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A TRIBUTE TO JUDY WEIGHTMAN

ARTICLES

COMMENTS

CASENOTES

RECENT DEVELOPMENTS

BOOK REVIEW

Tribute to Judy Weightman

Jon M. Van Dyke* and
Casey Jarman**

Vivacious, loving, dynamic, bright, committed, supportive, curious, courageous, effervescent, irreverent, insightful, hard-working, fun-to-be-with. These words can only begin to paint a picture of our good friend and colleague, Judy Weightman. Widely regarded as the "heart" of the law school, she directed the Pre-Admission Program at the William S. Richardson School of Law for ten years and each year provided her very special guidance to a dozen future leaders for Hawai'i and the Pacific. To both her students and her colleagues, she demonstrated through her life and her priorities how one's lawyering skills can be used for the benefit of the community. Without being judgmental, she always reminded us—through the way she lived her own life—what we could achieve as lawyers and as people if we only would readjust our focus to concentrate on what is truly important. She fervently believed that law is a tool to bring about the sometimes exclusive, but nonetheless attainable, twin goals of justice and fairness of all.

Her students and their contributions to our society are probably her most important lasting legacy, but her work on the Hawai'i Holocaust Project will also endure as a reminder to us all of the failures and triumphs of the human condition. The Holocaust was one of the most unbelievably terrible events of our century, and Judy understood the importance of ensuring that current and future generations remember what happened and why. But she also sought to highlight little known but important aspects of this overwhelming disaster by focusing our attention on the Japanese-American soldiers (who themselves had to overcome racial discrimination) who helped to free those who were trapped in the horror of the German concentration camps. Her excellent movie preserving this event—*From Hawai'i to the Holocaust, A Shared Moment in History*—richly deserves the many awards it has garnered and will be seen over and over by those seeking to understand our time. Her two written volumes, entitled DAYS OF REMEMBRANCE: HAWAI'I WITNESSES TO THE HOLOCAUST, complete the film by recording the oral testimony of the Hawai'i soldiers who liberated the victims.

Judy received an M.A. in American Studies from the University of Hawai'i and a J.D. from our Law School in 1981. She was a member of a distinguished class that included our current Dean, Larry Foster, as well as individuals who have become judges and community leaders in a variety of ways. Her classmates remember Judy as a special sparkplug, always

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generating fun activities as well as assisting others in mastering the intricacies of legal thinking. She was an excellent student who earned strong grades in her classes. After obtaining her law degree and passing the bar, she clerked for Chief Judge James S. Burns at the Intermediate Court of Appeals, served as a Deputy Public Defender, and then a Staff Attorney for the Department of Commerce and Consumer Affairs. In her "spare" time, she was an inventor who held four patents, including one for a popular soft and comfortable lamb-skin shoulder seat belt cover.

Judy helped our Law School in so many big and little ways. As director of the Pre-Admission Program, she not only helped her students with their academics, but also provided hours of counseling, earning her the nickname of "Mom." She initiated a scholarship program and established a tutoring class for the bar exam after graduation. She also brought her considerable skills and talents to our writing program, teaching Legal Methods Seminar, Appellate Advocacy, and the Second Year Seminar. She had the ability to touch her students' hearts in a way that gave them confidence in themselves, whatever challenges they had to face. And she freely shared her wisdom with her colleagues as well. She ably represented the Law School for a number of years as its representative on the University Faculty Senate and was one of the select few elected by her fellow Senators to serve on the five-member Executive Committee which meets regularly with the President of the University to discuss academic matters.

Judy's community service was extensive, ranging from her long tenure as director and officer of the American Civil Liberties Union and Jewish Federation of Hawai'i to chairing the education committee of her Neighborhood Board. She touched the lives of so many people through her basic human kindness, her conversational skills, her infectious laugh, and her sense of wonderment at all of life's pleasures. Whenever we needed strength or courage, her love was there to bolster us, even when she herself was debilitated by her illness. She helped us not only through her words, but also by example. She faced life's adversities, including her cancer, with courage and hope. To help others faced with cancer in their lives, she began a film documenting her own experiences in adjusting to life with cancer. Her family has pledged to finish her film.

We miss Judy a lot. We honor her for a life well-lived. We will continue to draw on her strength and example for the rest of our lives and will strive to pass on her life's legacy to future generations of law students.

Slow-Baked, Flash-Fried, Not to be Devoured: Development of the Partnership Model of Property Division in Hawai'i and Beyond

by Calvin G. C. Pang*

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Much thanks to my student researchers Amber Williams and Heather Stanton, and to Helen Shikina for her technical assistance. I am also grateful for the persistent but gentle nudges of my colleagues, particularly Eric Yamamoto, Casey Jarman and John Barkai throughout this project, and to Lisa Ikemoto for her helpful comments. Finally, I wish to acknowledge Amy Kastely, Professor of Law at St. Mary's University of San Antonio School of Law, whose article was the uniform starting point of this work.

I. INTRODUCTION

In 1984, Professor Amy Kastely published her article entitled *An Essay in Family Law: Property Division, Alimony, Child Support, and Child Custody.*[1] Kastely reviewed decisions of Hawai'i's appellate courts to paint the evolving landscape of family law in this state. Her review went beyond a still-life portrayal of the law as it existed in the early-1980's. It also presented a joyride of ideas, a few of which have been recited so often in the intervening thirteen years that younger family law practitioners today might take them for granted.

One such idea is that marriage is "a joint effort, to which each party contributes his financial resources and personal efforts."[2] The concept envisions marriage as a partnership in which each spouse contributes both services and property.[3] It also provides a premise for distributing property should the partnership dissolve.[4]

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[1] *See* 6 U. HAW. L. REV. 381 (1984). I first came across Professor Kastely's article on the eve of my first contested custody case in 1986. A copy of the essay was left in the top drawer of the desk I inherited from another Legal Aid attorney. The discovery was entirely fortuitous and at the time I considered the article to be a godsend. I have since reread it a number of times and continue to find guidance eleven years later.

[2] *Id.* at 391.

[3] *See id.* at 390.

[4] *See id.* at 390. Professor Kastely tied the marital partnership model to community property states. *See id.* at 390 n.52. Community property states begin with the presumption that all earnings from spousal labor during the marriage are the property of the marital "community" or partnership in which each spouse has an undivided one-half interest. Consistent with this notion, property acquired with spousal earnings is also owned equally by both spouses

An egalitarianism underlies this concept of partnership.[5] It assumes that all spousal contributions, whether they come in the form of earning wages, maintaining the household, or providing care to children or other dependent family members, are equally valuable to the vitality of the marital partnership.[6] It promotes a gender neutral assignment and sharing of roles and responsibilities. It recognizes that contributions not only have their own inherent value, but also gain value in how they allow the other spouse to pursue activities that enhance the partnership.[7] It promotes a conceptualiza-

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regardless of whose earnings were responsible for the acquisition. *See* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION 53-55 (1985). Professor Kastely also noted that commentators for equitable distribution systems, like Hawai'i, were already endorsing the partnership model. *See* Kastely, *supra* note 1, at 390 n.52.

[5] *See* Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing With Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 119 (1993). One could argue that the concept of partnership has been with us for a long time although this may not be obvious at first blush. At the start of this country's history, for example, it was still widely held that upon marriage, the legal identity of the woman dissolved into her husband's. Further, the property brought into marriage by the woman belonged to and came under the control of her husband. The "disappearance" of a legal identity, however, belied the fact that women continued to have a vital role in both the marital unit and family, and could expect certain important obligations from her husband. While it was clear she was chiefly responsible for maintaining the domicile and that her role was to provide service, she and her children could expect financial support. Each spouse had clearly defined *de facto* roles: he supported, she served, and it was a division of labor upon which the function of the family, and even the community-at-large depended.

This could be characterized as a partnership in which each spouse made contributions and reaped benefits. The difference between our present day concept of a marital partnership and the earlier concept is that the latter was not equal and sought no ideal of equality. Earlier marital partnerships could generally be considered "symmetrical" (i.e., "he supported, she served") at best.

[6] *See* Sally Burnett Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C. L. REV. 195, 199 (1987).

[7] *See id. See also* Margaret F. Brinig, *Property Distribution Physics: The Talisman of Time and Middle Class Law*, 31 FAM. L. Q. 93, 104 (1997). For example, in a marital partnership where the couple agrees that the husband works while the wife remains at home to care for the home and children, no one could dispute the inherent value of the wife's in-home contributions. But another dimension to the value of such contributions is in how they give the husband the freedom to work and flourish in the marketplace. By developing the expertise and track record to advance, the husband is in a position to bring even greater contributions to the marital partnership and family unit. Some commentators label this enhanced ability to earn higher incomes and seek advancement as "human capital" attributable to the marital enterprise. *See, e.g.*, Cynthia Starnes, *Applications of a Contemporary Partnership Model for Divorce*, 8 B.Y.U. J. PUB. L. 107, 112 (1993).

This idea is usually given much more attention during divorce proceedings when the stay-at-home spouse seeks to recapture her "investment" in the course of seeking an equitable property division and support award. *See, e.g., Cassiday v. Cassiday*, 68 Haw. 383, 716 P.2d 1133 (1986), a pivotal Hawai'i case in which the wife sought an award that adequately reflected the

tion of marriage in which each spouse seeks to contribute to the communal good with the goal of securing joint comfort, safety, and prosperity. It also entitles each spouse to an equitable, if not equal, sharing of the benefits of the marital partnership.[8]

Prior to Kastely's 1984 essay, Hawai'i's Intermediate Court of Appeals ("ICA") had already begun writing opinions on property division incident to divorce, which reflected more than an inkling that it understood and endorsed the partnership concept as described in Kastely's article.[9] Aiming to give trial judges and law practitioners a level of uniformity, stability, clarity or predictability to guide negotiations and structure decisions regarding property division, the ICA began to set forth a number of "general rules" that were consistent with a partnership model of marriage.[10] After the Kastely article, the ICA continued to give shape and structure to the division and distribution of marital assets, ultimately devising a system of "uniform starting points" to direct decisionmaking.[11] In all its decisions, the court applied a model of equal partnership to the marital unit without actually stating so.

Ironically, it took two striking reversals from the Hawai'i Supreme Court, first *Cassiday v. Cassiday*[12] in 1987, then *Gussin v. Gussin*[13] in 1992, to bring "partnership" into the vocabulary of reported decisions. In both decisions, the high court referred specifically to marriage as a partnership and recognized how the ICA had used this analogy to promulgate its rules. However, troubled

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value of her contributions as the supportive stay-at-home spouse. This case will be discussed later in this article. *See infra* notes 256-58, 262-79 and accompanying text.

[8] *See* Sharp, *supra* note 6, at 199.

[9] In fact, Professor Kastely noted that at the time of her article, numerous commentators had already endorsed the partnership model for equitable distribution states. *See* Kastely, *supra* note 1, at 390 n.52.

[10] An example of these rules may be found in *Raupp v. Raupp*, 3 Haw. App. 602, 658 P.2d 329 (1983), in which the Intermediate Court of Appeals announced its first two general rules. The first stated that "it [was] equitable to award each divorcing party the DOM [date of marriage] net value of his or her premarital property." *Id.* at 610, 658 P.2d at 335. The second stated that "it [was] equitable to award each divorcing party the date of acquisition net value of gifts and inheritances which he or she received during the marriage." *Id.* at 611, 658 P.2d at 336. These rules were intended to guide all lower courts in its treatment of property at divorce.

[11] As will be discussed later in this article, the Intermediate Court of Appeals devised a system of uniform starting points to give practitioners and trial judges a uniform place to begin their analysis of how to divide different categories of net market values. *See* discussion *infra* Part III.A. For example, the uniform starting point for dividing the date-of-marriage net market value of all property owned separately by each spouse at the start of the marriage was 100% to the owner spouse and 0% for the non-owner spouse. *See* Hashimoto v. Hashimoto, 6 Haw. App. 424, 428-29, 725 P.2d 520, 524 (1986).

[12] 6 Haw. App. 207, 716 P.2d 1145 (1986), *cert. granted*, 67 Haw. 685, 744 P.2d 781 (1985) *aff'd in part, rev'd in part*, 68 Haw. 383, 716 P.2d 1133 (1986).

[13] 9 Haw. App. 279, 836 P.2d 498 (Haw. App. 1991), *cert. granted*, 72 Haw. 618, 838 P.2d 860 (1991), *vacated*, 73 Haw. 470, 836 P.2d 484 (1992).

that the ICA's "fixed" rules had diminished the discretion of the family court to grant "just and equitable" decisions as required by statute, the high court rejected the ICA's attempts to bring uniformity, stability, certainty and predictability into family court decisions.[14]

While disagreeing with the ICA's methods, the Hawai'i Supreme Court acknowledged the ICA's desire to provide structure and guidance to trial judges. To answer the ICA's concern, the high court, first in *Gussin* then two years later in *Tougas v. Tougas*,[15] offered the partnership model as the conceptual framework for dividing property at divorce.[16] The high court wrote, "our acceptance of the 'partnership model of marriage' provides the necessary guidance to the family courts in exercising their discretion and to facilitate appellate review."[17]

Not satisfied, the ICA responded. Just a few months after *Tougas*, the ICA issued a decision in *Hussey v. Hussey*,[18] in which it created a new framework of guiding principles for dividing property at divorce, drawing partly from the state's commercial partnership statute under Hawai'i Revised Statutes section 425-118(a).[19] These principles are by and large similar to the ICA's earlier efforts which is not surprising in light of the ICA's general adherence to partnership principles long before its *Hussey* decision. At this writing, *Hussey* remains unreversed, and the ICA continues to use it as the launching point for its decisions.[20]

Analogizing marriage to a partnership, more specifically a commercial partnership, was a legal construct largely necessitated by a nationwide turn toward no-fault divorces. The disappearance of fault-based divorces meant easier access to divorces and thus, for dependent homemaker spouses, a loss

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[14] As discussed later in this article, the high court held that any attempt to dictate the division of property by a defined set of rules directly violated the statutory mandate set forth in Hawai'i Revised Statutes section 580-47(a). *See* discussion *infra* Part III.B. This section directs courts to make a "just and equitable" division. The supreme court determined that the ICA's construction of rules, both pre-*Cassiday* and pre-*Gussin*, had the effect of restricting the discretion of trial judges to fashion just and equitable distributions.

[15] 76 Hawai'i 19, 868 P.2d 437 (1994).

[16] *See generally* Lori L. Yamauchi, *Gussin v. Gussin: Appellate Courts Powerless to Mandate Uniform Starting Points in Divorce Proceedings*, 15 U. HAW. L. REV. 423 (1993).

[17] 836 P.2d 498 (Haw. App. 1991), *cert. granted*, 72 Haw. 618, 838 P.2d 860 (1991), *vacated*, 73 Haw. 470, 486, 836 P.2d 484 (1992).

[18] 77 Hawai'i 202, 881 P.2d 1270 (Haw. App. 1994).

[19] *See infra* note 258.

[20] At this writing, the ICA has authored four post-*Hussey* decisions dealing with property division: Epp v. Epp, 80 Hawai'i 79, 905 P.2d 54 (Haw. Ct. App. 1995), Markham v. Markham, 80 Hawai'i 274, 909 P.2d 602 (Haw. Ct. App. 1996), Kreytak v. Kreytak, 82 Hawai'i 543, 923 P.2d 960 (Haw. Ct. App. 1996), and Jackson v. Jackson, 84 Hawai'i 319, 933 P.2d 1353 (Haw. Ct. App. 1997). *See also infra* note 433.

of the financial security that had been part of the promise of marriage.[21] The partnership analogy helped courts, legislatures, and legal scholars reconceptualize the marital unit to justify an equal award of property to the dependent spouse, even if that spouse neither made direct financial contributions to the acquisition of property nor appeared on title.[22] It was also intended to create a sufficiently large award of property to divorcing spouses so as diminish the need for alimony, which had previously been the primary source of post-divorce support, and to facilitate a "clean break" between the parties.[23]

In Hawai'i, modern appellate decisions have tended to support this remedial[24] or redistributive character without specifically stating so. In aggregate, these decisions have maintained a relatively large reservoir of theoretically divisible property,[25] favored categorization of property as "marital," and provided rules, modeled after Hawai'i's commercial partnership statute, that mandate an equal distribution of the marital profits absent valid and relevant circumstances to justify a deviation. Thus, a spouse who chose to remain at home or whose marketplace work opportunities were somehow limited by the rigors of household management and familial caregiving, could still expect to share equally in the financial profits of the marriage.

In recent ICA cases, however, the ICA's response to *Gussin* and *Tougas* have begun to read like "partnership with a vengeance," with an increasing tendency to stay close to the partnership template even where facts might justify some deviation. This article seeks to temper the partnership fervor without extinguishing it, and suggests pausing to see where the model is taking us. The partnership model is seductive in the ideal it holds up to us, but

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[21] *See* Adriaen M. Morse, Jr., *Fault: A Viable Means of Re-injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605, 615 (1996).

[22] *See* HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 118 (1988).

[23] *See* Starnes, *supra* note 5, at 97.

[24] Being "remedial" or "redistributive" means moving away from the former practice of distributing property at divorce based on who held title to property and toward a distribution which reflected the important economic and non-economic ways in which both husbands and wives contributed to the marital unit. *See* Sharp, *supra* note 6, at 198.

[25] A hotchpot approach to property division contemplates a melding of all property, separate, marital and otherwise, into a single pot followed by an equal doling out of the pot's contents to awaiting recipients. While Hawai'i Revised Statutes section 580-47 authorizes Hawai'i courts to divide and distribute "the estate of the parties, real, personal, or mixed, whether community, joint or separate," Hawai'i's approach has not been to create and split a hotchpot. As a matter of practice and law, courts acknowledge and can consider the separate identities of certain properties but are not required, as in other jurisdictions, to restore separate property to the owner spouse. As seen later in this article, recent appellate cases allow parties to totally exclude properties from the marital partnership and thus from division. *See* discussion *infra* Part III.D. However, even here, trial judges are able to look at the amount of the excluded property to help them fashion a fair division of the divisible partnership estate. *See id.*

we should neither presume its perfection nor allow it to bar consideration of other models.

Before looking at the beyond, this article takes a long backward glance at the development of the partnership model in Hawai'i. Decisions in the 1980's and the 1990's, culminating in the *Gussin - Tougas - Hussey* trilogy, represent an accelerated evolution that was preceded by a more gradual but necessary sequence of decisions, events, and movements that began over a hundred years ago. Pieces of the model began to assemble well before the cases of the past thirteen years, and serve to lay the foundation for the model as we now understand it. For one, the process required the labored changes in societal attitudes regarding gender roles and positions, and the enactment of laws to reflect and reinforce these changes.

The more recent flurry of judicial decisions effectively institutionalized the partnership model. This article suggests, however, that the lofty expectations of the model, as noble as they might be, may not comport with the actual expectations of the parties and lead to perceptions that the court "got it wrong." An increasingly stiff application of the partnership template only aggravates this. A reminder is also left with the court to consider whether the model actually achieves what it sets out to do and to "hold to the light" other possibilities including compensatory spousal payments.

In culinary terms, what we have is something that was slow-cooked then, in recent years, flashed-fried, like the meaty uhu[26] or parrot fish, a local favorite served at homes and restaurants. Extending the analogy, the partnership model, as attractive as it is, cannot be devoured with abandon. In the case of the uhu, sharp unbending bones await the unwary. Likewise, the partnership model if applied without thought, can produce results that fall short of our standards for fairness.

Part II provides a brief historical perspective of the partnership concept and describes the convergence of the pieces needed for the emergence of the partnership model in Hawai'i. Part III chronicles the flurry of exchanges between Hawai'i's two appellate courts, a process that forged and institutionalized the model in this state. Part IV looks at how Hawai'i's incarnation of the partnership model projects the court's heightened expectations of marriages and family, as well as, the contributions and obligations that should occur within them. The article concludes with the notion that our courts are

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[26] *Uhu*, or the parrot fish, is an island favorite that is prepared at some Chinese restaurants. One method of preparation is to scald or "flash-fry" it with very hot oil after pouring shoyu and placing chopped green onions, sliced ginger, and cilantro on the fish. However, because of the size and meatiness of the uhu, it is generally insufficient to rely on flash-frying to ensure thorough cooking. Thus, prior to pouring the oil, the fish should be steamed first, a slower process that if done right will result in meat that is flaky and tender.

moving in the correct direction, but must be careful about unduly skewing its vision when applying the partnership model.

