injury.[349]

A. "PL Centers"

The first step for the injured product user seeking compensation, is to go to any one of numerous Shouhi seikatsu sentaa ("consumer life centers"), or to the "Japan Consumer Information Centers" ("JCIC"), which supplement the Seikatsu sentaa functions.[350] These centers record complaints, process information on injuries, aid consumers in resolving claims with manufacturers, and in the future may to some degree become involved in product testing, investigation, and fact finding for the purpose of litigation.[351]

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[349] A detailed examination of these systems is, however, beyond the scope of this article. This section will serve as an introduction, and provide sources for further research.

[350] Japan Consumer Information Centers were established pursuant to a 1970 law, the JAPAN CONSUMER INFORMATION CENTER LAW, Law No. 94 of 1970, and the JCICs carry out various duties such as answering consumer questions regarding products, comparative product testing, reporting injury information, compiling databases, issuing advisory information on products, and so forth. *See* Japan Consumer Information Center [JCIC], *Brief History of JCIC*, (Jan. 2, 1997) <http://www.kokusen/jcic_history brief.htm> (English language); *see* NAGASE, *supra* note 216, at 62, 64 (1995). With sufficient funding, these Centers may also engage in tests to establish causation in accidents for the purposes of lawsuits, lessening the plaintiff's burden of production. *See* CONSUMER SHINGIKAI REPORT 14, *supra* note 66, at 41-2; *see* NAGASE, *supra* note 216, at 65-66. Citizen's Information Center web pages include breaking information, in Japanese and English, on product liability issues, product testing reports, advisories about bad trade practices, and so forth. *See Kokumin Seikatsu Sentaa* [Japan Consumer Information Center] Web Page, (Jan. 22, 1997) <http://www.kokusen.go.jp> Recent stories include suffocation/choking deaths due to a type of *konnyaku* (a pasty gelatin) "one bite" food; advisories warning about pressure sales tactics from salespersons selling newspaper subscriptions. *See* Japan Consumer Information Center webpage (Jan. 22, 1997) <http://www.kokusen.go.jp/jcic3/ehello.html /jcic_news83.html> (in English). There are separate types of specialized "PL Centers" which handle certain products, including centers handling complaints about home appliances, cars, oil/kerosene burning products (often used as heat sources in Japanese homes), and chemical goods. *See* Ryuuichi Itou, *Tsuushousangyoushou ni okeru seizoubutsu sekininhou shikou ichinen to shoshisaku*, 596 NBL 12, 15 (1996).

[351] *See* sources cited *supra* note 350. For a slim volume geared toward layperson-consumers, *see* NAGASE, *supra* note 216 (containing user-friendly explanations of the PL Law, and phone numbers for hundreds of local JCICs in the end pages).

JCICs, found in almost 300 localities as of 1993, are administrative claim processing centers which have received increasing numbers of inquiries in the year since the PL Law went into effect, though up to 80% of these calls may be merely general inquiries about the PL system, and only about 5% may concern actual accidents.[352] These centers will be expected to provide extra-judicial solutions to the products liability problem in the future.[353] The centers and MITI have also been involved in tracking industry's response and are an integral part of the network watching the PL Law's effect.[354]

B. "Mark" System Manufacturer's Insurance

In addition to the government centers are privately operated, government supported, insurance group systems which supply compensation for product-related injuries to manufacturers who apply, allowing manufacturers to place the insurance group's "safety mark" on goods.[355] One such private system is the "SG mark" system, which covers cigarette lighters, roller skates, baby buggies and carriers, and other items.[356] Since its activation in 1974, the SG mark system had paid out about 155,970,000 (about $1.6 million) in 339 claims (of 727 heard), an average of about $4600 a claim, by 1991.[357] These systems are, in effect, a government-enabled private legal regime of voluntary submittal

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[352] *See* Itou, *supra* note 350, at 13. The number of calls received at the Citizens Information Centers is said to have "doubled," but it seems unclear just what the nature of the calls are, and most may be general inquiries about the PL Law or making claims. *See* Masato Nakamura, *Seizoubutsu sekininhou shikou ichinen to sono jittai: kekkan shouhin 110 ban no kiyou*, 596 NBL 23 (1996) (noting 80% of calls to some centers have only been general questions).

[353] *See* Itou, *supra* note 350, at 13. For charts enumerating the numbers of various types of claims and activities at these centers, *see* Motoyoshi Shizui, *Keizai kikakucho ni okeru seizoubutsu sekinin seido kanren shisaku he no saikin no torikumi joukyou*, 596 NBL 18, 20 (1996).

[354] For a MITI representative's report on the first year of operation of the PL Law and its ancillary systems, *see* Itou, *supra* note 350. The Economic Planning Agency, which wrote the other key commentary on the PL Law, *see supra* note 15, also published a one-year-of-operation status report. *See* Shizui, *supra* note 353.

[355] On the "mark" system, *see* Mark Ramseyer's, *Products Liability Through Private Ordering: Notes on a Japanese Experiment*, 144 PA. L. REV. 1823 (1996) (detailing the "mark" systems for various types of goods. *See also* Matsumoto, *Japan*, *supra* note 169, at 581.

[356] *See* Ramseyer, *Private Ordering*, supra note 355, at 1829. *See also* CONSUMER SHINGIKAI REPORT 13, *supra* note 94, at 198 (SG payments) & 199-211 (on the SG mark system in general, which was established pursuant to legislation to aid consumers).