II. ASSEMBLING THE PIECES

A. Where Did the Partnership Model Come From?

At the time of Professor Kastely's article, the partnership model had already vaulted into the national psyche. Her reference to marriage as a partnership, which was later cited in Hawai'i appellate decisions, can be traced to a report of the 1963 President's Commission on the Status of Women which stated in pertinent part: "Marriage is a partnership to which each spouse makes a different but equally important contribution. This fact has become increasingly recognized in the realities of American family living."[27]

In 1970, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Marriage and Divorce Act ("UMDA") which, although never adopted in Hawai'i, placed an imprimatur on many of our current notions regarding marriage and how decisions should be made when a divorce occurs. Its prefatory note contained a brief but clear reference to the partnership model as the framework for property division, stating "[t]he distribution of property upon the termination of marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership."[28]

The roots of this now often-cited analogy are actually centuries old, arising not from our Anglo-American common law tradition,[29] but from the Civil

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[27] COMMITTEE ON CIVIL AND POLITICAL RIGHTS, REPORT TO THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, 18 (1963). Professor Kastely noted the committee's reference to marriage as a partnership in her article. *See* Kastely, *supra* note 1, at 390 n.52.

[28] UNIF. MARRIAGE AND DIVORCE ACT 9A U.L.A. 147, 149 (1973). Interestingly, the term "partnership" was not used again in the text of the model act. However, as later discussed, partnership concepts undergirded the section on property division. *See* discussion *infra* Part II.E.

[29] In the broad sense that partnerships represent the melding of disparate parts to form a unit, with each part assuming a role in the function of the unit, our Anglo-American common law tradition provides an odd but ultimately unsatisfying match. As noted by Justice Hugo Black in *United States v. Yazell*, 382 U.S. 341 (1966), the common law determined that upon marriage, husband and wife became one, with the "one" being the husband. *See id.* at 359.

In his commentaries, Blackstone described this merger of husband and wife into a single legal identity:

> By marriage, the husband and wife are one person in law . . . . [T]he very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection and cover she performs everything; and is therefore called . . . a *femme-covert*; and her condition during her marriage is called her coverture.

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765), *quoted in* LENORE WEITZMAN, THE MARRIAGE CONTRACT 1 (1981).

Code of Spain which came to North America by way of Spanish colonialization of Mexico and surrounding areas.[30] The code espoused marriage as a partnership which respected the individuality of each spouse.[31] Unlike Anglo-American common law, the Spanish Civil Code allowed both spouses to retain their premarital legal identities, recognized and valued the individual contributions of each spouse to the marital effort, and extended to each the earned right to share in the assets of the marriage.[32]

Although the common law concept of a merged legal identity contained both the unit-forming and contributory aspects of partnerships it failed to recognize the continuing vitality and individuality of *both spouses* after the marriage, an element essential to our modern understanding of marital partnerships. Homer Clark wrote:

> Anglo-American law has for centuries prescribed rules for the proper behavior of husbands and wives in marriage. These rules were often stated in the abstract. Specifically, the courts have said that the husband has a duty to support his wife, that she has a duty to render services in the home, and that these duties are reciprocal.

1 HOMER CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 423 (2d ed. 1987).

[30] *See* Suzanne Reynolds, *Increases in Separate Property and the Evolving Marital Partnership*, 24 WAKE FOREST L. REV. 239, 249 (1989). The Spanish Civil Code provided the rule of law to Mexico and surrounding areas that were settled and colonized by Spain beginning in the 1700's. After Mexico gained independence in 1821, it used the code as a foundation for governance. Beginning in 1848, regions of Mexico that later formed many of the southwestern and southern border states of the United States, came under the U.S. sovereignty. In these regions, the influence of the Spanish Civil Code persisted in varying degrees thus blending Spanish jurisprudence into the formation of American law. *See* W.S. MCCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES 8 (1982).

[31] *See* MCCLANAHAN, *supra* note 30, at 331.

[32] *See id.* The Spanish Civil Code was subject to the scholarly review of "jurisconsults" who published commentaries on the meaning of sections and phrases within the code. *See id.* at 28. Since it was not uncommon for Spanish judges to rely on these commentaries when deciding cases, the work of jurisconsults significantly influenced the formation of law within the civil code system. *See id.*

Consistent with the code, jurisconsults discussed marriages as partnerships in surprisingly modern terms. Although not in full accord on how partnerships dictated the division of property among spouses, jurisconsults agreed that spouses were partners who worked to benefit the marital community and shared in the fruits of marital labor.

For example, Juan de Matienzo, a preeminent sixteenth century jurisconsult, wrote: "With regard to community of goods the law has regard to the industry and common labour of each spouse and to the burdens of partnership and community." 2 WILLIAM QUINBY DEFUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 75-76 (1943). He added, "just as an express partnership connotes a kind of contract of brotherhood, so too the partnership of husband and wife is called a brotherhood" thereby justifying the "sharing of property acquired during marriage [which] takes effect even though the husband comes to the marriage a rich and wealthy man while the wife is poor and altogether without a dowry." *Id.* at 76-77. He recognized that "[t]he wife can work and take care of and preserve the family property" and that "the poorer spouse by work and labour makes up the deficiency in his or her estate." *Id.* at 77.

Another noted jurisconsult, Joaquin Escriche y Martin (1784-1847), wrote "there is established between the two consorts a partnership, though legal, different from others in that

Its influence persisted when regions that had been under Spanish then Mexican rule came under the sovereignty of the United States.[33] These states became known as "community property" jurisdictions and provided a counterpoint to the common law states.[34] Although community property law never became the majority position in this country,[35] it provided a model for common law jurisdictions seeking to reformulate concepts of marriage, gender status, and spousal property rights. As envisioned by the Spanish Civil Code and the community property states, the concept of marriage as a partnership of two spouses offered a ready alternative to the traditional "husband-centric" model.

Finding a new way to think about property division was partly accelerated by the national movement toward no-fault divorces which began in the 1960's and was itself a result of changing perceptions about marriage, its functions, and its principles.[36] Under the fault system of divorce, punishment of spousal misconduct, even when the conduct had no effect on marital wealth, was considered an appropriate factor in deciding how to divide and distribute

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the acquisitions are the property of each in equal proportions." RICHARD A. BALLINGER, A TREATISE ON THE RIGHTS OF HUSBAND AND WIFE, UNDER THE COMMUNITY OF GANACIAL SYSTEM 43 (1895). Escriche y Martin pointed out that Spanish law construed all acquisitions as equal in each spouse notwithstanding the fact that one spouse did not directly contribute skill, labor or industry to the acquisition. *See id.*

[33] States that originally adopted the community property scheme as set forth by the Spanish Civil Code included Arizona, California, Texas, New Mexico, Florida and Louisiana. Before the end of the nineteenth century, its influences migrated north, affecting Washington and Idaho. *See* BALLINGER, *supra* note 32, at 31-32. At present, only eight states retain the community property system including Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. *See* Susan S. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. MIAMI L. REV. 567, 569 n.10 (1995). Wisconsin, by virtue of its adoption of the Uniform Marital Property Act, is considered by some to be a community property state. However, there is some disagreement on whether the Uniform Marital Property Act is a community property law. *See* JOHN DEWITT GREGORY, THE LAW OF EQUITABLE DISTRIBUTION 1-8, 1-9 (1989).

[34] *See* 2 HOMER CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 177 (2d ed. 1987).

[35] *See id.* at 177 n.10.

[36] In her article, Bea Ann Smith quoted Karl Llewellyn who wrote, "as we turn to review the changes occurring in the ways by which single marriages serve their radiant functions, we shall find also the social changes mirrored, distorted but unmistakable, in the rules and practice on marriage dissolution." Smith also quoted Llewellyn as saying, "[c]hange the practices of marriage, and divorce, after due lag, will be found readjusting to suit." Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 694–95 (1990) (quoting Karl Llewellyn, *Behind the Law of Divorce (pt.1)*, 32 COLUM. L. REV. 1281, 1286 (1932)).

property at divorce.[37] When states began eliminating fault-based divorce, an adjustment was also in order where property was concerned.[38] One obvious reason was that allowing parties to use spousal misconduct as leverage for larger property awards worked against one of the driving forces for no-fault divorces: reducing the acrimony that accompanied fault finding.[39] But to the extent that the move to no-fault divorces was an attempt to catch up with evolving social perceptions and beliefs, so too was the change in property division law a reflection of shifting norms and values.[40]

That the opportunity to rethink property division rules occurred at a time when discussions on gender equality issues were well under way greatly influenced the direction of reform.[41] The notion that equal marital partners were entitled to an equitable share of the marital estate upon divorce, based on a concept of shared efforts and property, seemed to provide the correct fit. Commercial partnership principles, as codified under the Uniform Partnership Act,[42] embodied some of the features of the Spanish Civil Code's marital

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[37] *See generally* Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2311-12 (1994).

[38] *See* JACOB, *supra* note 22, at 117.

[39] *See id.*

[40] Lawrence Friedman in his insightful history of divorce law wrote that the fault-based system of divorce became largely one of mutual consent and collusion, one of winks and knowing nods, that persisted because of two irreconcilable social demands: the genuine demand for divorce and the equally compelling demand for moral legitimacy in relationships of family and sex. *See* Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 662–63, 666 (1984). And thus, no-fault divorce, which allowed consensual (not to say that the consent was always mutual) dissolution minus the collusion, represented a more honest albeit delayed ratification of what had long been desired but became achievable only when an adequate quantum of moral opposition finally crumbled. *See id.* at 664–66.

What social changes created the environment which allowed no-fault divorces to explode on to the scene? Friedman strongly suggests the answer by listing the factors that ultimately allowed no-fault divorce to thrive: the sexual revolution, the fading stigma of divorce, the new role of women and marriage, and the emphasis of personal choice. *See id.* at 667.

Likewise, the change in property law also reflected social changes and could only occur when social realities created the appropriate environment.

[41] The push toward gender equality intersected with the movement away from fault-based divorces. To the extent that women had looked to marriage as a significant if not sole source of support and had therefore been protected by barriers to divorce, increasing access to divorce by eliminating the showing of fault was an acknowledgment that women had the capacity to fend for themselves, marriage notwithstanding. However, whether society actually provided real opportunities for them was another matter. *See generally* WEITZMAN, *supra* note 4, at 357-99.

[42] The Uniform Partnership Act, or UPA, was first adopted by the Commissioners on Uniform Laws in 1914. *See* James W. Boyle, *Preliminary Provisions and the Nature of a Partnership Under the UPA*, 9 HAW. B.J. 83, 84 (1973). In 1972, Hawai'i became the forty-fourth jurisdiction to adopt the UPA. *See id.* at 84 n.6.

partnership and thus provided an additional model for states to look to.[43]

B. Evolving Gender Positions and the Married Women Property Acts

Like other common law states, Hawai'i had to undergo an evolution in its view of gender-based roles and positions within marriage before it could accept the partnership model as a conceptual framework for the division and distribution of property at divorce.[44] It was a progression that took time to develop.

Because of its unique history as an independent kingdom with a strong indigenous cultural heritage which remained largely unaffected by western influences until the nineteenth century, evolution of gender positions in Hawai'i did not initially track the changes occurring in the United States. However, with the arrival of Protestant missionaries in 1820 and the embracing of their mores and values by significant leaders within the kingdom,[45] Hawai'i became

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[43] As seen later in this article, Hawai'i's courts did in fact rely directly on the UPA, codified under Hawai'i Revised Statutes Chapter 425, to develop rules for property distribution upon dissolution of a marital partnership. *See infra* note 258 and accompanying text.

[44] Like many other evolutionary processes, defined stages represent no more than fluid beliefs consisting of remnants from a passing stage, along with newly emerging perspectives seeking articulation and understanding.

Even the often cited mergence of man and women into a single identity favoring the husband may be at best an approximation. To wit, English law historians Pollock and Maitland wrote:

> In particular we must be on our guard against the common belief that the ruling principle is that which sees an 'unity of person' between husband and wife. This is a principle which suggests itself from time to time; it has the warrant of holy writ; it will serve to round a paragraph; and may now and again lead us out of or into a difficulty; but a consistently operative principle it cannot be.

2 FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW 405–06 (2d ed. 1968).

[45] Kamehameha the Great, the father of the Hawaiian kingdom, died less than a year before the arrival of the missionaries. *See* SHELDON DIBBLE, HISTORY OF THE SANDWICH ISLANDS, 124, 139 (1909). His son and heir Liholiho (Kamehameha II) was the sovereign when the missionaries arrived. Although characterized by some as a weak ruler who had an appetite for material goods and alcohol and who could not conform his conduct to the moral codes of the missionaries, Liholiho was considered friendly and occasionally attended public worship. *See* HAROLD WHITMAN BRADLEY, THE AMERICAN FRONTIER IN HAWAII, THE PIONEERS, 1789–1843, 59, 142 (1968). Upon leaving Hawai'i for an ill-fated journey to England in November 1823, Liholiho appointed Kaahumanu, the favorite wife of his father and Liholiho's *kuhina nui* [The *kuhina nui*, although translatable into English as the premier or prime minister, actually held power roughly equal to the king. *See* 1 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM, 1778–1854: FOUNDATION AND TRANSFORMATION (1965)] regent or the *de facto* ruler in his absence. *See id.* at 78, 117. Liholiho, who became ill, did not return until after his death. The throne passed to the then eleven-year-old Kauikeaouli (Kamehameha III). *See id.*

During Kauikeaouli's minority, the regency continued. *See id.* Kaahumanu, who converted to Christianity in 1825, led the kingdom's highest chiefs in lending the prestige and power of

quickly immersed in Anglo-American thought and perceptions.[46]

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their offices to the enforcement of a series of moral reforms. *See* BRADLEY, *supra* note 45, at 169. Despite admonitions against interfering with the political landscape, the missionaries took advantage of the willingness of the kingdom's leaders to put forth a program of moral legislation which "substituted the ideals of rural New England for the folkways of a Polynesian archipelago." *Id.* at 168. Growing commercial interests and the presence of foreigners also pushed the kingdom toward legislation that reflected western influences and values. *See* KUYKENDALL, *supra* note 45, at 120-26.

[46] Prior to the arrival of Protestant missionaries from New England in 1820, the status of women in Hawai'i developed against a frame of reference which differed in significant ways from that experienced by married women on the North American continent. *See* Judith R. Gething, *Christianity and Coverture: Impact on the Legal Status of Women in Hawaii, 1820–1920*, 11 HAWAI'IAN J. OF HIST. 193 (1977). Until 1819 when it was abolished by Liholiho (Kamehameha II), Hawai'i had a *kapu* system which separated men from women in certain aspects of daily life on the assumption that women had a polluting effect. While this might suggest another system that institutionalized the diminution of women, the *kapu* system did not tell the whole story. Women, in fact, could wield great power in pre-missionary Hawai'i, and who was positioned to do so depended less on a binary system of male-female categories, and more on a matrix consisting of male-female, chiefly-commoner groupings. *See* JOCELYN LINNEKIN, SACRED QUEENS AND WOMEN OF CONSEQUENCE–RANK, GENDER, AND COLONIALISM IN THE HAWAIIAN ISLANDS 75 (1990).

The dissimilarity was amplified by the different system of land tenure which existed in pre-missionary Hawai'i. Not a commodity to be bought, sold or owned, land in pre-contact Hawai'i had a deep cultural and religious significance which made stewardship rather than ownership the hallmark of land tenure in Hawai'i. Land was to be cherished and cared for rather than merely used. *See* LILIKALA KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES 25-26, 51 (1992). Yet there was a hierarchical system for control of the land. What was present in Hawai'i prior to the ascension of Kamehameha I was akin to a feudal system wherein land was vested in the *Mo'i* (the King who was the paramount chief) of each island who in turn apportioned control and possession to members of the class of high chiefs or *Ali'i Nui*. Upon the arrival of a new *Mo'i* (either through succession or conquest), all control of land reverted to him or her for reapportionment according to his or her dictates in consultation with a council of *Ali'i Nui*. *See id.* at 51-52.

After Kamehameha united all major islands except for Kauai in 1795, he gave large tracts of land in perpetuity to four *Ali'i Nui* who had contributed to the great *Mo'i's* rise to power. These four were allowed to pass their interest to their descendants. *See id.* Thus began a system of land inheritance and gifting which developed and expanded to bring land into the control of female *Ali'i Nui* and lesser chiefs. *See id.* at 133. In the case of inheritance, it was common for female *Ali'i* to pass their interest to female descendants. *See id.*

The influence of the missionaries and their western view of gender positions within families quickly took hold following their arrival in 1820 and was clearly reflected in laws promulgated by the Hawaiian monarchy beginning in the 1840's. Within a short period of time, the missionary influence, at least as reflected by early Hawaiian legal codes, managed to turn traditional Hawai'i into a "remarkably close copy of mid-19th century New England." Gething, *supra* note 46, at 195.

This stark and rapid shift in the status of women provoked suffragist Susan B. Anthony to remark:

It is therefore helpful to look at some of the developments in the law regarding married women and property leading to the mid-1800's when Hawai'i began its immersion into a more western, specifically Anglo-American jurisprudence.

1. Early developments

Because divorces in most Anglo-American jurisdictions did not become prevalent until the nineteenth century,[47] early developments in spouse-related

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I have been overflowing with wrath ever since the proposal was made to engraft our half-barbaric form of government on Hawai'i and our other new possessions. I have been studying how to save, not them, but ourselves, from disgrace. This is the first time the United States has ever tried to foist upon a new people the exclusively masculine form of government.

Id. at 213.

Two Political Science professors at the University of Hawai'i metaphorized the decision of Protestant missionaries to protect, rescue and ultimately dominate Hawaiian society as a peculiarly patriarchal imposition upon a Hawai'i that had been perceived as the "weak female needing manly protection from a dangerous world." Kathy Ferguson & Phyllis Turnbull, *Masculine Order and Feminine Hawaii: From Missionaries to the Military*, 38 SOCIAL PROCESS 96 (1997). In their article, they discuss how the missionaries (and military systems) in Hawai'i have contributed to and shaped the patriarchal concepts of our day to day society. *See id.*

[47] Professor Lawrence Friedman described this dearth:

England had been a "divorceless society," and remained that way until 1857. There was no way to get a judicial divorce. The very wealthy might squeeze a rare private bill of divorce out of Parliament. Between 1800 and 1836 there were, on the average, three of these a year. For the rest, unhappy husbands and wives had to be satisfied with annulment (no easy matter), or divorce from bed and board (*a mensa et thoro*), a form of legal separation which did not entitle either spouse to marry again. The most common "solutions," of course, when a marriage broke down, were adultery and desertion.

In the colonial period, the South was generally faithful to English tradition. Absolute divorce was unknown, divorce from bed and board very rare. In New England, however, courts and legislatures occasionally granted divorce. In Pennsylvania, Penn's laws of 1682 gave spouses the right to a "Bill of Divorcement" if their marriage partner was convicted of adultery. Later, the governor or lieutenant governor was empowered to dissolve marriages on grounds of incest, adultery, bigamy, or homosexuality. There is no evidence that the governor ever used this power. Still later, the general assembly took divorce into its own hands. The English privy council disapproved of this practice, and, in the 1770's, disallowed legislative divorces in Pennsylvania, New Jersey, and New Hampshire. The Revolution, of course, put an end to the privy council's power.

After Independence, the law and practice of divorce began to change; but regional differences remained quite strong. In the South, divorce continued to be unusual. The extreme case was South Carolina. Henry William Desaussure, writing in 1817, stated flatly that South Carolina had never granted a single divorce. He was right. There was no such thing as absolute divorce in South Carolina, throughout the 19th century. In other Southern states, legislatures dissolved marriages by passing private divorce laws . . . .

property law tended to forge around intact marriages.[48] These developments either dictated how property was held or controlled during marriage, or defined how property was distributed upon the death of a spouse.[49] They remain relevant, however, to the divorce context in the way they reflected and

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North of the Mason-Dixon line, courtroom divorce became the normal mode, rather than legislative divorce. Pennsylvania passed a general divorce law in 1785, Massachusetts one year later. Every New England state had a divorce law before 1800, along with New York, New Jersey, and Tennessee. Grounds for divorce varied somewhat from state to state.

LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 204-05 (2d ed. 1985).

The story was scripted differently in Hawai'i at least during the pre-missionary period. Prior to the arrival of Protestant missionaries from New England in 1820, marriage and divorce customs were described as "quite informal" leading to a fluidity in the formulation and dissolution of unions:

[E]xcept for the people of superior rank, there was very little in the way of ceremony connected with marriage. Divorce consisted merely in quitting and either party was free to terminate the arrangement at will, but there was some sentiment against changing wives frequently . . . . A man might have two or more wives and, at the same time, each wife might have two or more husbands.

Robert C. Schmitt & Rose C. Strombel, *Marriage and Divorce in Hawai'i Before 1870 in* HAWAI'I HISTORICAL REVIEW, SELECTED READINGS 241 (Richard A. Greer ed., 1969).

Missionary influences quickly aligned Hawai'i's marriage and divorce customs with those on the mainland United States, institutionalizing procedures for and restrictions on marriages and divorces. The first Christian marriage among Hawaiians occurred on August 11, 1822. *See id.* In 1826, Hoapili, the governor of Maui who himself had entered into a Christian marriage in 1823, outlawed at will unions and dissolutions on his island. *See id.* In the same year, missionaries laid the foundation for a fault-based process for divorce, passing a resolution which stated "an aggrieved party justly complaining of adultery, or willful desertion . . . may, by consent of the proper authorities, be married to another . . . [and] . . . that the deserting party cannot contract a new marriage . . . until the deserted is known to be fairly divorced." *Id.* at 243.

Under the guidance of Christian convert and *kuhina-nui* Kaahumanu, young Kauikeaouli (Kamehameha III) on September 21, 1829 proclaimed in *No Ka Moe Kolohe* ("Law Against Licentiousness") the following:

If a man sleeps with a woman and his wife be displeased and wish to be separated she may apply to the Governor who shall grant a divorce and they shall be separated. If the wife wish to leave him and marry again she may but the guilty husband shall not be at liberty to marry again until the death of his first wife.

Id.

The king reworded this in 1835, proclaiming that:

[I]f the husband of the adulterous wife, or wife of the adulterous husband desires to be separated for life on account of disgust arising from frequent adultery and bad conduct, let a bill of divorcement be given and let them separate; but the adulterous persons shall by no means marry again till the death of the party forsaken.

Id.

The years that followed saw a broadening in the grounds for divorce. In 1853, jurisdiction over the granting of divorces moved from the governor to the courts. *See id.* at 244.

[48] *See generally*, CLARK *supra* note 34, at 498-524.

[49] *See id.*

institutionalized the incremental shifts in gender roles and positions, explained the framework of property rights and obligations between spouses, and provided a starting point for deciding how such rights and obligations might shift when marriages dissolved. Thus, some of the developments described below should be understood as doctrines, devices or practices that arose outside the divorce context but later became useful in framing the discussion of property division incident to divorce.

As stated earlier, one could generally characterize the early common law framework as being based upon the "unity" of husband and wife with the emergent unit being heavily, if not wholly dominated by the husband.[50]

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[50] In *Peters v. Peters*, 63 Haw. 653, 634 P.2d 586 (1977), the Hawai'i Supreme Court reviewed the history of gender positions within marriages enroute to deciding whether to uphold the then-existing doctrine of interspousal tort immunity. The court quoted from William Blackstone's Commentaries on English Law to describe the merging of the wife's identity into her husband's:

> By marriage, the husband and wife are one person in the law: (1) that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law-french a *feme covert, foemina viro cooperta*; it is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.

Id. at 656, 64 P.2d at 588 n.2 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442 (1765)).

Interestingly, the quote mixes two images. The first is the pure merging of legal identities into a unit that is essentially the husband. Whether there was simply a death of the woman's identity or a mere suspension during the marriage seems moot; the effect was the same at least during the course of the marriage. The second image is that of the husband serving as a guardian and protector, allowing the woman to maintain a separate albeit inferior identity characterized by weakness, dependency and vulnerability. The latter has been argued by some as a counter against the generally accepted notion of "unity" between husband and wife. Pollock and Maitland, for example, viewed the "unity" concept as one which reduced women to "a thing or somewhat that is neither thing nor person." In their view, what really existed was an "exaggerated guardianship" which at least preserved a woman's personhood. *See* POLLOCK & MAITLAND, *supra* note 44, at 405–06. Others have responded that requiring husbands to save their wives from their assumed incompetence did not place women in a significantly better position and dismiss it as "(un)convincing apologia." *See* WILLIAM Q. DEFUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY LAW 4 n.14 (2d ed. 1971).

Regardless of which model we accept—the merged identity model, the guardianship model or a hybrid—common law property doctrines had a decidedly protective or paternalistic attitude toward women. For example, the concept of "dower", or the legal right or interest that a wife acquired by marriage in the estate of her husband, was developed to protect a wife from destitution in the event of widowhood. *See* LOUIS CANNELORA, SUMMARY OF THE HAWAI'I LAW OF DOWER AND CURTESY AND COMMUNITY PROPERTY 1 (1971). The dower, which under common law became quantified as one-third of all lands owned by the husband during the

Property rules relating to spouses reflected this, giving to the husband dominion over the property brought into the marriage by the wife or acquired by her during the marriage.[51] In the rare instances where a marriage was

coverture or marriage, was protected to the extent that the husband could not alienate it by selling lands during the marriage without first receiving the consent of the wife by way of joining in the conveyance. As an alternative, the husband could will to his wife an equivalent life estate in lands, thereby skirting the dower. *See* ELIZABETH BOWLES WARBASSE, THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN 1800–1861, 10–11 (1987).

[51] Pollock and Maitland roughly summarized the final shape that common law took. A few sentences from that summary are as follows:

> 1. In the lands of which the wife is tenant in fee whether they belonged to her at the date of the marriage or came to her during the marriage, the husband has an estate which will endure during the marriage, and this he can alienate without her concurrence. If a child is born of the marriage, thenceforth the husband as tenant of the curtesy has an estate which will endure for the whole of his life, and this he can alienate without the wife's concurrence. The husband by himself has no greater power of alienation than is here stated; he can not confer an estate which will endure after the end of the marriage or (as the case may be) after his own death. The wife has during the marriage no power to alienate her land without her husband's concurrence.
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> 2. Our law institutes no community even of movables between husband and wife. Whatever movables the wife has at the date of the marriage, becomes the husband's, and the husband is entitled to take possession of and thereby to make his own whatever movables she becomes entitled to during the marriage, and without her concurrence he can sue for all debts that are due to her.
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> 3. Our common law—but we have seen that this rule is not very old—assured no share of the husband's personality to the widow. He can, even by his will, give all of it away from her except her necessary clothes, and with that exception his creditors can take all of it. A further exception, of which there is not much to be read, is made of jewels, trinkets and ornaments of the person, under the name of *paraphernalia*. The husband may sell or give these away in his lifetime, and even after his death they may be taken for his debts; but he cannot give them away by will.
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> 4. During the marriage the husband is in effect liable to the whole extent of his property for debts incurred or wrongs committed by his wife before the marriage, also for wrongs committed during the marriage. The action is against him and her as co-defendants.

POLLOCK & MAITLAND, *supra* note 44, at 403-05.

As described in the *Peters* decision, Hawai'i codified this "ancient but unvenerated concept of the female marriage partner's legal subjugation" in 1846 as part of Act 2, 1 Statute Laws of His Majesty Kamehameha III. In relevant part, the statute read:

> The wife, whether married in pursuance of this article or heretofore, or whether validly married in this kingdom or in some other country, and residing in this, shall be deemed for all civil purposes, to be merged in her husband, and civilly dead. She shall not, without his consent, unless otherwise stipulated by anterior contract, have legal power to make contracts, or to alienate and dispose of property—she shall not be civilly responsible in any court of justice, without joining her husband in the suit, and she shall in no case be liable to imprisonment in a civil action. The husband shall be personally responsible in damages, for all the tortuous [sic] acts of his wife; for assaults, for slanders, for libels and for consequential injuries done by her to any person or persons in this kingdom.

Peters, 63 Haw. at 657, 634 P.2d at 589 n.3 (citing Act 2, 1 Statute Laws of His Majesty Kamehameha III).

dissolved, property division generally depended on who held title to the property or contributed the funds to acquire it. It was essentially an owner-driven distribution.[52] While this appeared to offer relief to the wife by letting her recoup her separate property, it actually favored husbands, in light of the general incapacity of married women at the time to hold or acquire property.[53] Many wives simply had little to recoup.

2. Getting around legal disabilities of the common law

In the seventeenth century, England's courts of chancery or equity[54] began to uphold devices created to reverse or circumvent the legal disabilities suffered by married women.[55] For example, wealthy fathers seeking to preserve the right of property management and use for their daughters resorted to trusts as a way of bypassing their sons-in-law.[56] This gave the daughter a

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[52] *See* JACOB, *supra* note 22, at 113; BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY 4 (2d ed. 1994); *see also* RICHARD H. CHUSED, PRIVATE ACTS IN PUBLIC PLACES, A SOCIAL HISTORY OF DIVORCE IN THE FORMATIVE ERA OF AMERICAN FAMILY LAW 64 (1994).

[53] *See* JACOB, *supra* note 22, at 113. This, in large part, caused alimony to become the primary form of post-divorce support. Support of the ex-wife was considered, at least until the eighteenth century, to be an extension of the husband's duty to support during marriage. The heritage for this view of alimony came from England where absolute divorces were prohibited until the mid-1800's. English courts, however, were authorized to grant divorce *a mensa et thoro*, which amounted to separations short of legal dissolution. The support which the husband was ordered to pay his estranged wife was considered to be no more than what he was expected to do since the marriage was still technically intact. *See* CLARK, *supra* note 34, at 220–21.

[54] England's equity courts were a response to the strictures of the common law. Individuals who were unable to gain justice through the formal application of common law could theoretically approach the king, who was considered the "fountainhead" of justice, for an alternative decision based on considerations of fairness. The original arbiters of equity were the king's secretary known as the chancellor. Early chancellors were clergymen who were more familiar with church or canonical teachings than the common law. Their rulings and grants of relief were therefore based on moral or ethical grounds. As the demand for such rulings increased, a separate court system, consisting of courts of chancery or equity, was devised to consider and grant equitable relief. *See* GEORGE L. CLARK, EQUITY–AN ANALYSIS AND DISCUSSION OF MODERN EQUITY PROBLEMS 3-4 (1919).

[55] *See* CLARK, *supra* note 34, at 501. It should be pointed out that under English common law, unmarried women enjoyed legal property rights far in excess to that of married women. For example, they could contract, hold title, and bring litigation. However, even these rights paled against those held by the men of the times. *See id.* at 498.

[56] If the father had fully gifted the property to the daughter, the son-in-law would have assumed control over it. While the property was not his in title, the husband exercised control by virtue of being the "guardian" of the marital estate, a part of which was the property brought into the marriage by the wife or acquired by her by gift or inheritance during the marriage. The control would continue through the marriage, and through the life of the husband if a child was born of the marriage.

modicum of control and use of property, often in the form of land, without making an outright gift to her.[57] By separating use and control from title, these trusts effectively side-stepped the common law rule which enabled a husband to control property held in his wife's name.[58] Challenges to such trusts were rejected by the equity courts,[59] on the grounds that the donor of the property (the father in the above example) had as an incident of ownership, the absolute right to dispose of it upon conditions and limitations of his choosing.[60] The endorsement of these trusts by the chancery courts created separate estates of equity for married women, estates within which women were able to exercise legal rights of control and use that the common law took from them.[61]

American courts were either slow or inconsistent[62] in following the lead of England's chancery courts, thereby leaving it to state legislatures to develop statutory reforms.[63] And they acted.[64] Struck by a wave of public feminist

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A thorough treatment of how separate estates for women evolved in England using devices such as trusts is found in MARYLYNN SALMON, WOMEN AND LAW OF PROPERTY IN EARLY AMERICA 84-87 (1986).

[57] *See id.* at 85-86.

[58] *See* JACOB, *supra* note 22, at 107.

[59] Such trusts were not recognized by common law courts; only courts of equity provided a supportive forum. *See* WARBASSE, *supra* note 50, at 30.

[60] *See* 2 JAIRUS WARE PERRY, A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES 1111 (7th ed., revised and enlarged by Raymond C. Baldes, 1929).

[61] *See* CLARK, *supra* note 34, at 502.

[62] Marylynn Salmon recounted several reasons why these doctrines and practices emanating from England's chancery courts failed to catch on rapidly in America. *See* SALMON, *supra* note 56. First, several colonies simply chose not to duplicate England's chancery court system and such colonies often failed to adopt equitable rules on women's separate estates. While some common law courts tried to handle questions of equity, they were hampered by a lack of tradition in equity law. *See id.* at 82. Second, the English model was itself still undergoing transition and refinement. Transferring those developments across the Atlantic was understandably slow given the primitive communication and transportation modes of the time. *See id.* at 88. Third, the movement in England arose from the country's moneyed classes, those who had adequate property for the creation of separate estates to be a concern. Given the far less endowed populations in America, the ground for the movement to develop was less fertile. *See id.* Finally she suggested that the difficulties of transplanting feudal English practices into an increasingly commercial America may have accounted for the hesitation. For example, tying large parcels of land into a trust made them either unavailable to be mortgaged against, or inaccessible to creditors of the husband, the marriage partner who was far more likely to be invested in commercial pursuits. *See id.* at 93.

[63] *See* CLARK, *supra* note 34, at 502.

[64] Elizabeth Warbasse described how in the 1820's a movement within state legislatures toward statutory codification became a prelude to the grand reforms reflected in the Married Women's Property Acts. *See* WARBASSE, *supra* note 50, at 57. The codification movement, as described by Lawrence Friedman, grew out the of the notion that the common law was no longer an adequate system and that the European practice of codification offered a better model:

sentiment in the nineteenth century, states began to enact such remedies which collectively came to be known as the Married Women's Property Acts.[65] Although these laws were not intended to and did not by themselves bring women fully to the table with men, they at least helped to institutionalize the notion that married women could legally own and control property.

Popular acceptance of this notion was a building block in bringing common law states closer to the partnership model already embraced by the community property system. Although these laws took on different incarnations depending on the enacting state, one unifying theme was that certain types of property were to be deemed the wife's separate property, subject at least theoretically to her control. More specifically, these laws reserved for married women increased dominion over property they brought into the marriage, as well as, property they acquired during marriage as gifts and inheritances, or in some cases, through earnings.

3. Hawai'i's adoption of the common law and the enactment of the Married Women's Property Act

Even before the statutory adoption of English common law in 1892,[66]

> The smell of feudalism still oozed from the pores of the common law. To men like Jeremy Bentham and his followers in England, and David Dudley Field, Edward Livingston, and others in America, the common law was totally unsuited for an Age of Reason. It was huge and shapeless. Common-law principles had to be painfully extracted from a jungle of words. "The law" was an amorphous entity, a ghost, scattered in little bits and pieces among hundreds of case–reports, in hundreds of different books. Nobody knew what was and was not law. Why not gather together the real principles of law, put them together, and build a simple, complete and sensible code? The French had shown the way with the Code Napoleon. Louisiana was at least something of an American demonstration.

FRIEDMAN, *supra* note 47, at 403.

Warbasse opined that the move to codify the common law necessitated a critical attitude toward the common law thereby creating an environment for creative thought and reform. *See* WARBASSE, *supra* note 50, at 57. And although the codification movement did not ultimately supplant the common law, it did result in the reduction of many legal principles to writing. This process created opportunities to rethink these principles and to make changes as the laws were being written. *See id.* at 63-72.

[65] *See* CLARK, *supra* note 34, at 502–04.

[66] This enactment is presently codified under Hawai'i Revised Statutes section 1-1. It reads:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii 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. ANN. § 1-1 (MICHIE 1995).

Hawai'i's developing case law reflected a clear patriarchal bent. For example, in *Hookii v. Nicholson*,[67] the Supreme Court of the Hawaiian Kingdom found that "[t]here [could] be no question as to the general principle of law, that the husband [was] exclusively entitled to the society and service of the wife, and that no contract made with the wife in contravention of, or affecting the rights of the husband [was] valid without his consent."[68] In *Maa v. Administratrix of the Estate of Kalua*,[69] the supreme court looked to common law authorities to support its holding that if a husband reduced his wife's *choses in action* (the right to pursue repayment of a personal loan, in this case) to possession, said choses became his entitlement and not his wife's.[70] Likewise, in *Riemenschneider v. Kalaehao*,[71] the court found that a carriage and three horses purchased by a married woman out of the proceeds of the sale of land belonging to her, were nonetheless the property of her husband by virtue of

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The Anglo-American common law actually came to Hawai'i well before the statutory adoption of common law principles in 1892. In 1844, John Ricord was appointed attorney general by Kauikeaouli (Kamehameha III). *See* KUYKENDALL, *supra* note 45, at 236. Under Ricord's leadership, an expanded formal judiciary developed as a response to a growing number of cases that, in other countries, would have been disposed of by courts of equity, probate or admiralty. *See id.* at 242. Under Ricord's advice and with his help, Kekuanaoa, then governor and judge of Oahu, assumed jurisdiction of such cases and began deciding them on principles of American and English jurisprudence. *See id.* As the only trained lawyer in the kingdom, Ricord was called upon to guide Kekuanaoa's decisions which he did by way of written opinions that drew heavily on Anglo-American common and civil laws. *See id.*

[67] 1 Haw. 467 (1856). This case was included in the initial compilation of reported decisions issued between 1847-1857 and originally published in 1857.

[68] *Id.* at 468. The case was based on a challenge by working women, most of whom were married, against the unfair treatment of their employer, merchant tailor C.H. Nicholson. *See id.* at 467-68. The decision reflected the fact that women were already working outside the home and were daring enough to challenge perceived mistreatment by their male employer. The plaintiffs' complaint was largely motivated by decreased wages brought on by Nicholson's introduction of a sewing machine which curtailed the need for hand sewing. *See id.* at 469-70. The women sought a nullification of their employment contract with Nicholson, arguing that their husbands had not specifically consented to their employment contract. *See id.* at 468. The court rejected the argument by inferring consent. *See id.* at 469.

[69] 4 Haw. 201 (1879).

[70] *See id.* at 203-05. The wife, Maa, was married to Kekai at the time that she made a $75 loan to Kalua in 1858. *See id.* at 202. Maa argued that the money was her property and in her possession when she made the loan, and that she was therefore individually entitled to recover the debt. *See id.* In her lawsuit, she sought to avoid the argument that the right to sue belonged to Kekai who died subsequent to the making of the loan. *See id.* The court apparently found that Kekai had in fact reduced all of Maa's money "to his possession" (even though the money was in her hands) by virtue of the marriage and that any loan she made was therefore as her husband's agent and not in her own right. *See id.* at 204. He (or his estate) was thus entitled to repayment and not Maa. *See id.* at 204-05.

[71] 5 Haw. 550 (1886).

the marriage.[72] In *Mutch v. Holau*,[73] the high court even found the husband's control to extend premaritally and voided an engaged woman's premarital (but post-betrothal) transfer of real property to a brother, calling the conveyance a "surreptitious" circumvention of the prospective husband's equitable rights.[74]

Conversely, the court upheld a husband's duty to support his wife as an incident of the marriage even beyond a decision to separate. For example, in *Luka v. Poohina*[75] and *Kekoa v. Borden*[76] the court stated the general rule regarding a married woman's right to necessaries from her husband, and that a wife could contract for necessaries as an agent of her husband. Alimony was considered an extension of the husband's duty to support during marriage, "a consequence of the merger of the legal existence of the wife, in that of the husband."[77]

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[72] *See id.* at 551-53. Interestingly, this was a case between the estate of the wife's first husband (William Harbottle) and the wife's second husband (William Kalaehao). *See id.* at 550. Kalaehao was charged by the deceased's estate for the wrongful conversion of the subject carriage and horses. *See id.* Although the opinion is not clear on this point, the facts suggest that Kalaehao, as the second husband, insisted on the control of the subject horses and carriage in direct challenge to the estate of Harbottle. *See id.* The conflict would not seem unusual given the norms of the time. The issue was reduced to which husband had control, the resolution of which depended on whether the property was the wife's beyond the death of her first husband thereby making it available for control by the second husband. The court found that the property belonged to the wife and was therefore subject to the control of her current husband. *See id.* at 552.

[73] 5 Haw. 316 (1885).

[74] *See id.* at 317. It is not clear from the opinion if the betrothed couple ever married. However, there is allusion to the birth of a child. *See id.*

[75] 5 Haw. 695 (1876). In this case, the wife separated from her husband on account of his adultery. *See id.* Subsequently, she allegedly engaged in adultery and the question was whether her misconduct barred her from further support from her husband. *See id.* at 695-96. The court determined that the "notoriety" of her adultery had to be so severe that it withdrew her from the protection of the coverture. *See id.* at 697. Otherwise, husband was not entitled to an instruction that his wife's adultery served as a defense to his duty to provide necessaries. *See id.*

[76] 5 Haw. 23 (1883). This case posed the interesting situation of a wife's attorney seeking payment of fees from a husband on the theory that the wife's attorney fees were "necessaries". *See id.* at 23. The attorney had defended the wife in a criminal action based on her desertion of her husband. *See id.* at 24.

The court ruled that had there been misconduct by the husband which justified either the wife's separation or divorce from him, she could have brought the appropriate action and requested an award of alimony or post-separation support. *See id.* at 24. However, the case at bar failed to present such facts thus resulting in a denial of the attorney's petition. *See id.* at 24-25.