[357] Several other "mark" systems similar to "SG" exist, but SG is the largest and has made the most payments. For "mark" system insurance payment charts, *see* CONSUMER SHINGIKAI REPORT 13, *supra* note 94, at 198 (SG payments) & 199-211 (on the SG Mark system in general). *See also* TSUUSHOUSANGYOUSHOU SANGYOU SEISAKUKYOKU SHOUHISHA KEIZAIKA, *supra* note 29, at 47-48.

to strict liability with an extra-judicial fact finder.[358] In a system in which the product must first be approved by an insurer with a profit motive, however, there seems room for doubt about whether the system is entirely just or adequately directed towards statistically more dangerous types of products which may require more coverage.[359]

C. Compensatory Funding for Drug-Related Injury

There also exists a government fund, established pursuant to the Drug Side-Effects Injuries Relief and Research Promotion Fund Act, which compensates victims of defective drugs for their injuries.[360] The fund paid out an average of $16,048 per claim on 1,878 approved claims of 2,645 total filed, from 1980 to 1991.[361] This fund however, excludes certain kinds of drugs from coverage,[362] provides comparatively low payments,[363] does not compensate when a "potential defendant" for the injury exists,[364] and does not disclose the name of the drug.[365] Obviously, the law and the administrative discretion allowed in its application places limits on what it can do for consumers.

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[358] *See supra* Ramseyer, *Product Liability*, note 355, at 1831 (also noting that the details on this system are unclear because it is private).

[359] *See supra* Ramseyer, *Product Liability*, note 355, at 1829 (chart listing product for which claim was paid includes these goods most often claimed against: disposable cigarette lighters (49 claims), baby buggies (36), swings (27), metal stepladders (26), pressure cookers (16), and bicycles (12)).

[360] On this law, *see* Tejima, *supra* note 193, at 730-734; CONSUMER SHINGIKAI REPORT 13, *supra* note 94, at 212-216.

[361] *See* Tejima, *supra* note 193, at 732.

[362] *See id.*

[363] *See id.*

[364] *See id.* at 733.

[365] *See id.*

APPENDIX 3:

On June 18, 1996, for the first time in 70 years,[366] the Japanese government enacted major changes to its Civil Procedure Code ("CPC").[367] Due to the number and nature of the changes, including the type of language used,[368] the law will not be implemented until some two years from its promulgation, and it is probably too early to know how the changes will affect the operation of the PL Law.[369]

Listed below are the major new provisions and revisions which may affect the PL Law's operation.

1) CPC article 220. This article provides for mandatory disclosure and production of most all the documents which are related to the cause of action at issue.[370] It is potentially revolutionary. There remains the question of whether judicial interpretation of the law will narrow its effect.[371] The new article 220 could ease the plaintiff's burden of taking on manufacturers. This change may go the way of the 1926 reform's attempt to institute continuous or concentrated trials.[372]
2) CPC Articles 164, 168, 175. Several new procedures have been enacted to speed up the judicial process, providing various procedures for pretrial clarification of issues and evidence (gathering).
3) CPC Article 368 et. seq. New provisions aim to create one day trials resolving disputes concerning claims for under 300,000 yen.[373] This may increase the use of the judicial system for small claims against manufacturers.[374]

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[366] For sources on the old Civil Procedure Code, *see supra* notes 10-12.

[367] *See* Yanagita, *Shinminji*, *supra* note 213, at 17.

[368] The new CIVIL PROCEDURE CODE fulfills its goal of being accessible and easier to use by changing from old-style legal language to *gendaigo* (modern Japanese which is closer to the spoken language than the older classical type of language used in the Code until now). *See* Yanagita, *supra* note 213, at 18-19.

[369] *See* Yanagita, *supra* note 213, at 25 (noting that debate is also taking place around supplementary laws which govern production of documents by public officials).

[370] For a detailed account, *see generally* Tahara, *supra* note 12.

[371] Hideki Matsui, *Shinminji Soshouhou ni okeru bunshou teishutsu meirei to kigyou himitsu* [Document Production Orders and Trade Secrets in the New Code of Civil Procedure], 604 NBL 6 (1996) (part I).

[372] On the attempt and failure to reform trial preparation and procedure by instituting near continuous trials, *see supra* note 11.

[373] Previous attempts to mandate continuous, or one day trials have not been successful. *See supra* note 11.

[374] See Shirou Kawashima, *Shougaku soshou tetsuzuki no kisoteki kadai to tenbou*, 1098 JURISUTO 93 (1996) (covering changes to procedural laws governing small claims).

4) CPC Article 92. There is a provision to protect trade secrets, providing for in camera inspection and censure of the record to avoid their publication.[375] This provision may ease the concerns of manufacturers about mandatory disclosure by ensuring the secrecy of trade secrets, but the protections have been criticized as too weak.[376]

These several provisions may change the operation of the PL Law and make it a better tool for injured consumers. It is too early to tell, however, to what extent these changes will be carried out, or whether the high fees, lack of punitive damage awards, and social or cultural factors will continue to keep litigation levels down.

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[375] *See* Tahara, *supra* note 12, at 64.

[376] *See generally* Masahisa Deguchi, *Soshou ni okeru himitsu hogo*, 1098 JURISUTO 68, 72 (1996) (covering trade secrets in litigation; noting criticism that the revised CIVIL PROCEDURE CODE, art. 92 does not create a duty on the part of opposing parties to protect the secret, weakening protection).