[77] Kaelemakule v. Kaelemakule, 33 Haw. 268, 270 (1934). This was part of a larger quote which read in pertinent part:

> The common law imposes upon the husband the duty to support his wife so long as she is free from conjugal fault and our statute recognizes such duty. Speaking of this

The first attempts to codify rules relating to marriage and property adopted and further institutionalized this patriarchal bent. The Civil Code of the Hawaiian Islands was passed in 1859 and included a section which read "[t]he wife, whether married in pursuance of this article or heretofore, or whether validly married in this kingdom or in some other country, and residing in this, shall be deemed for all civil purposes, to be merged in her husband, and civilly dead."[78] As a result, she could not, as a general principle, enter into contracts or dispose of property without her husband's consent.[79] At the same time, he was personally responsible for damages resulting from tortious acts by the wife.[80] Upon marriage, the law made the husband the "virtual owner" of all movable property belonging to the wife before the marriage as well as movable property acquired during the marriage.[81] Further, he could control and enjoy the profits of the wife's fixed or immovable property which she either owned prior to the marriage or acquired during the marriage.[82] His duty to support his wife was also affirmed in the Hawaiian Civil Code.[83]

By 1888, however, the move to reverse the legal disabilities of married women came to the Hawaiian Kingdom through the adoption of Hawai'i's incarnation of the Married Women's Property Act.[84] These laws were described as "destroy[ing] the common law fiction of the unity of husband and

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common–law duty it was said by Chief Justice Brickell in *Smyley v. Reese*, 53 Ala. 89, 96: "The common law compelled him" (the husband) "to maintain his wife—to supply her with necessaries suitable for her situation, and corresponding with his social position, and the degree of his fortune. If the husband neglects this duty the wife may on his credit, against his will, obtain necessaries, and he will be liable for them. In such case she is presumed to have authority to bind him, but the presumption is made only to enforce a performance of duty. Schouler's Dom. Rel., 85; 2 Kent. 128; Tyler on Inf. and Cov., 340. This duty of the husband did not arise from, nor was it solely dependent on, the common–law principle, that marriage was a gift of the husband of the wife's estate—that he thereby became vested with an ownership qualified or absolute, of her property, and rights of property. The duty was as obligatory on the husband, to whom the wife brought no portion, as on him who had received the largest fortune. It was a consequence of the merger of the legal existence of the wife, in that of the husband."

Id.

[78] The Civil Code of the Hawaiian Islands, § 1287 (1859).

[79] *See id.*

[80] *See id.*

[81] *See id.* § 1286.

[82] *See id.*

[83] *See id.*

[84] These laws were codified as Chapter 175, §§ 2993 - 3013 of the Revised Laws of Hawaii, 1925.

wife."[85] Under these laws, married women in Hawai'i retained their separate real and personal property throughout the marriage, free from the control of their husbands.[86] Among other things, they could enter into contracts,[87] be appointed "executrix, administratrix, guardian or trustee",[88] sue and be sued individually,[89] work or transact business on an account separate from their husbands,[90] and have their separate property protected from attack by their

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[85] First Nat'l Bank v. Gaines, 16 Haw. 731, 733 (1905).

Prior to 1888, Hawai'i's statutes supported the common law tradition of giving to the husband dominion of all property, as well as, the concomitant obligation to support. Section 1286 of the Compiled Laws of the Hawaiian Kingdom (1884) delineated this control and obligation:

> § 1286. The husband, whether married in pursuance of this article, or heretofore, or whether validly married in this Kingdom or in some other country, and residing in this, shall be accountable in his own property, for all the debts contracted by his wife anterior to, and during marriage; to any of which debts, he may set up the same defense she could have interposed had she remained sole. The husband shall be bound in law to maintain, provide for, and support his wife during marriage, in the same style and manner in which he supports and maintains himself. The husband shall, in virtue of his marriage, and in consideration of the responsibilities imposed on him by law, be the virtual owner, except otherwise stipulated by express marriage contract, of all movable property belonging to his wife anterior to marriage, and of all movable property accruing to her after marriage; over all of which movable property he shall, unless otherwise stipulated by contract, have absolute control for the purposes of sale or otherwise, and the same shall be equally liable with his own for his private debts. The husband shall in virtue of his marriage, unless otherwise stipulated by express contract, have the custody, use and usufruct, rents, issues and profits of all property of a fixed and immovable nature, belonging to his wife before marriage, or accruing to her after marriage; and he may, with her written consent, rent or otherwise dispose of the same for any term not exceeding the term of his natural life: provided, that in case his wife shall first die, the husband legally married as aforesaid, shall cease to have control over the immovable and fixed property of his wife, and the same shall immediately descend to her heirs as if she had died sole, unless there happens to be legitimate issue of the marriage within the age of legal majority; in which case the husband shall continue to enjoy a *curtesy* in said immovable or fixed property, until such issue shall attain majority, when the same shall descend to the heir or heirs of the body of the wife. The immovable and fixed property of the wife shall not be liable to be sold for the payment of the husband's debts, whether contracted in his own behalf solely, or in support of or for the use of his wife after marriage. But such immovable and fixed property may be legally sold on execution to satisfy the debts contracted by the wife before marriage, if no property of the husband be found to satisfy the same.

Compiled Laws of the Hawaiian Kingdom, § 1286 (1884).

[86] *See* Revised Laws of Hawai'i § 2993 (1925) (current version at HAW. REV. STAT. ANN. § 572-25 (Michie 1997)).

[87] *See id.* § 2994 (current version at HAW. REV. STAT. ANN. § 572-22 (Michie 1997)).

[88] *Id.* § 2996 (current version at HAW. REV. STAT. ANN. § 572-26 (Michie 1997)).

[89] *See id.* § 2998 (current version at HAW. REV. STAT. ANN. § 572-28 (Michie 1997)).

[90] *See id.* §§ 2995 and 3003, 1925 Revised Laws of Hawai'i 1071, 1072.

husbands' creditors.[91]

Even under these laws, however, a wife's dominion was not unfettered. For example, a significant limitation on a married woman's ability to control her property was that she could not validly sell or mortgage her real estate without the written consent of her husband.[92] Likewise, she could not make contracts for personal service without her husband's written consent.[93] With time, some of these limitations disappeared.[94]

C. Embracing the Partnership Mode: Hawai'i as a Community Property State—A Four Year Fling

With the evolution of gender roles well underway, Hawai'i in the 1940's was positioned to consider adopting a community property scheme that, by its general reliance upon a model of equal partnership between spouses, would further acknowledge and institutionalize women's increasingly independent and powerful place in society and the family. Hawai'i took that step in 1945 when it enacted legislation to become a community property state. In the Community Property Act of Hawai'i of 1945, Hawai'i's territorial legislature recognized "the partnership interests of the husband and the wife in accumulations subsequent to marriage."[95] In passing the bill out of committee, the territorial house judiciary committee wrote:

> In theory the marital relationship in respect of property acquired during its existence is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity. The avowed object and purpose of the community system is to place husband and wife on an equal footing as to their property rights. The community estate is created by law as an incident of marriage. The property owned by each spouse before marriage remains his or her separate estate, while all that is acquired during coverture otherwise than by gift, descent, or devise becomes community property.[96]

In reviewing the community property law, the Hawai'i Supreme Court affirmed the notion that "the wife's labors in the home are substantially commensurate with the efforts of the husband in marital economic gain."[97] It

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[91] *See id.* § 2999 (current version at HAW. REV. STAT. ANN. § 572-23 (Michie 1997)).

[92] *See id.* § 2993 (this prohibition was repealed in 1925).

[93] *See id.* § 2994 (this prohibition was repealed in 1945).

[94] *See, e.g., supra* notes 92-93 and parenthetical explanations. However, the "revolution" was far from over. In the decades that followed, progress was slow, hard fought and incremental. *See infra* notes 107, 118, 122, 123 and accompanying text. The struggle continues today.

[95] Bulgo v. Bulgo, 41 Haw. 578, 586 (1957).

[96] *Id.*

[97] *Id.* This review of the community law system actually occurred seven years after the

traced the Spanish origins of the community property system noting that "[t]he basic idea of the Spanish law was that upon marriage the husband and wife became partners as to subsequent 'gains and acquests' with the profits of the partnership to be divided equally upon its dissolution."[98] The court observed that while each spouse retained ownership of his or her separate property, "each [spouse] unselfishly and unhesitantly had at heart the success and well-being of the marital union and that, accordingly, the fruits and income of all property of each naturally were to be devoted to the benefit of the marital union."[99]

Even while accepting the precepts of equal partnership, however, Hawai'i's incarnation of community property tended to favor the husband, at least in its paternalistic view of him as the "guardian of the coverture." For example, the husband controlled the management of all community property that did not stand in the wife's name.[100] He also maintained the obligation to support his wife and children.[101] Interestingly, the legislature also retained its laws on dower and curtesy, thereby keeping in place the concept that a husband's earnings could be deemed to belong to him rather than to the marriage except for his general obligation to support his family. Reconciling this with the community property notion that the labors and fruits of the marriage belonged to the partnership and not to the individual spouses posed a difficult tension.

The new scheme and the paradigm shift it presented was nonetheless important enough to move the territorial bar to educate itself and the public on what it all meant. At the suggestion of the territorial attorney general, the bar president commissioned a panel of attorneys to review and analyze its provisions.[102] From the ensuing report came a series of seven articles that ran

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system had already been repealed. The court's review was necessitated by the facts of the case which concerned holdings and liabilities subject to the territorial community property laws in effect between 1945-1949. In this case, the appellant argued that the community property law resulted in an unconstitutional taking of his property to the extent that it mandated an equal split of income arising from property that appellant owned solely and separately before the April 12, 1945 effective date of the law. *See id.* at 580. The court rejected appellant's argument, noting that husbands, even under the community property scheme, maintained control over the community's income during the marriage. *See id.* at 587.

[98] *Id.* at 581.

[99] *Id.* at 581-82.

[100] 1945 Haw. Sess. Laws 311, 314-15 (repealed 1949).

[101] *Id.* § 12391.13(h) (repealed 1949).

[102] C. Nils Tavares, then Attorney General for the Territory of Hawai'i, asked the Bar Association of Hawai'i to provide a summary and analysis of the community property law. Heaton Wrenn, who was president of the bar, appointed Livingston Jenks, Eugene H. Beebe and Eugene K. Kai to perform the study with the additional charge that it be written in a form that could be easily understandable by the public. The report, entitled "Hawai'i's Community Property Law, An Analysis by a Special Committee of the Bar Association of Hawai'i," was completed on June 13, 1945 and included a section of anticipated questions and answers.

in the *Star Bulletin* in June 1945.[103] In addition, at the prompting of concerned Honolulu attorneys, the University of Hawai'i Board of Regents voted to recommend action to seek a property law expert from the mainland to give a series of lectures on community property.[104]

Only four years after passage, however, the community property law scheme was repealed. During the 1949 legislative session, the primary motivation for adopting the community property scheme became clear. Far from seeking some modicum of equality, it was evident that the Community Property Act had been adopted primarily to take advantage of federal tax provisions which permitted husbands and wives to split incomes in community property jurisdictions; when the Internal Revenue Code was amended in 1948 to permit spouses to split income even in non-community property states, Hawai'i's "need" to enact a community property law evaporated.[105]

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[103] These articles, entitled "Facts on Community Property Law - Analyzed for Information of the Public", ran in the *Honolulu Star Bulletin* on June 11, 1945 through June 14, 1945 and June 18 through June 20, 1945. These articles summarized the key provisions of the community property scheme and, using a question and answer format, explained the practical effects of the new law.

[104] *See Regents Recommend Lecture Series on New Property Law*, HONOLULU STAR BULLETIN, June 12, 1945, at 3.

[105] *See* JOURNAL OF THE SENATE, TWENTY-FIFTH LEGISLATURE OF THE TERRITORY OF HAWAI'I, 1579 (1949).

Legislative committee reports *prior* to the passage of the community property laws were much more subtle in suggesting tax advantages as the prime if not sole reason for adopting a community property system in the territory. A casual reading of these reports suggests that while tax considerations were on the minds of the drafters, they did not constitute the sole or even the most important reason. Take, for example, this paragraph from the territorial senate judiciary committee's report:

> The changes in property rights would be brought about by the bill are recommended because they recognize the partnership interests of the husband and wife in accumulations subsequent to marriage. Eight states have community property laws. In community property jurisdictions married couples are able to divide their incomes for income tax purposes, with resulting savings.

AN ACT RELATING TO TAXATION, AND AMENDING §§ 5151 AND 5252 OF THE REVISED LAWS OF HAWAI'I 1945, JOURNAL OF THE SENATE, TWENTY-THIRD LEGISLATURE OF THE TERRITORY OF HAWAI'I, 931 (1945).

It should be noted that the decision to adopt the community property scheme in order to benefit from then existing federal tax provisions was not unique to Hawai'i. Nebraska, Michigan, Oklahoma, Oregon and Pennsylvania were likewise motivated. *See* WILLIAM Q. DEFUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 89 (1971). In addition, community property bills were introduced but failed to pass in Alabama, Illinois, Indiana, Massachusetts, New Hampshire and Wisconsin. *See Note, Epilogue to the Community Property Scramble: Problems of Repeal*, 50 COLUM. L. REV. 332, 332 n.4 (1950).

The specific tax advantage arose from provisions allowing each spouse in a community property state to file a separate tax return declaring as income one-half of the marital community's total income even if the income was earned by only one spouse (usually the

Perhaps more telling was a Senate Judiciary Committee comment which described a clash between what the law seemingly achieved and what the community wanted or was ready for: "The institution of community property is foreign to the history and mores of Hawai'i. If community property were to continue, it would be necessary to revise the present provisions of Chapter 301A extensively and perhaps to re-examine the laws relating to dower and curtesy, joint tenancy, and other laws."[106] Thus, while the language and the concepts of the modern partnership model were being used, Hawai'i history ultimately records a lukewarm regard for them.[107]

Interestingly, Hawai'i law still contains a section on community property which was enacted to guide the disposition of property that remained "community" after the 1949 repeal.[108] This vestige of the community property law, which was passed concomitantly with the 1949 repeal, has offered a prototype for the partnership model for almost fifty years. However, restrictions on its application and its obscurity since the repeal of the community property scheme severely limited its influence on more recent developments of property division. Nonetheless, the four year experiment may well have had some impact on local sensibilities in the years that immediately followed.

One feature of the community property system in Hawai'i foreshadowed property division incident to divorce as it exists today. Unlike some

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husband). By halving the community income, each spouse was able to get into a lower tax bracket. While this did not yield much benefit to a lower or moderate income couple, its advantages were considerable for those with high incomes. *See* DEFUNIAK & VAUGHN, *supra* this note, at 89.

Changes in the Internal Revenue Code in 1948 ended the movement of states to the community property system, a migration that began in 1939 when Oklahoma experimented with an elective system which allowed married couples to decide whether to subject themselves to community property principles. *See id.* at 90-91.

[106] DEFUNIAK & VAUGHN, *supra* note 105, at 90-91.

[107] Community property and its underlying partnership principles served as a counter against patriarchal order. By asserting that community property was "foreign to the history and mores of Hawai'i," the legislature rejected this counter, expressing instead its preference for patriarchal values.

[108] This vestige of the community property scheme is found in Hawai'i Revised Statutes, Chapter 510. Seeking to avoid confusion over how to treat property that had been subject to community property principles during the years of 1945-1949, the territorial legislature determined that such property would continue to be treated as community property unless subsequently converted to separate property. Statutory provisions reflecting community property principles were thus retained to govern the disposition of such property, and remain viable law to this day. *See also* An Act to Repeal and Amend Laws Relating to Community Property, Ch. 301 A, 1949 Haw. Sess. Laws 629 *et seq.* (Act 242, as set forth in the 1949 Session Laws, both repealed the community property scheme and put into place what is now known as Hawai'i Revised Statutes Chapter 510. Sections 1 and 2 described the purpose for retaining a vestige of the community property scheme).

community law jurisdictions that equally divided community property as a starting point, Hawai'i mandated that community property be divided "in such proportions as such court, from the facts of the case, shall deem just and equitable."[109] No guidance was given on what an "equitable" division was and it was assumed that a court could select from a wide range of possible choices, limited only by whether its choice was fair in light of relevant circumstances.[110]

This was a significant historical development in that it represented the first clear grant of plenary judicial power to divide property incident to divorce.[111] Although this grant disappeared with the repeal of the community property

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[109] Revised Laws of Hawai'i § 12391.14 (1945) (repealed 1949).

[110] "Fair" is a relative term. In describing early property division statutes, Brett Turner pointed out the difficulties arising from giving judges too much discretion in deciding what was fair. The norms and social forces at the time tended to turn the meaning of "fair" into something that meant "pro-husband." *See* BRETT TURNER, EQUITABLE DISTRIBUTION OF PROPERTY 7-8 (2d ed. 1994). As an example, Turner recounted how a "surprising number of decisions" considered it "liberal" to award a wife a third of the marital estate at divorce, and that an equal division was reserved for only the most unusual cases. *See id.* at 8.

[111] Previously, Hawai'i, like other common law jurisdictions, empowered judges to compel the husband to provide such suitable allowance for the wife, for her support, as the judge deemed just and equitable. *See* Revised Laws of Hawai'i § 12226 (1945) (current version at HAW. REV. STAT. ANN. § 580-47 (Michie 1997)). This was generally construed as giving courts the power to order alimony as a post-divorce extension of the husband's duty to support his wife. *See* CLARK, *supra* note 34, at 220-21.

As stated earlier, common law property division at divorce was essentially owner-driven. *Cf.* Revised Laws of Hawai'i § 12233 (1945) (This provision entitled the wife to property in her name at divorce. However, as written, the provision appeared to reserve this entitlement for the wife only if the husband's adultery or "other offense amounting thereto" caused the divorce. This was ultimately amended in 1955 with the adoption of Hawai'i's "equitable distribution" statute. *See infra* notes 112-20 and accompanying text). But the court which had jurisdiction of the divorce was not empowered to divide property within the divorce action. *See* H. R. STAND. COMM. REP. NO. 356, 28th Terr. Legis., Reg. Sess. (1955), *reprinted in* HAW. H. R. JOURNAL 697 (1955)). In fact, courts settled property matters by way of extra-divorce proceedings that were generally available for matters of property disposition. *See id.* For example, if real property had to be divided, the parties would file a separate action to partition the parcel. *See id.* Likewise, an action would need to be initiated to divide personal property. The legislature was clearly concerned about this grossly inefficient process and sought to streamline it by empowering domestic relations judges to adjudicate property division as part of the divorce action. *See id.*

It should also be noted that although the domestic relations courts were not specifically empowered to divide property until the mid-1900's, they were empowered to make lump sum alimony awards, or "alimony in gross" that partially had the effect of property distributions. Thus, if a wife was found to have contributed to the acquisition of the husband's property and was therefore entitled to compensation for her efforts, she could be entitled to a lump sum distribution which, while couched in alimony terms, amounted to a share of her husband's property. *See* Nobrega v. Nobrega, 13 Haw. 654, 658-60 (1901) and Nobrega v. Nobrega 14 Haw. 152, 155-58 (1902).

law in 1949, it resurfaced six years later in a more expansive form. This reemergence is described in the next section.

D. Adopting an Equitable Distribution Scheme and Allowing Family Court to Divide Property

With the demise of the short-lived community property system in 1949, Hawai'i restored its common law system of property ownership which, in the context of property distribution, favored the spouse who was better-positioned to own and acquire property in his or her name. However, in 1955, Hawai'i reopened the door to change by enacting an amendment which reinstated the court's power to make an equitable distribution of property. Specifically, the territorial legislature authorized the court:

> [T]o finally divide and distribute the estate, real, personal or mixed, whether community, joint, or separate, in such proportion as shall appear just and equitable, having regard to the respective merits of the parties, to the ability of the husband, to the condition in which they will be left by such divorce, to the burdens imposed upon it for the benefit of the children of such marriage, and all circumstances of the case.[112]

With this amendment, Hawai'i joined the swelling ranks of "equitable distribution" jurisdictions which gave judges broad discretion to assign to either spouse property acquired during marriage, irrespective of title, taking into account the circumstances of the particular case and recognizing the value of both the financial and non-financial spousal contributions.[113] The modern view of equitable distribution systems recognizes that "marriage is essentially a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute—directly and indirectly, financially and nonfinancially—the fruits of which are distributable at divorce."[114]

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[112] 1955 Haw. Sess. Laws 60 (current version at HAW. REV. STAT. ANN. § 580-47 (Michie 1997)).

[113] *See* JOHN DEWITT GREGORY, THE LAW OF EQUITABLE DISTRIBUTION 1-6 (1989).

Herbert Jacob noted that the development of equitable distribution statutes began in Kansas and Oklahoma in the late 1800's. Kansas in 1889 passed legislation that read as follows:

> [With regard to] such property, whether real or personal, as shall have been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall make such division between the parties respectively as may appear just and reasonable, by a division of property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such a sum as may be just and proper to effect a fair and just division thereof.

JACOB, *supra* note 22, at 114.

[114] GREGORY, *supra* note 113, at 1-6.

That Hawai'i was ready to give a domestic relations judge the discretion to fashion an equitable division after considering all relevant factors seemed clear. Whether the legislature or Hawai'i's judges had actually recognized and accepted the modern view of marriages as partnerships was less clear. Thus, this zone of discretion was, perhaps initially, only a theoretical opportunity to apply partnership principles to the division of property at divorce. It should be remembered that divorce was still fault-based at this time and thus courts could consider, among other things, the misconduct of a spouse regardless of whether it impacted on the finances of the marriage.[115]

Nonetheless, by adopting this amendment, the legislature in 1955 signaled an emerging awareness of an evolving social order. For example, in its committee report, the House Judiciary Committee recognized the entitlement of a wife to a just share of a family business which she helped establish and contributed to, and sought to give her access to the value due to her by way of a property settlement.[116] In the same breath, it recognized that husbands, as well as wives, were entitled to a fair property settlement based on an array of factors.[117] This was a departure from the traditional notion that along with their control over property, husbands had a duty to support, a duty that extended beyond marriage.[118] However subtly, equality was displacing hierarchy[119] as the guiding principle in property division. It suggested at least a quiet erosion of traditional gender-based boundaries, creating an opportunity to think about spousal roles and responsibilities in more dimensions than were previously possible.

Moreover, the new legislation, on its face, allowed judges to consider and divide all property regardless of its form, or the technical or legal manner in which it was held.[120] Community property, as well as separate and jointly held

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[115] This is to say that judges and litigants could consider factors that had little to do with partnership principles. Lenore Weitzman described how under the fault-based divorce laws, a litigant was encouraged to detail or even exaggerate the grievous behavior of her spouse as a means to punish him by way of a larger property award. *See* WEITZMAN, *supra* note 4, at 28. No-fault reformers argued that justice was better served if the judicial system considered the economic situation of the spouses rather than culpability for bad behavior. *See id.* at 29.

[116] *See* S. STAND. COMM. REP. NO. 595, 28th Terr. Legis., Reg. Sess. (1955), *reprinted in* HAW. S. JOURNAL 1955, Spec. Sess. (1956) 632 (1955).

[117] *See id.*

[118] However, it should be noted that among the factors that courts had to consider was the "ability of the husband" with no corresponding reference to a wife's ability. Further, the support and maintenance provisions continued to refer only to a husband's obligation to support both wife and children. *See* Revised Laws of Hawai'i § 324-37 (1955). While forward steps were being made, the transformation was far from complete.

[119] *See* JACOB, *supra* note 22, at 5.

[120] In passing House Bill No. 499 (the bill which ultimately became Hawai'i's equitable distribution statute), the Senate Judiciary Committee wrote: "The purpose of this bill is to confer upon the Judge . . . the power to make property settlements between the parties of *all*

property, became subject to distribution. In doing so, Hawai'i became an "all-property" jurisdiction as contrasted to "dual-property" systems which identified certain categories of property to be exempt from division.[121] In one fell swoop, this took from the dominant spouse the use of title and control of property as an easy shield against post-divorce property division. Nothing was exempt. In maximizing the pool of property from which an equitable division could occur, the legislature enlarged the font from which courts could draw to duly address the needs of each divorcing spouse. By so doing, it moved toward the concept of marriage as a partnership with an emphasis on its sharing aspects. For in considering all property for division, the legislature affirmed the notion that spouses should demonstrate their commitment to the marital partnership by dedicating resources to it, including property that might be considered separate. Therefore, it was conceptually appropriate to make some assumptions that those resources belonged to the unit rather than to its individual parts, and that with the dissolving of the unit came the need to divide these collectively shared resources, with little regard to how title was held.

Whether the legislature or the courts actually looked at both spouses as equal partners in 1955 was questionable.[122] After all, Hawai'i's equitable

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property, real, personal, or mixed, whether held as community, joint or separate property." S. STAND. COMM. REP. NO. 595, 28th Terr. Legis., Reg. Sess. (1955), *reprinted in* HAW. S. JOURNAL 1955, Spec. Sess. (1956) 632 (1955)(emphasis added).

[121] *See* GREGORY, *supra* note 113, at 2-4, 2-22.

[122] The Hawai'i Supreme Court, in its *Bulgo* decision, reviewed the community property scheme which existed in Hawai'i ten years before. *See* Bulgo v. Bulgo, 41 Haw. 578 (1957). After extolling the virtues of that system, the court took a puzzling turn in its opinion, which suggested a misunderstanding of how the system should have worked and may have revealed a perspective that reinforced the paramount position of the husband in a marriage.

In responding to the husband's argument that the community property scheme was unconstitutional to the extent that it took from him half of the income generated from his premarriage separate property, the court replied almost apologetically:

> No property is taken from the husband and it will be noted he has the administration and control of the community-property income, whether it be income from his own property . . . or income from the wife's separate property or . . . income from the efforts of the labor of the community. As a rule it becomes of importance only when the community is terminated. *As has been aptly said, a community is a partnership which begins only at its end.*

Id. at 587 (emphasis added).

To support its statement, the court drew from a 1907 United States Supreme Court decision, *Garrozi v. Dastas*, 204 U.S. 64, 79, in which the justices reviewed a case from Puerto Rico, a community property jurisdiction.

> The rights of the wife are dormant during the marriage, because the husband is charged to watch over and conduct the affairs of the conjugal society. But this right, which is inert, as long as the husband is at the head of the affairs of the community, becomes active when the marital authority ceases to exist. The wife is like a silent partner, whose rights arise and reveal themselves when the partnership ceases.

Id. at 79.

distribution statute was enacted a few years prior to the national struggle toward gender and race equality which began to foment in the 1960's.[123] Yet, the doors were beginning to open. Thus, the 1955 legislation was significant not only in how it enabled courts to adjudicate an equitable and just property division, but in how it reflected a change in attitude and perception, a start down the road that took us to where we are.

Finally, in a way that could not have been anticipated at the time of its passage, the equitable distribution statute was vital to the ultimate adoption of the partnership model by becoming the center of a storm between the state's two appellate courts beginning in the 1980's. It was through this long, sometimes frustrating, struggle that the partnership model was finally crystallized. This exchange will be described in Section III.

Thus in the court's eyes, the system adopted by the territorial legislature between 1945 and 1949, reserved the fruits of partnership for the dissolution of the marriage. How the court reached its conclusion remains an enigma in light of the language of the community property statute which clearly distributed power to both spouses to be exercised throughout the marriage.

[123] An account of U.S. Congresswoman Patsy Mink's struggle to take the bar examination and find employment after graduating from the University of Chicago School of Law in the 1950's sheds light on the difficulties experienced by even highly trained professional women during this period:

> John [Congresswoman Mink's husband] found a position with the Hawaiian Sugar Planters Association, while Patsy first had to prove that she was eligible to take the Hawai'i bar examination. Under a domicile law that required a woman to take the residency status of her husband, Patsy was now considered a resident of Pennsylvania and would have to reestablish her Hawai'i residency. Irate, Patsy challenged the sexist statute. The attorney general then reversed his earlier denial and ruled that since she had not ever physically resided in Pennsylvania, she had not assumed her husband's domicile.
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> Even with her admission to the bar in June 1953 Patsy failed to obtain work as an attorney in the private or public sector. Prospective employers believed that attorneys were expected to work long hours and that women "should not be out late at night." When interviewers learned that she had a child, they rejected her without further consideration, even if she explained that she had adequate care for [her daughter] Wendy. They were concerned that she might have "another child." With help from her father, Patsy turned to solo practice. She opened her law office, furnished with borrowed pieces, in downtown Honolulu. Despite news stories announcing that she was the first Japanese female admitted to practice law in the Territory of Hawaii, few clients materialized. To augment her income and to fill time, she took court-appointed cases and lectured in business courses at the University of Hawaii. Her early cases were those that established law firms traditionally avoided: criminal, divorce, and adoption cases.

Esther K. Arinaga & Rene E. Ojiri, *Patsy Takemoto Mink, in* CALLED FROM WITHIN, EARLY WOMEN LAWYERS OF HAWAI'I 261 (Mari J. Matsuda ed., 1992).

E. Passing Through the Tumultuous Sixties —The Divorce Revolution and the UMDA

The turmoil of the sixties created a fertile environment for social change which in turn compelled a retooling of the law. A major push for female representation and power in the workplace merged with changing attitudes toward the longevity of marriages during this tumultuous decade.[124] Together they forced a serious examination of the nature of property within marriage and how that property should be distributed when a marriage dissolved. As women's earning power increased, their economic contributions could not be denied and needed somehow to be acknowledged. At the same time, assumptions regarding a wife's dependence on her husband were being replaced by the belief that women as well as men were capable of financial self-sufficiency, thereby raising challenges to the way we thought of alimony and our objectives for awarding it.[125] Any move to reform divorce law therefore needed to include the reevaluation of the place of alimony while defining a cogent theory of property division that reflected emerging cultural realities.

In the mid-sixties, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") began to generate a code of uniform laws regarding marriage and divorce, which became known as the Uniform Marriage and Divorce Act ("UMDA").[126] This assembling of experts was an attempt to organize ideas and capture the energy emanating from the push toward divorce reform which bubbled in the 1960's. One of the areas requiring work was property division which was characterized as "in even worse condition" than the then-extant confusion over divorce in general.[127]

Professor Robert J. Levy of the University of Minnesota Law School was selected to provide a preliminary analysis with recommendations to help direct the work of the NCCUSL's Special Committee on Divorce. Levy quoted the following from a 1963 report of the Committee on Civil and Political Rights of the President's Commission on the Status of Women: "Marriage is a

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[124] *See* TURNER, *supra* note 110, at 9-10.

[125] In the late 1960's, Samuel P. King, who later became senior judge of the United States District Court for the District of Hawai'i, was the state circuit court judge assigned to handle all domestic relations cases in Honolulu. In an article that called him "Hawaii's foremost authority on divorce," Judge King said "[a]limony should be used for rehabilitation purposes, not as a lifetime annuity for a wife." He added, "in 1969, it should be viewed as a short-term stop-gap measure. It certainly shouldn't provide a woman with a lifetime insurance policy unless she is in ill health." Drew McKillups, *Judge Calls Hawaii Alimony Law Unfair*, HONOLULU ADVERTISER, May 13, 1969, at C-2.

[126] *See Prefatory Note* to UNIF. MARRIAGE AND DIVORCE ACT 9A U.L.A. 147 (1968).

[127] ROBERT J. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 135 (1969).

partnership to which each spouse makes a different but equally important contribution. This fact has become increasingly recognized in the realities of American family living. While the laws of other countries have reflected this trend, family laws in the United States have lagged behind . . . ."[128] Noting both the burgeoning drive to erase fault as a basis for divorce and the dramatic rise of women in the work force after the second World War, Levy concluded that basing property division on fault or title ignored the realities of American family life.[129] He found it odd that states restricted the use of fault in the divorce itself in order to reduce acrimony but allowed the parties to allege fault in the same proceedings to justify a higher property award.[130] His objections to title-based property division drew from its tendency to mask the contributions, increasingly economic, that wives made to the acquisition of property nominally owned by husbands.[131]

The diminution of alimony as the primary source of post-divorce support corresponded with the emerging importance of property division incident to divorce.[132] With the growing acceptance of marriage as a partnership and its expansive view of spousal partnership contributions, greater attention had to be given to effectuating a fair return on those contributions by way of appropriate property awards, and the UMDA sought to reflect this.[133]

Observing that many jurisdictions of the era, including Hawai'i, already had statutes giving courts the discretion to effectuate a "fair" distribution of property, Levy suggested that an appropriate next step was to guide judges toward relevant factors. He included the duration of the marriage, each spouse's contributions, both economic and non-economic, each spouse's "mode" of life (i.e., their individual circumstances), and the extent of each spouse's separate holdings.[134] Such an approach would help curb any problem

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[128] *Id.* at 164 (*quoting* THE COMMITTEE ON CIVIL AND POLITICAL RIGHTS, REPORT TO THE PRESIDENT'S COMM'N ON THE STATUS OF WOMEN 18 (1963)).

[129] *See id.* at 165.

[130] *See id.*

[131] *See id.*

[132] *See Prefatory Note* to UNIF. MARRIAGE AND DIVORCE ACT 9A U.L.A. 149 (1968).

[133] The UMDA's Prefatory Note reads in relevant part:

> The Act's elimination of fault notions extends to its treatment of maintenance and property division. The distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership. The Act authorizes the division, upon dissolution, of property acquired by either spouse during the marriage (except for gifts and inheritances) as the *primary means of providing for the future financial needs of the spouses.* Where the marital property is insufficient for this purpose, the Act provides that an award of maintenance can be made to either spouse under appropriate circumstances *to supplement* the available property.

Id. (emphasis added).

[134] *See* LEVY, *supra* note 127, at 169.

with "judicial discretion turned loose cannon," and focus judges on appropriate specific factors.[135]

Beyond trying to identify relevant considerations, the NCCUSL drafted a section on property division that supported a vision of marital partnership akin to that already held by community property states. In its initial draft of Section 307 which dealt with the disposition of property, the NCCUSL distinguished marital property (all property acquired by either spouse during the marriage except, primarily, for gifts and inheritance) from separate property, recommending a return of the latter to the owner spouse and an equitable division of "community" or marital property.[136] Consistent with its vision of the marital partnership, the NCCUSL topped its list of relevant considerations with the "contribution of each spouse to [the] acquisition of the marital property, including contribution of a spouse as a homemaker."[137]

This draft provision, issued in 1970, provided one of several focal points for strong dissension from the Family Law Section ("FLS") of the American Bar Association.[138] The refusal of the FLS to support the UMDA in general and

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[135] *See* Mary Moers Wenig, *The Marital Property Law of Connecticut: Past, Present and Future*, 1990 WIS. L. REV. 807, 826 (1990).

[136] *See id.* at 827. The relevant portions of the NCCUSL's comment to the original section 307 of the UMDA reads:

> (T)he court is directed first to set apart to each spouse all of his or her property that is not defined as marital property by subsection (b), and secondly to divide the marital property between the parties in accord with the standards established by this section. The court may divide the marital property equally or unequally between the parties, having regard for the contributions of each spouse in the acquisition thereof, the length of the marriage, the value of each spouse's non-marital property, and the relative economic position of each spouse following the division. The court is directed not to consider marital misconduct, such as adultery or other non-financial misdeeds, committed during the marriage, in making its division
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> . . . .
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> Subsection (c) creates a presumption that all property acquired after marriage and prior to a decree of legal separation is marital property. In the absence of contrary evidence this presumption will be controlling, regardless of the manner in which title is held by the spouse. A spouse seeking to overcome the presumption has the burden of proof on the issue of identification. The presumption is overcome by a showing that the property (1) was acquired prior to the marriage, was the increase in value of such property, or was acquired after the marriage in exchange for such property; (2) was acquired after the marriage by gift, bequest, devise or descent or in exchange for property so acquired; (3) was acquired after the entry of a decree of legal separation; or (4) was designated as non-marital property by a valid agreement of the spouses, all as provided in sub-section (b). The phrase "increase in value" used in subsection (b) (5) is not intended to cover the income from property acquired prior to the marriage. Such income is marital property.

Id at 827 n.99.

[137] UNIF. MARRIAGE AND DIVORCE ACT § 307(1), 9A U.L.A. 239 (1968).

[138] A number of reasons have been mentioned to explain the sometimes heated disagreement between the NCCUSL and the FLS. Some have attributed it to personalities and egos between

the proposed property division provision in particular, moved the NCCUSL to develop an alternative version of section 307, now known as Alternative A.[139] This alternative, which allowed judges to equitably divide *all* property and not just marital property, sufficiently placated the FLS and helped bring the UMDA to a narrow endorsement by the ABA in 1974.[140]

How the UMDA brought Hawai'i closer to its embrace of the partnership model is open to conjecture. The fact that it elevated to a national debate a uniform code section on property division modeled in part on community property principles must have had some impact in molding local thought and discussion.[141] In fact, a year after the American Bar Association endorsed the UMDA, the *Honolulu Advertiser* ran a series of articles on divorce in Hawai'i.[142] The series drew largely from a melange of interviews with judges, attorneys, and parties of divorce. Among those quoted was Thomas Rice, then

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the leadership of two powerful institutions. *See* Harvey L. Zuckman, *The ABA Family Law Section v. The NCCUSL: Alienation, Separation, and Forced Reconciliation over the Uniform Marriage and Divorce Act*, 24 CATH. U. L. REV. 61, 62-63 (1974). Others have pointed to the differences in world views, with the NCCUSL, consisting primarily of academics, and the FLS, representing frontline family law practitioners, unable to bridge the distance. *See* Peter Severeid, *Increase in Value of Separate Property in Pennsylvania: A Change in What Women Want?*, 68 TEMP. L. REV. 557, 578 (1995). Still others describe the FLS's fear of shifting paradigms, moving away from the growing status quo of equitable distribution of all property and toward an adoption of a system that was closer to that adopted by the small minority of community property states. *See id.*

[139] *See* Sevareid, *supra* note 138, at 579. Alternative B of section 307, which was closer to the original draft, was adopted to meet the needs of community property states which preferred its system to the "hotchpot of assets" contemplated in Alternative A. *See* UNIF. MARRIAGE AND DIVORCE ACT § 307(2) cmt., 9A U.L.A. 239 (1968).

[140] *See* Sevareid, *supra* note 138, at 579.

[141] Herbert Jacob wrote:

> Almost no state fully adopted the property provisions of the NCCUSL's Uniform Marriage and Divorce Act. Some provisions won wider acceptance than others; some spawned different responses to the same problems. However, the adoption of the marital property concept clearly gathered momentum after the NCCUSL first suggested it in 1970 . . . [w]hile we have no direct documentary evidence of a link between the NCCUSL's actions and state adoption of these provisions, it is reasonable to conclude that the model provided by the Uniform Marriage and Divorce Act played a role in the diffusion of these provisions.

JACOB, *supra* note 22, at 121.

[142] *Honolulu Advertiser* reporter Pat Hunter wrote a four-part series on various aspects of divorce. The series ran in the Advertiser from April 7, 1975, through April 10, 1975. *See* Pat Hunter, *No-Fault Divorce - It Still Isn't Easy*, HONOLULU ADVERTISER, Apr. 7, 1975, at B1; Pat Hunter, *Financial Results in Divorce Can Be a Disaster*, HONOLULU ADVERTISER, Apr. 8, 1975, at B1; Pat Hunter, *What Happens When Custody is an Issue*, HONOLULU ADVERTISER, Apr. 9, 1975, at E1; Pat Hunter, *The Poor Who Can't Afford Divorce Costs*, HONOLULU ADVERTISER, Apr. 10, 1975, at B1.

one of the state's most notable family law attorneys.[143] In discussing the economic consequences of divorces, Rice said:

> Although there's no statute at the present time that says you have to treat divorce the same way you would the dissolution of a partnership, the trend is to consider the marital partnership equal and try to divide the assets equally . . . [e]ach [spouse] has contributed to the accumulation and preservation of those assets . . . .[144]

At the time of Rice's statement, the UMDA was already available for consideration and adoption by all states. His statement that Hawai'i had not yet statutorily adopted the partnership model could be construed to reflect an awareness of the UMDA's presence in the wings. Not only did Hawai'i's statutes say nothing about marital partnerships, but its appellate courts would say nothing about such partnerships for at least another decade.[145] Thus, Rice's reference to a "trend" must have sprung not from local sources but from an awareness of broader conversations such as those that occurred during the heated UMDA debates.[146]

The UMDA acted as a prism, first capturing the social and economic shifts within individual relationships and the larger society, then translating those changes into proposed legal reform. It was reflective and responsive, seeking to conform the law to current realities rather than to blaze new trails. It gave a formal place and process for reform, and by its national character and repute, institutionalized the debates and the vocabulary on the changing face of divorce and its incidents. It gave a message on where things could or should be, and left it to the states to decide whether or when to climb on.

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[143] On September 13, 1996, Thomas Rice died at the age of seventy-six. In a one-page bulletin sent to section members in September 1996, Hawai'i State Bar Family Law Section Chair Geoffrey Hamilton noted that Rice had been regarded by many as the "father" of modern Hawai'i divorce practice. Hamilton also reminded members that Rice had been the section's first chairperson.

[144] Pat Hunter, *Financial Results in Divorce Can be a Disaster*, HONOLULU STAR BULLETIN, Apr. 8, 1975, at B1.

[145] *See infra* notes 264-79 and accompanying text.

[146] Rice also alluded to the importance of non-economic contributions spouses made to partnerships that entitled them to share in the profits of the partnership. *See* Hunter, *supra* note 144, at B1. While acknowledging that the evaluation of those contributions was not easy, it was clear that he thought it appropriate to consider them. In a statement that mixed enlightenment with the continued realities of gender positions in the sixties, he said the following: "Men generally fail to realize they didn't get where they are today all by themselves. There's no way to measure how much of a man's success is due to his wife's satisfaction in him and his subsequent feeling of confidence." *Id.*

F. Statutory Changes in 1978

The momentum of divorce reform reflected in, and perhaps, generated by the UMDA, and the passage of the state's no-fault divorce law in 1972,[147] represented clear changes in the way we were willing to look at gender and marriage. In 1978, these changes were further embodied in legislative amendments that remain largely intact to this day. These amendments, which were introduced in House Bill 2095-78, sought to "amend the law relative to the duty of parties to marriage to support themselves, each other and their family."[148] The amendments clustered around two distinct periods: one cluster targeted Hawai'i Revised Statutes sections 573-6 and 573-7 (now renumerated as Hawai'i Revised Statutes sections 572-23 and 572-24, respectively) which dealt with the support obligations of spouses *during marriage;* the remaining cluster was directed to Hawai'i Revised Statutes section 580-47 which dealt with property division and spouse support *at the termination of a marriage.*

1. The "mutualization" of intra-marital support

The amendments dealing with support within an ongoing marriage consisted mainly of changing gender adjectives so that what had been a statutory duty for the husband to support his wife was transformed into a duty by both spouses to support each other and their family. This was significant in that it eliminated, by statutory fiat, the traditional notion of husband as the breadwinner and wife as the homemaker, replacing it by the more egalitarian idea of mutual support.[149] The amended statutes were in accord with the

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[147] Passed in 1972 by the sixth state legislature, Act 11 amended portions of Hawai'i Revised Statutes Chapter 580 to eliminate fault as grounds for divorce. 1972 Haw. Sess. Laws 165-67.

[148] S. STAND. COMM. REP. NO. 720-78, 9th State Legis., Reg. Sess. (1978), *reprinted in* HAW. S. JOURNAL 1978, Reg. Sess. 1088 (1978).

[149] The "bilateralization" of support obligations within marriage met with some resistance particularly from women who considered themselves homemakers and were concerned that this mutual support statute would allow wayward husbands to duck their obligations with impunity. A sample of the forceful and passionate testimony submitted against the bill is as follows:

> As the mother of seven children I have been very conscious of a movement to downgrade mothering and the family. I am deeply concerned with the impact of this on future generations. I see HB #2095 dealing with spousal liabilities as one step in that degradation process.
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> I am not concerned for its impact on me for I have a responsible husband, but not everyone does, and for those who don't, their only recourse is the law. If they are not protected under the law we have failed them.
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> . . . .
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> With both parties of a marriage equally liable for the necessities to maintain that marriage, what is to protect the full-time homemaker from a husband who goes out and runs up bills he cannot pay? Is the wife then required to:

concept of a marital partnership to the extent that they set forth both an ideal and an expectation that spouses would take care of each other, and that each brought into the marriage a modicum of resources, financial and non-financial, to be used for the security and advancement of the marital unit.[150] If there was dependency, it was assumed that each partner relied on the other, although perhaps in different ways, and that the fact of dependency did not *per se* suggest inferiority. The law let the spouses decide for themselves the nature and extent of each person's labors and contributions, but assumed that these decisions would ultimately be driven by the best interests of the family. Where the process of intrafamilial decision-making failed to work, and the court was relied upon to intervene, specific factors were set forth to guide the court.[151]

2. *Support obligations after the breakup*

The other cluster of amendments proposed in House Bill 2095 dealt with support obligations in separation and divorce.[152] These amendments modified

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1) leave her children with a sitter and go out and earn money to pay off those debts or, 2) sell other goods she may have to pay off the debts or, 3) serve beside her husband in a prison term incurred through non-payment?

I would say House Bill #2095 does not meet the needs of the full-time homemaker and has the potential to do her great harm. I believe it requires greater study to find a law that will satisfy all parties equally . . . for I believe being treated the same is not necessarily just in all cases.

Marilyn White, Testimony against House Bill No. 2095-78 heard by the House Judiciary Committee (Feb. 8, 1978).

The amendments were driven in part by Hawai'i's ratification of the Equal Rights Amendment in 1972 which is now found under Article One, section 3 of the Hawai'i State Constitution. *See* Sherry Broder & Beverly Wee, *Hawaii's Equal Rights Amendment: Its Impact on Athletic Opportunities and Competition for Women*, 2 U. HAW. L. REV. 97, 100-01 (1979). Stating simply that the "[e]quality of rights under the law shall not be denied or abridged by the State on account of sex[,]" the statutory amendments under House Bill No. 2095-78 were cited by the House Judiciary Committee as necessary for avoiding the constitutional deficiency of imposing support obligations on the male spouse only. *See* H. R. STAND. COMM. REP. NO. 309-78, 9th State Legis., Reg. Sess. (1978), *reprinted in* HAW. H. R. JOURNAL, Reg. Sess. 1526-27 (1978).

[150] The original draft of House Bill No. 2095-78 set forth factors to be considered when determining support obligations during separation and divorce, but did not extend the factors to the determination of obligations in an ongoing marriage. And thus the bill was amended to resolve this concern. *See* H. R. STAND. COMM. REP. NO. 309-78, 9th State Legis., Reg. Sess. (1978) *reprinted in* HAW. H. R. JOURNAL, Reg. Sess. 1526-27 (1978).

[151] *See infra* note 154 and accompanying text. These factors are now found in Hawai'i Revised Statutes section 580-47(a), the section that deals with the division of property and alimony incident to a divorce. The House Judiciary Committee amended the bill to apply this list to ongoing marriages. *See* H. R. STAND. COMM. REPORT NO. 309-78, 9th State Legis., Reg. Sess. (1978), *reprinted in* HAW. H. R. JOURNAL, Reg. Sess. 1527 (1978).

[152] The "mutualization" of post-separation or divorce support obligations was already

Hawai'i Revised Statutes section 580-47 to include a non-exhaustive list of specific factors for the family court to consider when deciding support obligations.[153] Among these factors were the financial resources of the parties, each party's ability to independently meet his or her needs, the duration of marriage, the standard of living during the marriage, the age of the parties, the physical and emotional conditions of the parties, each party's needs, and the probable duration of the need of the party seeking support.[154]

Although this set of amendments focused on support and maintenance provisions of divorce and not ostensibly upon property division, legislative committee reports indicate that legislators fully intended to apply these factors to property division as well. For example, the House Judiciary Committee wrote, "[t]he bill also amends laws relating to divorce and separation by listing factors which are to be considered by the court in determining the *disposition of property* and support and maintenance obligations."[155] Likewise, the Senate Judiciary Committee which developed the draft that ultimately became the current law wrote:

> Your Committee notes that when the Legislature adopted no-fault divorce in Hawai'i, one of the primary purposes was to avoid unnecessary disputes between the parties. However, because of the vagueness of the present law, many divorces continue to be marred by disputes over *division of marital assets* and support and maintenance obligations. *Your Committee therefore amended the bill by listing factors which clearly define the rights and obligations of the parties in regard to division of marital assets* and maintenance obligation. These factors add certainty to the law and minimize avoidable disputes between the parties.[156]

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legislatively enacted in 1967 under Act 76, eleven years before support obligations in ongoing marriages turned gender neutral. *See* 1967 Haw. Sess. Laws 76-77. This act amended Revised Laws of Hawai'i section 324-37 (now Hawai'i Revised Statutes section 580-47) to read in relevant part:

> Upon granting a divorce, the court may make such further orders as shall appear just and equitable . . . compelling either party to provide for the support and maintenance of the other party and finally dividing and distributing the estate of the parties, real, personal, or mixed, whether community, joint, or separate. In making such further orders, the court shall take into consideration the respective merits of the parties, the relative abilities of the parties [as opposed to just the husband's], the condition in which each party will be left by the divorce, the burdens imposed upon either party for the benefit of the children of the marriage, and all circumstances of the case . . . .

1967 Haw. Sess. Laws 76.

[153] These factors were enacted in 1978 under Act 77. *See* 1978 Haw. Sess. Laws 100-02.

[154] *See* HAW. REV. STAT. ANN. § 580-47(a) (Michie 1997). *See infra* note 156, for the complete listing.

[155] H. R. STAND. COMM. REP. NO. 309-78, 9th State Legis., Reg. Sess. (1978), *reprinted in* HAW. H. R. JOURNAL, Reg. Sess. 1526-27 (1978)(emphasis added).

[156] S. STAND. COMM. REP. NO. 720-78, 9th State Legis., Reg. Sess. (1978), *reprinted in* HAW. S. JOURNAL, Reg. Sess. 1088 (1978)(emphasis added).

The list of thirteen factors assembled by the Senate Judiciary Committee clearly bore the influence of the UMDA, matching almost item by item, the list appearing in the UMDA's section 308.[157] Although the legislative history evinced a consistent and firm intent to apply these factors to property division as well as to alimony, the statutory language inexplicably failed to reflect this.

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[157] UMDA section 308 reads in relevant part:

(b) The maintenance order shall be in amounts and for periods of time the court deems just, without regard to marital misconduct, and after considering all relevant factors including:

(1) the financial resources of the party seeking maintenance, including martial property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
(2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
(3) the standard of living established during the marriage;
(4) the duration of the marriage;
(5) the age and the physical and emotional condition of the spouse seeking maintenance; and
(6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

UNIF. MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 348 (1987).

In comparison, House Bill No. 2095-78, H.D.1, S.D.1, which is now codified as Hawai'i Revised Statutes section 580-47, reads in relevant part:

In addition to any other relevant factors considered, the court, in ordering spousal support and maintenance, shall consider the following factors:

(1) Financial resources of the parties;
(2) Ability of the party seeking support and maintenance to meet his and her needs independently;
(3) Duration of the marriage;
(4) Standard of living established during the marriage;
(5) Age of the parties;
(6) Physical and emotional condition of the parties;
(7) Usual occupation of the parties during the marriage;
(8) Vocational skills and employability of the party seeking support and maintenance;
(9) Needs of the parties;
(10) Custodial and child support responsibilities;
(11) Ability of the party from whom support is sought and maintenance to meet his or her own needs while meeting the needs of the party seeking support and maintenance;
(12) Other factors which measure the financial condition in which the parties will be left as the result of the action under which the determination of maintenance is made; and
(13) Probable duration of the need of the party seeking support and maintenance.

HAW. REV. STAT. ANN. § 580-47(a) (Michie 1997).

As adopted, the plain language of the changes to Hawai'i Revised Statutes section 580-47 instructed the family court to consider these factors in ordering support and maintenance only, leaving property division to the flexible but vague "equitable distribution" standard.[158]

Nonetheless the factors for support and maintenance reflected the changing attitudes toward alimony, and correspondingly, property division. They were gender neutral, thereby reinforcing the fact that the need for, as well as the ability to provide support could run both ways. They affirmed that alimony would in most cases be temporary rather than the lifetime post-divorce annuity it had once been.[159] They provided bench marks for determining the need for support, weighing heavily the potential, ability and opportunities for an individual to obtain income independent of the former spouse. The conspicuous absence of fault or marital misconduct from the list followed the elimination of fault-based divorces six years earlier.[160]

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[158] Because of the flexibility of the "equitable distribution" standard, courts could conceivably use the listed factors in disposing of the property distribution scheme. As seen later, however, the case law which developed through the 1980's to the present, created a framework which its critics argued diverted analysis to the particulars of the framework and away from a fuller possible range of relevant factors. *See, e.g., infra* notes 264-79 and accompanying text.

[159] The UMDA's alimony provision, section 308, set forth a two-tiered process for determining support.

The first tier was to be used to see if support was even appropriate. Specifically, this first step stated that a court could only grant support if the petitioning spouse "(1) lacks sufficient property to provide for his reasonable needs; and (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home." UNIF. MARRIAGE AND DIVORCE ACT 9A U.L.A. 348 (1987).

The second tier, consisting of many of the factors adopted in House Bill No. 2095-78, was to be used to determine the amount and periods of time of an award only if the spouse seeking support satisfied the first level of inquiry.

While Hawai'i did not adopt the two-tiered system, it was clear that the days of requiring a husband to provide long-term support was over. The multifactorial analysis that was adopted provided a screen against both the frequency and longevity of awards.

In fact, by the time the 1978 amendments were adopted, the number of alimony awards granted in Hawai'i were already on the wane. Eight years before, the *Honolulu Star Bulletin* reported that "(v)ery few women receive alimony nowadays according to officials of Hawaii's Family Court. The trend in the past ten or fifteen years, not only in Hawai'i but in most other states as well, has been to award child support only." *Few Divorcees Get Alimony*, HONOLULU STAR BULLETIN, July 30, 1970, at D-3.

[160] Actually, Hawai'i Revised Statutes section 580-47 contained no expressed prohibition against the use of fault as a factor. However, the effect of this omission was later clarified when the Hawai'i Supreme Court declared that fault would be a non-factor in both alimony and property division. *See, e.g.*, Richards v. Richards, 44 Haw. 491, 355 P.2d 188 (1960); Woodworth v. Woodworth, 7 Haw. App. 11, 740 P.2d 36 (1987).

Even without explicitly attributing this list of factors to property division, the statute already contained language which gave some direction to courts. Such considerations as "the respective merits of the parties, the relative abilities of the parties, the condition in which each party will be left by the divorce, [and] the burdens imposed upon each party for the benefit of the children of the parties" remained available to the court.[161] Although vagueness made their application somewhat difficult,[162] these considerations reflected the same attention to gender-neutral needs, abilities and circumstances that was emerging across the country. The ideals of egalitarianism and sharing (not only of property but also of the disruption caused by divorce) were evident in these factors and helped to lay the foundation for acceptance of the marital partnership model.

As indicated above, Hawai'i apparently drew from the UMDA in amending Hawai'i Revised Statutes section 580-47. Like the UMDA, the amendments, to a large extent, did no more than reduce a twirl of existing realities into a code of legal rules. It would be the last significant amendment to Hawai'i Revised Statutes section 580-47 related to property division and alimony. From there, the courts took over.

G. The Court Acts

Some look to the 1986 Hawai'i Supreme Court decision in *Cassiday v. Cassiday*[163] as the first enunciated step toward the eventual adoption of the partnership model in Hawai'i. While *Cassiday* marked a clear turning point, it was preceded by a string of Intermediate Court of Appeals decisions authored by Chief Judge James Burns in the 1980's which outlined the model and began casting it as the norm.[164] Although none of these ICA decisions used the term "partnership," their concepts unmistakably bore its markings.

To a degree, the ICA decisions, with their thoughtful detail, were logical extensions of previous appellate decisions. It is therefore helpful to look a few years back to when divorce reform began to hit the nation, to get an idea of where Hawai'i appellate decisions were moving and the foundation they laid for later decisions.

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[161] 1978 Haw. Sess. Laws 101; *see also supra* note 116.

[162] As seen later in this article, the reported difficulties in applying and measuring such vague and generalized factors led to the development of a framework which was intended to lend certainty and predictability to property division decisions.

[163] 68 Haw. 383, 716 P.2d 1133 (1986).

[164] *See* discussion *infra* Part II.G.2.

1. The pre-Burns period: Richards, Carson and Au-Hoy

As mentioned above and in the next section, development of the partnership model of property division began to accelerate after Chief Judge Burns joined the ICA and almost single-handedly created much of the body of modern appellate decisions dealing with family law in Hawai'i. Before the creation of the ICA, however, the Hawai'i Supreme Court issued several opinions that laid stepping stones on the path leading to the ultimate development and adoption of the partnership model. In this section, we will look at three cases, *Richards v. Richards*,[165] *Carson v. Carson*,[166] and *Au-Hoy v. Au-Hoy*.[167]

a. Richards v. Richards

In 1960, the Hawai'i Supreme Court, then the only appellate court in the state,[168] decided *Richards v. Richards*.[169] The *Richards* opinion was the supreme court's first significant attempt to construe the "equitable distribution" statute enacted in 1955, which apart from the short-lived community property statute, finally authorized courts to divide and distribute property. The tone of the opinion was decidedly modern when stood against the *Bulgo v. Bulgo*[170] decision three years before.

The case had begun in 1955, when Helen Richards filed a divorce complaint alleging grievous mental suffering as the grounds for the divorce.[171] Having reserved the issues of alimony and property division for later consideration, the trial court granted the divorce.[172] Over a course of seven months, the trial court took evidence and heard arguments on alimony and property division.[173]

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[165] 44 Haw. 491, 355 P. 2d 188 (1960).

[166] 50 Haw. 182, 436 P.2d 7 (1967).

[167] 60 Haw. 354, 590 P.2d 80 (1979).

[168] The Hawai'i Intermediate Court of Appeals, which has become the primary source of family law appellate opinions, was created only after the 1978 Constitutional Convention which adopted the needed constitutional provision for an intermediate appeals court. For an interesting account of its creation and role, see Jon C. Yoshimura, *Administering Justice or Just Administration: The Hawai'i Supreme Court and the Intermediate Court of Appeals*, 14 U. HAW. L. REV. 271 (1992).

[169] 44 Haw. 491, 355 P. 2d 188.

[170] 41 Haw. 578 (1956); *see also supra* note 122.

[171] *See Richards*, 44 Haw. at 492, 355 P.2d at 190.

[172] *See id.* at 493, 355 P.2d at 191.

[173] *See id.* At the time of the trial, the statute dealing with support payments and property division read, in relevant part, as follows:

> Upon granting a divorce the judge may make such further decree or order against the defendant, compelling him to provide for the maintenance of the children of the marriage, *to provide such suitable allowance for the wife, for her support, and to finally divide and distribute the estate, real, personal or mixed, whether community, joint, or separate, in*

While granting a permanent alimony award of $600 per month to Mrs. Richards, the court denied her request for property beyond household furniture, silver, art work and other items considered under the rubric of "household paraphernalia."[174] Mrs. Richards challenged the adequacy of the permanent alimony award as well as the property division.[175]

The significant item of property at issue was Mr. Richards' shares of stock in Kahua Ranch, Limited.[176] He acquired about 3/4 of his shares prior to marriage and purchased the final 1/4 during the marriage.[177] Estimates of the total value ranged from $160,500 to $573,000, the former being the husband's estimate, the latter being the wife's.[178] The trial court awarded all shares to the husband.[179]

Mrs. Richards argued that she was entitled to a portion of the stock because she contributed to its acquisition and maintenance "to the extent that she used her [own] funds to pay the living expenses which libelee [Mr. Richards] was

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such proportion as shall appear just and equitable, having regard to the respective merits of the parties, to the ability of the husband, to the condition in which they will be left by such divorce, to the burdens imposed upon it for the benefit of the children of such marriage, and all other circumstances of the case.

Id. at 501, 355 P.2d at 195 (emphasis added).

Note again that the obligation of support at the time fell on the defendant, which by the plain language of the statute, was assumed to be the husband.

[174] *See id.*

[175] *See id.* at 494, P.2d at 191. Interestingly, Mrs. Richards also argued that the divorce should not have been granted prior to the adjudication of support and property issues. *See id.* Her argument suggested a continued reliance on the male spouse, not surprising given the norms of the time (pre-1960). Her concern was understandable: had Mr. Richards died after the divorce but before an award of property and support could be made, Mrs. Richards would have been without the financial resources available through a dower incident to the marriage, or through a property award incident to the divorce.

The parties had been married for seventeen years when the divorce was filed in 1955. *See id.* at 516, 355 P.2d at 202. This was apparently not the first marriage for either spouse. *See id.* at 513, 515, 355 P.2d at 200-01. At the time of the marriage, Mr. Richards was president of the Hawaiian Pineapple Company, Ltd., earning an annual income of $125,000 and owning assets with a net worth of $941,000. *See id.* at 516, 355 P.2d at 202. During the marriage, however, he lost his position, experienced a significant drop in income, and incurred business debts of over $640,000. *See id.* Nonetheless, the parties continued to maintain an expensive lifestyle to the time of the divorce, with expenses exceeding income. *See id.*

[176] *See id.* at 511, 355 P.2d at 199.

[177] *See id.* at 512, 355 P.2d at 200.

[178] *See id.*

[179] Mr. Richards was also allowed to keep his residence worth $43,500 (there was no net worth at the time of the divorce due to encumbrances equal to the property's value), other corporate stock worth $99,423 and was awarded $15,000 worth of household paraphernalia. *See id.* at 493, 510-11, 355 P.2d at 191, 199-200.

bound to provide."[180] The court was unpersuaded, finding that the husband was not solely responsible for paying living expenses incurred during the marriage.[181] Further, the court determined that Mr. Richard's net worth had been significantly eroded by the lavish lifestyle enjoyed by the parties despite Mr. Richard's declining income.[182] Thus, far from helping to preserve her husband's estate, she helped to consume it.[183] The court also took note of Mrs. Richards' own property and its considerable "during marriage" appreciation.[184]

In considering the permanent alimony issue and whether the $600 per month award was adequate,[185] the court looked primarily at each spouse's individual income and necessary expenses, and concluded that the award, while "on the low side," was insufficient to evince judicial abuse of discretion (the appropriate standard of review).[186] The court sought a "realistic appraisal of the situation of the parties at the time of the divorce" which included "a consideration of the respective resources and revenues of the parties, their accustomed manner of living, and the manner of living which is appropriate on the basis of such resources and revenues," with the primary consideration generally being the respective income of the parties.[187] The court was willing to give less weight to actual income as a measure of need when the income was being depressed because of malingering or that assets were being kept in

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[180] *See id.* at 513, 355 P.2d at 200. In addition, Mrs. Richards argued that Mr. Richard's misconduct, which led to the divorce, entitled her to an amount of property equal to the dower she would have received had the marriage remained intact. *See id.* at 502, 355 P.2d at 195. This argument was rejected because the court determined that personal misconduct was not an appropriate factor in the division of property. *See id.* at 509, 355 P.2d at 198. Thus, the elimination of fault as a basis for property division disappeared before the elimination of fault-based divorce in 1972.

[181] *See id.* at 513-14, 355 P.2d at 200-01.

[182] *See id.* at 514, 355 P.2d at 201.

[183] *See id.*

[184] At the time of marriage, Mrs. Richards' property consisted of $25,205 in bank deposits, a claim of $12,436 against a former husband's insurance adjustments, household paraphernalia valued at $25,587 and jewelry of an unspecified value. *See id.* at 513, 355 P.2d at 200. At divorce, she had bank deposits, traveler's checks, U.S. treasury bonds and current credits amounting of $42,045. *See id.* In addition, she held securities valued at $4,827 and jewelry worth $52,925. *See id.* The household paraphernalia awarded to her by the trial court totaled $35,000 in value. *See id.* The at-marriage total was thus at least $63,000; the at-divorce total was approximately $135,000. *See id.*

[185] Mrs. Richards was seeking an award of $1,813 to supplement her own income of $2,400/month. *See id.* at 502, 355 P.2d at 195. She argued that a total monthly income of over $4,000 was needed to maintain the lifestyle to which she had become accustomed. *See id.* at 502, 514, 355 P.2d at 195, 201.

[186] *See id.* at 515-16, 355 P.2d at 201-02.

[187] *See id.* at 516, 355 P.2d at 202.

a non-productive form.[188] The court was also willing to factor in such circumstances as the ill-health of a party ostensibly as a measure of need or inability to earn income.[189]

The court rebuffed as overly broad the general proposition that a wife, who was divorced because of her husband's misconduct, was entitled to live in the same manner to which she was accustomed during the marriage and that the husband was obligated to fund that lifestyle by way of an alimony award.[190] While the court appeared to think that the proposition could be true in some instances, it was clearly departing from a punitive fault-based formula well over a decade before no-fault divorces became a statutory reality.

The *Richards* opinion showed that its authors were ready and able to use at least some of the pieces of the partnership model. Certainly, the court was willing to ignore statutory language that still emphasized a husband's ability and responsibility to amass resources and provide support.[191] It assumed the possibility that both spouses could earn and obtain wealth, provide support, and experience need. This was essential to the understanding of an equal partnership.

Further, the court was willing to look at spousal contributions, and the compensation thereof, as a basis for property division and distribution.[192] But while the concept of contributions would have a place in the marital partnership model, it would often require neither an appraisal of each contribution nor a dollar-for-dollar repayment. Instead it would exist as an assumption, or perhaps, an expectation. That partners expended energy and other resources in myriad and sometimes mundane ways, in the interest of advancing the partnership, would generally be deemed sufficient to justify a fair, if not equal, sharing of partnership property when that partnership dissolved. In *Richards*, the court only considered financial contributions that were more easily measurable. It would take several more years and another case before the value of non-financial contributions would be recognized.[193]

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[188] *See id.* at 516-17, 355 P.2d at 202.

[189] *See id.*

[190] *See id.* at 516, 355 P.2d at 202.

[191] *See id.* at 513-14, 355 P.2d at 200-01 (rejecting Mrs. Richards' assumption that husbands were obligated to fund all of the family's living expenses).

[192] *See id.* at 512-13, 355 P.2d at 200 (reviewing the trial record to identify contributions by the wife to the "building up" of the husband's estate, and finding none to justify a sharing of the husband's estate). Interestingly, the court also noted how, in an earlier decision, it had recognized the contributions of the wife to the growth of the marital estate and how it had found alimony in gross awards to be a way to compensate her during the period when domestic relation courts lacked jurisdiction to divide property incident to divorce. *See id.* at 505, 355 P.2d at 196-97.

[193] A more modern conceptualization of contributions can be found in *Epp v. Epp*, 80 Hawai'i 79, 92-93, 905 P.2d 54, 67-68 (1996) and *Jackson v. Jackson*, 84 Hawai'i 319, 933

b. Carson v. Carson

In 1967, seven years after *Richards*, the supreme court issued its decision in *Carson v. Carson*.[194] Once again, the supreme court faced the question of whether the trial court had correctly declined the wife's request for an award of her husband's separate property, which consisted largely of real property and securities acquired prior to marriage with a worth of $250,000 at the time of divorce.[195] The trial court refused providing no explanation other than to note that the husband's property was obtained before the marriage and that the marriage was "fairly short" (eight years).[196] However, the court granted Mrs. Carson a monthly award of $400 over a period of three years "to get her adjusted," noting that it had already "strain[ed] the evidence in order to grant her an absolute divorce."[197]

P.2d 1353, 1367 (1997).

In more recent developments of property distribution law as described later in this article, the courts began to generally categorize property as marital versus non-marital property, finding the distinction helpful in thinking about how property should be divided. *See infra* Part III.

In *Richards*, the court either broadly defined "non-marital" property or simply adhered to a form of title-based distribution. Allowing the husband to retain the entire value of his Kahua Ranch stock, a full one-fourth of which was acquired *during* the marriage, suggests this. *See Richards*, 44 Haw. at 511-12, 355 P.2d at 200. As valued by the husband, the stock was worth $160,000 (wife argued that the value was closer to $600,000). This alone exceeded wife's total award of about $135,000, much of which represented a return of the property she apparently owned premaritally or acquired during the marriage. *See id.* at 512-13, 355 P.2d at 200. Although the statute subjected all types of property to division and distribution regardless of whether they were community, joint or separate, the *Richards* opinion suggested both an inclination to return property to the spouse who brought it into the marriage, and an understanding that such a return would be fair. The supreme court's tone changed seven years later when it decided *Carson v. Carson*. *See infra* notes 194 and 199 and accompanying text.

Richards also provided an early look at how the court thought about distributing the "during marriage" appreciation of property acquired premaritally. In the case of the Kahua Ranch stock, the court appeared predisposed to let such growth in value remain with the owner spouse unless the other spouse could sufficiently justify a claim to it. *See id.* at 511-13, 355 P.2d at 199-200. In later years, as the partnership model began to emerge, appellate decisions tended to favor awarding a part of the during-marriage appreciation to the non-owner spouse. *See, e.g., infra* note 257 and accompanying text (the ICA first states a "general rule" guiding trial judges toward the sharing of during marriage appreciation of separate properties).

[194] 50 Haw. 182, 436 P.2d 7 (1967).

[195] *See id.* at 183-86, 436 P.2d at 9-10. The husband-respondent in this case was Robert Carson who was chief administrative assistant to then-United States Senator Hiram Fong. The job paid Carson $20,000 per year which, when added to income from other sources, gave Carson a per annum income of $30,000. *See High Court Reverses Divorce Case Ruling*, HONOLULU STAR BULLETIN, Dec. 13, 1967, at A-9.

[196] *See Carson*, 50 Haw. at 187, 436 P.2d at 9, 11.

[197] *See id.* at 183, 436 P.2d at 9. The court also remarked that it "certainly [had] not fe[lt] sorry for Mrs. Carson" but expressedly denied that this impacted its decision to withhold

The supreme court found the trial judge's reasoning to be an abuse of discretion.[198] Concluding that the trial judge had placed undue weight on the "separateness" of the husband's property, the court reversed the decision and instructed the trial judge on remand to consider other factors listed in Revised Laws of Hawai'i section 324-37, including the "respective merits of the parties," the "ability of the husband," "the condition in which parties would be left by the divorce," and "all other circumstances of the case."[199]

The supreme court took the opportunity to run down the statutory list of factors. The court began with the "respective merits of the parties" which it interpreted to include "the consideration of a spouse's contribution to, or assistance in the accumulation or preservation of, the separate property of the other."[200] As it did in *Richards*, the court looked for evidence that Mrs. Carson had somehow contributed. Unlike *Richards*, however, it found it in the form of such activities as the sewing of her own dresses, the purchasing and refinishing of second hand furniture, and fulfilling the social role of aiding her husband in his employment.[201] The court also noted that she worked without compensation at a "family business" distributing cosmetics, drugs and jewelry.[202] It concluded that by helping to maintain the level of marital property, the wife facilitated the preservation of the husband's separate property which would otherwise have been used to pay for marital

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property from her. *Id.*

[198] *See id.* at 187, 436 P.2d at 11.

[199] *See id.* at 184, 436 P.2d at 9. Whether the trial judge had actually failed to consider factors other than the premarital acquisition of property or had considered them but simply failed to say so is open to conjecture. According to the trial judge, the fact that the acquisition occurred prior to marriage was not by itself dispositive. *See id.* However, the judge failed to elaborate other than to say that the facts of the case did not justify an award to the wife. *See id.* Neglecting to say what those "facts" were or how they were weighed could well have been the extent of the court's culpability.

The trial judge, Allen Hawkins, did consider the length of the marriage. *See id.* at 187, 436 P.2d at 11. The parties were married for approximately eight years. *See id.* Judge Hawkins considered the marriage to be a "fairly short" one and used this finding to support his decision to withhold the husband's separate property from the wife at the time of divorce. *See id.* at 183, 436 P.2d at 9. In reviewing this portion of the decision, the supreme court measured the length of the marriage in terms of how many years were "happy" ones. *See id.* at 187, 436 P.2d at 11. Finding that the marriage had been relatively good for 6 1/2 years, the court determined the period to be long enough to entitle wife to some share of the husband's separate property. *See id.* The idea of looking at the "good" years of the marriage was an early incarnation of a concept labeled "DOFSICOD" (date of final separation in contemplation of divorce), developed later by the state's appellate court. It looked at when the marriage was, in fact, a marital unit in which spouses were assumed to share both resources and burdens. *See* Woodworth v. Woodworth, 7 Haw. App. 11, 15, 740 P.2d 36, 39-40 (1987).

[200] *See Carson*, 50 Haw. at 185, 436 P.2d at 10.

[201] *See id.*

[202] *See id.*

expenses.[203] The court did not require Mrs. Carson to show that she brought property or money to the marriage as a precondition for sharing in her husband's separate property.[204] However, had she dissipated her husband's assets, the court would have considered it a relevant factor.[205]

While still bent toward economic contribution and dissipation, the *Carson* analysis considered acts that, at best, may have had minimal impact on the accrual or maintenance of economic benefits, and whose intended purpose was not necessarily financial enhancement. For example, sewing or refinishing furniture could well have been personal hobbies that had an incidental financial benefit, while attending Washington, D.C. soirees were more likely to be social obligations or opportunities that had little if any financial implications. Although still couched in more tangible economic terms, the *Carson* analysis was actually moving toward an understanding of contributions that were in fact non-financial, but in congregate, served an essential function in the development and support of the marital unit. That Mrs. Carson's contributory acts may have in fact had little measurable financial effect, but remained noteworthy, suggested a shift away from an emphasis on what financial resources one brought to or acquired for the marriage. It was an understanding that was to become essential to the acceptance of the partnership model.

The remainder of the *Carson* analysis was largely aimed at measuring Mrs. Carson's post-divorce needs. Guided by the language of the statute, the court applied factors to its property division analysis that had traditionally appeared in discussions relating to alimony. Looking at such factors as Mrs. Carson's age, limited employment opportunities, minimal separate property, and various medical problems, the court evidenced its belief that property division was not a mere unscrambling and distribution of property that necessarily dictated a return of property to the owner spouse.[206]

The supreme court was clear that property division would be used as a source for meeting the demonstrated needs of a spouse, needs that, especially in longer unions, sprung from the circumstances of the marriage.[207] This would justify reaching not only more deeply into the marital property but also into the less needy spouse's separate property.[208] This does not necessarily square with a strict vision of partnership, or at least not a commercial one. To the extent that partnerships seek a return of the original investment value to each partner and an equal division of the partnership property, there is little

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[203] *See id.*

[204] *See id.* at 185-86, 436 P.2d at 10.

[205] *See id.* at 186, 436 P.2d at 10.

[206] *See id.* at 186-87, 436 P.2d at 10-11.

[207] *See id.*

[208] *See id.* at 184, 186, 436 P.2d at 9-10.

room for consideration of need.[209] Traditional partnership analysis tends to seek historical landmarks within the marriage, thereby explaining its preference for identifying past contributions over future needs.[210] Nonetheless, the then-controlling statute, Revised Laws of Hawai'i section 324-37, directed courts to inject need into their formulation, and thus the *Carson* court's attention to need-based factors was not surprising.[211]

The *Richards* and *Carson* decisions set the landscape upon which a slew of property-related cases, beginning in 1980 and generated by the then-newly created Intermediate Court of Appeals, were built. On the eve of the ICA explosion, however, came one more Hawai'i Supreme Court decision, *Au-Hoy v. Au-Hoy*.[212]

c. Au-Hoy v. Au-Hoy

The Au-Hoys were married for thirty years and had no children from the marriage.[213] This was the second marriage for at least Mrs. Au-Hoy, whose separate property at the time of divorce consisted of an inherited interest in real property "of substantial value" on the island of Hawai'i.[214] Mr. Au-Hoy's "separate"[215] property included two lots in Pupukea, Oahu.[216] The Au-Hoys

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[209] *See infra* note 258 (Hawai'i's commercial partnership law states that upon dissolution, partners should recover the amount of their initial investment and equally divide the profits and losses generated by the partnership; post-partnership need is nowhere to be found in the Hawai'i commercial partnership law); *see also* Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827, 896-97 (1988).

[210] *See* Reynolds, *supra* note 209, at 896-97.

[211] The court's focus on need came under its discussion of the condition of the parties after the divorce, one of the factors listed specifically in Revised Laws of Hawai'i section 324-37. *See Carson*, 50 Haw. at 186, 436 P.2d at 10-11. It found that "[a]lthough there are no children of the marriage, the condition in which the parties will be left is to be considered, the needs of the wife being of the most importance." *Id.* at 186, 436 P.2d at 10 (quoting Van Klefans v. Van Klefans, 274 P.2d 708 (Wash. 1929)).

[212] 60 Haw. 354, 590 P.2d 80 (1979).

[213] *See id.* at 355, 590 P.2d at 81.

[214] *See id.*

[215] It is unclear whether the term "separate" as used in this case carried the same meaning generally used today. While Mrs. Au-Hoy's inherited real property might fall within the current definition of "separate" property, which includes premarital property brought into the marriage, as well as gifts or inherited property acquired during the marriage, the other "separate" properties in the case may have been labeled as such by virtue of whose name was on title. In the course of a thirty year marriage, even if the spouses maintained somewhat separate lives, it would be difficult to imagine that the separate properties in this case consisted solely of premarital properties or gifts or inheritances acquired during the marriage.

In fact, the opinion stated that with the possible exception of Mrs. Au-Hoy's inherited real property interest in Kona, the parties owned little if any significant property at the time of the

owned a third Pupukea lot as tenants by the entirety.[217] Each spouse worked, maintained separate bank accounts upon which they drew to meet their separate needs; however, the husband covered food and utility expenses incurred after the couple moved into their Pupukea home in 1964.[218] One joint account existed but it was funded solely by the husband and never used by the wife.[219]

The trial court awarded the two "separately" owned Pupukea lots and a one-half interest[220] in the family home to Mr. Au-Hoy. Mrs. Au-Hoy kept her Kona property and the other one-half interest in the family home.[221] She was also granted the right to occupy the family home but was to assume the mortgage payments, property taxes, and charges and improvement costs.[222] The decision did not describe division of anything other than the real property. The husband filed the appeal, claiming *inter alia* that the trial judge erred in awarding the wife one-half of the lot on which the family home was built.[223]

The supreme court affirmed the decision below with little explanation beyond its finding that the family court had not abused its discretion.[224]

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marriage. *See id.* at 355, 590 P.2d at 81. From this, one could reasonably infer that other than Mrs. Au-Hoy's real property interest, all of the significant properties described in the opinion were acquired during the marriage. Thus, the term "separate" property as used here was intended to allude more to the fact that one spouse held title or acquired it during marriage for one's own use and control rather than to strictly describe property that has traditionally been deemed "non-marital"; i.e., premarital property or property acquired by gift or inheritance during the marriage.

One could argue that the Au-Hoys' clear, consistent and long-standing pattern of separating assets and leading separate lives signaled that this was not a typical partnership and that ordinary understandings of separate and marital property did not necessarily apply. "Separate" in this case could simply have affirmed the parties' agreement that property obtained or accrued during the marriage would be deemed as not belonging to the marital unit. In this sense, there is some kinship to the most recent incarnation of what is "non-marital" property as defined in case law. As seen later in this article, *Hussey v. Hussey*, 77 Hawai'i 202, 881 P.2d 1270 (Haw. Ct. App. 1994), sets forth a category of "marital separate property" which consists of property acquired during the marriage via gift or inheritance that the acquiring spouse clearly designates as belonging outside the marital partnership. *See id.* at 207, 881 P.2d at 1275-76.

[216] *See Au-Hoy*, 60 Haw. at 355, 590 P.2d. at 81.

[217] *See id.* at 356, 590 P.2d at 81.

[218] *See id.* at 355, 590 P.2d at 81.

[219] *See id.*

[220] This was awarded in the form of a tenancy-in-common. *See id.* at 357, 590 P.2d at 82.

[221] *See id.*

[222] *See id.*

[223] *See id.* The trial court also made decisions regarding other properties including two lots in Wahiawa, Oahu which bore the name of Mrs. Au-Hoy's son and daughter-in-law as tenants by the entirety. Mr. Au-Hoy apparently argued that it was he and Mrs. Au-Hoy who actually paid for at least one of the lots which thus entitled him to some return of value. *See id.* at 356, 590 P.2d at 82 n.1.

[224] *See id.* at 358-59, 590 P.2d at 83.

Because the parties had maintained separate bank accounts and largely covered their own expenses during their thirty year marriage, the court appeared swayed that the parties had, by agreement, pursued separate lives, and therefore, were entitled to the properties each accumulated during the marriage for his or her own use, even if the properties were purchased with during-marriage earnings.[225] The court appeared to reach this conclusion despite the fact that: 1) the parties cohabited in a jointly owned home for at least the final decade of the marriage; 2) husband paid for food and utilities during this period; and 3) husband established a joint bank account which wife could access.[226]

Like the *Richards* case, all "during-marriage" appreciation was apparently awarded to the title holder of the principal property.[227] This demonstrated at least some adherence to a title-based model of distribution. It is unclear if the supreme court, like it did in *Carson*, gave attention to need-related factors. The majority was willing to accept the trial court's statement that it had reviewed all relevant factors as required in *Carson* enroute to arriving at a "fair and equitable" distribution.[228] Given the fact that wife had maintained her own employment,[229] covered many of her own expenses during the marriage,[230] and owned a valuable interest in real property in Kona, the trial court apparently considered her needs to be adequately met. That the trial judge required her to assume the mortgage payments and the other ordinary

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[225] *See id.*

[226] *See id.* at 355-56, 590 P.2d at 81.

[227] The trial court awarded to husband the two lots in Pupukea which were held in his name and one-half of the family home in Pupukea. *See id.* at 356-57, 590 P.2d at 82. The wife received the other one-half of the family home, as well as her Kona property, which she acquired premaritally. *See id.* at 355-57, 590 P.2d at 81-82. In its decision, the trial court alluded to specific parcels of property and not to their values. Thus, it could be assumed that the value of a given parcel, including any during-marriage appreciation, was awarded to the spouse who received that parcel.

[228] This rather cursory review drew a dissent from Justice Baird Kidwell who argued that the majority had accepted too easily the trial judge's blanket assurances that he had considered all relevant factors and was aware of the *Carson* decision in developing what he considered a fair and equitable distribution. *See id.* at 359, 590 P.2d at 83 (Kidwell, J., dissenting). Kidwell complained that the trial judge failed to provide a description of what factors were weighed, and therefore thought it impossible to decide if the court below considered the statutory criteria for property division. While acknowledging that trial judges would occasionally stumble upon facts that defied the statutorily required analysis, Kidwell insisted that trial courts had to do more than simply state its awareness of the *Carson* opinion, and must instead, give due consideration to statutory factors. *See id.* at 360-61, 590 P.2d at 84 (Kidwell, J., dissenting).

[229] *See id.* at 355, 590 P.2d at 81.

[230] *See id.*

costs of owning real property[231] was a further acknowledgment of her financial ability.

One might say that the *Au-Hoy* decision accords with the partnership model, although the partnership in this case departed from the norm. The supreme court recognized that this particular partnership developed upon the premise that each partner would carve out his or her own sphere of financial acquisitions and liabilities, essentially excluding these from the community pot and thus, the default principles of partnership distribution. This particular partnership, unlike the ideal marital partnership which emphasizes sharing, was one that allowed each spouse to act autonomously even to the extent of excluding during-marriage acquisitions from the marital estate. The court recognized the parties' expectations of separateness and upheld a distribution that affirmed those expectations.

d. Summarizing the "pre-ICA explosion" period

In summary, on the eve of the "ICA explosion" which ultimately led to the present norm of using partnership to guide property division, Hawai'i's supreme court had already assembled several pieces of the partnership model. The court recognized that each spouse had the potential to become self-supporting through the acquisition of property and income, and could expect equal treatment. Neither spouse was presumed subordinate to or dependent upon the other, although the court, as it had in *Carson*, recognized that one spouse's post-divorce needs could have developed from the marriage itself and therefore be met through a shifting of property from the less needy spouse. Spousal contributions, although primarily financial at this point, arose as a major but not dispositive justification for distributing property. The notion of contribution would lend itself particularly well to the partnership model because it characterized what was expected of spouses and neatly explained why each spouse might be entitled to an equal slice of the marital estate.

Absent evidence of contribution, the court was hesitant to award property that was separately owned by one spouse to the other. This included not only the principal property but any increase in value that accrued during the marriage. If a contribution were made, the court was inclined to consider only those that directly resulted in an acquisition or an increase of value. This meant that tangible, more measurable financial contributions, might result in an award of separate property appreciation whereas household contributions might not unless a nexus to the appreciation could be drawn (as the *Carson* court tenuously tried to do).

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[231] *See id.* at 357, 590 P.2d at 82.

The cases indicated that "separateness" had a broader meaning than that currently used. Its definition seemed drawn in part from the model of title-based property distribution. The court thought it fair to return to the spouse what apparently "belonged" to him, whether it was acquired before or during the marriage. As the *Au-Hoy* decision illustrated, even earnings acquired during a long marriage and the substantial properties purchased with those earnings were not necessarily "marital." As noted above, the opinions reflected little inclination toward assigning during-marriage appreciation of separate property to the marital estate unless a spouse could demonstrate an entitlement through contribution.[232]

While fault-based factors were at least nominally eliminated from consideration, a variety of factors based on title, need and contribution, gave courts much to consider in fashioning an equitable award. Pieces of the partnership model were present, but were mixed with other considerations. As implied in the *Au-Hoy* dissent,[233] identifying and juxtaposing a myriad of relevant factors would be in many cases a difficult task, and in some, almost impossible. Perhaps in recognition of this practical reality, the supreme court in *Au-Hoy* appeared somewhat satisfied with less than the comprehensive and specific multifactorial analysis called for in its *Carson* decision.[234]

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[232] One commentator reviewed how community property states treated during-marriage increases in separate property. *See* Reynolds, *supra* note 30, at 239. She noted that even community property states initially departed from their Spanish civil law roots in developing policies that favored preserving separate property for the owner spouse. *See id.* at 259-60. This was so even when marital assets were used to increase the value of separate property. *See id.* She explained that this originated from the paternalistic notion that a wife's separate estate had to be protected and that any increases in its value could not be taken from her lest it threaten the wholeness of her separate estate and thus her ability to retain it in its entirety. *See id.* at 260.

In addition, because community property states followed the common law practice of letting the husband manage the family's finances, including the wife's estate, courts concluded that if a husband used marital property and labor to increase the value of the wife's separate property, such use was a gift to the wife and thus she was solely entitled to the increase. *See id.* There was no need to compensate the community or to otherwise give an entitlement to the partnership. *See id.*

Later, when trial judges had to decide whether to divide during-marriage increases in the husband's separate property, they merely adopted the "no-division" stance of the earlier "wives" cases even though the underlying policies of the "wives" cases did not apply. *See id.*

When courts in these states began to shift direction and allow the community to partake in increases in a wife's separate property, the rationale centered on the sometimes unjustified assumption that the husband applied all partnership resources to the betterment of the community. It therefore followed that the community developed some entitlement to the increase. *See id.* at 261.

[233] *See Au-Hoy*, 50 Haw. at 359, 590 P.2d at 83 (Kidwell, J., dissenting).

[234] Because the standard of review in these cases is "abuse of discretion", an appellate court has the leeway of upholding a lower court's decision absent abuse. *See id.* at 358, 590 P.2d at 83. The court in *Au-Hoy* was willing to infer that the family court had met its obligation

The cases that followed grappled with this tension between a desire for specificity and comprehensiveness on the one hand, and judicial efficiency on the other. The former tended to stretch the inquiry while the latter tended to structure if not restrict it. This struggle would soon expand to consider the need of practitioners for enough structure and certainty to assess the facts before them, reasonably predict outcomes, and develop negotiating positions.[235] As called for by Justice Kidwell in the *Au-Hoy* dissent, requiring detailed findings from the trial judge that were sufficient to facilitate appellate review would continue to surface as a concern.[236] With Hawai'i Revised Statutes section 580-47 as the base, these all became part of the primal soup from which the partnership model finally emerged.

2. *Judge Burns arrives*

Pursuant to a 1978 amendment to the Hawai'i State Constitution and the statutory provisions enacted to implement the amendment, the Intermediate Court of Appeals was formed.[237] The first three-member panel was sworn in on April 18, 1980 and convened its first session ten days later.[238] One of the original appointees to the ICA was James Burns who had previously served in the state circuit court. During his three years on the circuit court bench, Judge Burns ("Burns") was assigned to the family court.[239]

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pursuant to *Carson* by virtue of the court's summary representation that it was aware of the *Carson* mandate and had performed the required analysis enroute to fashioning its decision. *See id.* That the lower court had not described with much specificity what it actually considered apparently did not faze the reviewing judges. *See id.*

[235] At this writing, the American Law Institute is developing drafts of *Principles of the Law of Family Dissolution: Analysis and Recommendations.* In the preface of its first draft, Professor Marygold Melli of the University of Wisconsin wrote: "When divorce is understood as a process of party negotiation with the possibility of judicial review, one can see that substantive rules are not helpful when cast in terms of judicial discretion exercised . . . 'to achieve an equitable division' or after considering a list of multiple factors. More effective to channel negotiation by parties and their lawyers are rules that use appropriate presumptions and formulas." *Preface to the Tentative First Draft* of A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS at xviii (Tentative Draft No. 1, Mar. 15, 1995).

[236] Facilitating appellate review through clear and sufficiently detailed trial court findings was certainly a concern of ICA Chief Judge James Burns who wrote most of the post *Au-Hoy* family law decisions. *See infra* note 283 and accompanying text.

[237] *See* Yoshimura, *supra* note 168, at 276-78.

[238] *See* 1979-1980 ST. OF HAW. JUDICIARY ANN. REP. 14.

[239] Judge Burns ("Burns") was appointed to the state circuit court in May 1977. *See id.* All of the Judiciary's annual reports from FY 1976-1977 through 1978-1979 showed Burns to be one of two circuit court judges assigned to the family court. The other was Judge Betty Vitousek, who was the family court's senior judge during this period. *See* 1976-1977 ST. OF HAW. JUDICIARY ANN. REP. 32, 1977-1978 ST. OF HAW. JUDICIARY ANN. REP. 32, 1978-1979 ST. OF HAW. JUDICIARY ANN. REP. 40.

Frank Padgett, another of the original ICA appointees[240] who later became an associate justice of the Hawai'i Supreme Court, knew of Burns' expertise and interest in family law, and during his long tenure as the supreme court's assignment judge, funneled family law cases to the ICA for Burns' review.[241] This no doubt contributed to the stream of family law decisions authored by Burns during the 1980's to the present. The impact of these decisions on the current state of family law, particularly in property division and distribution, earned Burns such honorifics as "father of modern Hawai'i appellate family law."[242]

a. Promulgating general rules and etching the outlines for the partnership model

Burns started early and fast. His initial decisions demonstrated an awareness that partnership principles might provide a framework for arriving at equitable property distributions. For example, in *Linson v. Linson*,[243] the ICA held that non-vested retirement benefits were subject to division in divorce proceedings.[244] The court recognized that such benefits were more potential than real. However, keeping them out of the equation meant that if they were to vest and mature, the non-employee spouse could not access them even though she had expended "effort" during the marriage to help acquire them.[245] Taking its lead from three community property states that considered non-vested retirement benefits as part of the marital partnership and therefore

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[240] Yoshimi Hayashi was the third appointee. *See* 1979-1980 ST. OF HAW. JUDICIARY ANN. REP. 14. Hayashi was the ICA's original chief judge. *See id.* Like Justice Padgett, he was subsequently appointed to the state's supreme court. *See* 1981-1982 ST. OF HAW. JUDICIARY ANN. REP. 16-17. Burns succeeded him as the ICA's chief judge after his departure in 1982. *See id.* at 18.

[241] Justice Padgett was quoted as follows:

> Judge Burns had been in the family court as a trial court judge and built up a good deal of familiarity with the procedures and had a lot to do with trying to get that court back on track. And I felt that we, again, ought to take advantage of his expertise on the first run through.

See Yoshimura, *supra* note 168, at 294.

[242] William Darrah, Introductory Remarks at the 1995 Family Law Section/Hawaii Institute of Continuing Legal Education Annual Divorce Law Update (Dec. 7, 1995). Darrah, a prominent family law practitioner and leader in state bar activities relating to family law, has chronicled and analyzed many of the Burns-authored decisions in the *Journal of Hawai'i Family Law*, a publication of the Family Law Section for which Darrah has been the editor since its inception in January 1990.

[243] 1 Haw. App. 272, 618 P.2d 748 (1980).

[244] *See id.* at 277, 618 P.2d at 751.

[245] *See id.* at 275, 277-78, 618 P.2d at 750-51.

community property,[246] the ICA found that whether or not non-vested benefits constituted "property;" it simply was inequitable to ignore the fact that "18 of the 20 years necessary to qualify for it were years in which the Linsons were *partners in marriage*."[247] Therefore, the court included it in the divisible marital estate[248] and affirmed the family court's award of 50 percent of Mr. Linson's retirement benefits multiplied by a factor of 18/20.[249]

What Mrs. Linson's contributions were are not at all clear from the opinion. No reference was made to her having worked or owning property of significant worth. There was no mention of children or of any significant homemaker efforts. On the surface, her 50 percent award was solely based on her *status* as an equal partner in the marriage.

In subsequent decisions, Burns began constructing a framework of what he termed "general rules" that formally etched the outlines for the partnership model. He intended these rules to guide property divisions and to give trial judges and practitioners a sense of uniformity, certainty and predictability.[250]

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[246] *See id.* at 275-76, 618 P.2d 750 (citing LeClert v. LeClert, 453 P.2d 755 (N.M. 1969); DeRevere v. DeRevere, 491 P.2d 249 (Wash. Ct. App. 1971); and *In re* Marriage of Brown, 544 P.2d 561 (Cal. 1976)).

[247] *Id.* at 277, 618 P.2d at 751 (emphasis added).

[248] *See id.* at 278, 618 P.2d at 751.

[249] *See id.* at 273, 618 P.2d at 749. The factor of 18/20 consisted of the number of years that Sgt. Linson was in the military while married but prior to separation (eighteen years) divided by the number of years that Linson needed to serve in order for his retirement to vest (twenty years). *See id.*

[250] *See* Hashimoto v. Hashimoto, 6 Haw. App. 424, 725 P.2d 520 (1986). In *Hashimoto*, Burns explained his insistence on setting standards. Although not intended to be "fixed rules" for determining the amount of property to be awarded to each spouse at divorce, these standards provided a starting point from which to perform the equitable distribution analysis required by statute. *See id.* at 426, 725 P.2d at 522. Burns was clearly bothered by the notion that without any guidelines, two cases presenting identical facts could yield widely disparate results depending on who the judge was. *See id.* at 426-27, 725 P.2d at 522-23. Not only did this raise serious questions about the consistency of court decisions but also made it more difficult for attorneys to make reasonable predictions about outcomes, advise clients and propose negotiating positions. *See infra* note 283.

> At a state family law conference, Burns made the following remarks:
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> Many of you know by now that I am a big fan of standardized rules and procedures, uniform principles and manuals. Prior to the 1980's, family court lawyers enjoyed standardized rules and procedures and uniform principles in divorce cases. But that was because one judge in each circuit decided all the cases. And for those of you who are old enough to remember, the line of succession went from Judge Corbett to Judge King to Judge Lum to Judge Vitousek.

Chief Judge James Burns, Introductory Remarks at the 1995 Family Law/Hawai'i Continuing Legal Education Institute (Dec. 7, 1995).

Burns' point was that by knowing the one presiding judge and his or her style, preferences and tendencies, one could reasonably project a range of possible outcomes and plan accordingly.

He stated his first general rule in the 1983 decision of *Raupp v. Raupp*.[251] Writing for the court, Burns determined that it was generally equitable to award each divorcing party the date of marriage net value of his or her premarital property.[252] In addition, the court held that it was generally equitable to award to each party the date of acquisition net value of gifts and inheritances which he or she received during the marriage.[253]

Two months after *Raupp*, in another decision by Burns in *Takara v. Takara*,[254] the ICA declared another general rule: that it was generally equitable to award each divorcing party one-half of the net value of jointly held property.[255] A final general rule came in *Cassiday v. Cassiday*[256] in

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As explained in *Hashimoto*, Burns was also concerned about facilitating appellate review under the abuse of discretion standard. *See Hashimoto*, 6 Haw. App. at 427, 725 P.2d at 523.

[251] 3 Haw. App. 602, 658 P.2d 329 (1983). The Raupps were already in their forties at the time of their marriage in 1970. *See id.* at 603, 658 P.2d at 331. Both owned property premaritally, with Mrs. Raupp owning substantially more, including several parcels of real property. *See id.* at 603-05, 658 P.2d at 331-33. Unlike the marriage in *Au-Hoy*, the union here saw significant mixing of premarital property with marital property (or the transformation of premarital into ostensibly marital property) over the ten-year marriage. *See id.* at 608, 658 P.2d at 334. For example, the parties worked together to form a mobile food concession called "The Chew Chew Caboose" which consisted of a trailer attached to a pick-up truck. *See id.* at 606, 608, 658 P.2d at 333-34. During the marriage, the parties liquidated premarital property to acquire other properties, some of which was used to finance the start-up and maintenance of the "Caboose" and to cover day-to-day living expenses. *See id.* at 608, 658 P.2d at 334.

The ICA also used the opinion to set forth "nuts and bolts" directives on how parties were to identify and organize specific values and items of property to help a trial court sift through the information enroute to fashioning a property award. *See id.* at 609, 658 P.2d at 335.

[252] *See id.* at 610, 658 P.2d at 335.

[253] *See id.* at 611, 658 P.2d at 336.

[254] 4 Haw. App. 68, 660 P.2d 529 (1983). This case involved a two-and-a-half year marriage. The husband in this case inherited three parcels of real property before the marriage. *See id.* During the marriage, husband converted two of these parcels into tenancies by the entirety and the parties purchased a third parcel together. *See id.*

The trial court awarded all parcels to the husband except for a one-half interest in one of the parcels that husband had turned into a tenancy by the entirety. This one-half interest was awarded to the wife. *See id.* at 70, 660 P.2d at 531. The ICA affirmed the lower court decision finding that the relatively short marriage justified deviation from the rule that jointly held properties should, as a general proposition, be divided equally. *See id.* at 71, 660 P.2d. at 532.

[255] *See id.* It is interesting that in *Takara*, pieces of jointly owned property were not in fact equally divided, general rule notwithstanding. There were three jointly-held properties, two of which became joint after husband conveyed them to himself and his wife as tenants by the entirety. *See id.* at 68, 660 P.2d at 530. The third was purchased together. Of these three, the court only divided one equally. *See id.* Various circumstances, including the fact of the gifts from the husband and the relatively short marriage (less than three years), explained the trial judge's decision. The ICA also upheld the trial court's award to husband of a fourth parcel—the marital home acquired during marriage under a tenancy by the entirety. *See id.* at

which Burns wrote the following:

> As a general rule, it is equitable to award each divorcing party one-half of the after acquisition but during marriage real increase in the net value of property separately owned at the TOM [time of marriage] or acquired during the marriage by gift or inheritance and still separately owned at the TOD [time of divorce].[257]

68, 70, 660 P.2d at 530-31. The opinion was oddly silent on why the wife received nothing. This case illustrated Burns' belief that general rules were not in fact fixed and that deviation was expected if circumstances so justified.

[256] 6 Haw. App. 207, 716 P.2d 1145 (1985), *aff'd in part, rev'd in part*, 68 Haw. 383, 716 P.2d 1133 (1986).

[257] *See id.* at 213, 716 P.2d at 1149-50. The court had an earlier opportunity to consider "during marriage" appreciation of premarital separate property in *Takara* but declined to generate a rule. *See Takara*, 4 Haw. App. at 71, 660 P.2d at 532. It also had a chance to look at the issue in *Raupp* but did not do so because appellant/husband had failed to claim any entitlement to such appreciation during the trial. *See Raupp*, 3 Haw. App. at 610, 658 P.2d at 335.

The husband in *Cassiday* was a West Point graduate and retired U.S. Air Force brigadier general. *See Cassiday*, 6 Haw. App. at 208, 716 P.2d at 1147. The wife maintained the home during the thirty-plus years of marriage. *See id.* at 215, 716 P.2d at 1150. Husband acquired several pieces of valuable real property through gifts and inheritance during the marriage. He also owned valuable parcels of land prior to the marriage. *See id.* at 209-11, 716 P.2d at 1147-48. In addition, husband made several during-marriage purchases of real estate, placing some in his name and others in both his and his wife's names. *See id.* For many of his separate properties, husband used "nonmarital" funds to purchase or maintain them. To be "nonmarital", the funds could not have come from income earned during the marriage. *See id.* at 209, 716 P.2d at 1147 n.3.

The trial court essentially awarded all of the separate property to husband and split the jointly held properties equally. *See id.* at 209-11, 716 P.2d at 1147-49. Wife was awarded none of the during-marriage appreciation of husband's separate real property. *See id.* at 212, 716 P.2d at 1149. In addition, wife was awarded $1,150/month in alimony along with $1,150/month from husband's military retirement. *See id.* at 215, 716 P.2d at 1150.

Wife appealed to the ICA arguing primarily that she should have received 50% of the increased value of husband's separate real property to the extent those increases occurred during the marriage. *See id.* at 212, 716 P.2d at 1149. These increases were apparently sizable and an award of 50% would have been substantial. The ICA reversed the property division and remanded the case to the trial court. *See id.* at 216, 716 P.2d at 1151.

Wife also argued that her spousal support award was far less than the $5,000/month allowance she needed to maintain the standard of living to which she had become accustomed during the marriage. *See id.* at 215, 716 P.2d at 1151. Agreeing with the wife, the ICA reversed the spousal support order and set forth a sequence of relevant factors for the trial court to consider. While the factors were enumerated under Hawai'i Revised Statutes section 580-47(a), the ICA used the occasion to list and order what it generally considered most relevant. It directed trial courts to ask themselves the following:

> (1) After taking into account the property awarded in the divorce case, what amount does the spouse seeking support need to maintain the standard of living established in the marriage? If no need can be demonstrated, no support should be ordered.
>
> (2) Considering the income of the party seeking support, or what it should be, and the

This last rule announced in *Cassiday* completed an analytical framework that tracked the principles of commercial partnership law, which provided a template for dividing property based on the partnership model of marriage. In this model, the divorcing partners could generally expect to receive an equal portion of the partnership's profits (i.e., the net value of the marital estate), as well as a return of their respective contributions to the partnership property (i.e., property owned premaritally and brought into the marriage, or property acquired during marriage by one spouse in the form of gifts or inheritances).[258]

During this period, Burns never said that partnership principles were the basis for his general rules. It is clear, however, that he embraced them. In *Linson*, Burns noted that Mrs. Linson had been a "partner[] in marriage" and could thus share equally in her husband's military retirement.[259] Then later, in *Raupp*, Burns sought the point when it became fair to begin deeming the acquisitions of the parties as property of the union.[260] Burns was essentially

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income producing capability of the property awarded to him or her in the divorce action, what is his or her ability to meet needs independently? If the spouse can meet needs independently, no support should be ordered.

(3) Considering the income of the party from whom support is sought, or what it should be, and the income producing capability of the property awarded to him or her, what is his or her ability to meet his or her own needs while meeting the need for spousal support of the other party? *See id.* at 215-16, 716 P.2d at 1151.

Finding that the trial judge in this case had not answered these questions, the ICA remanded the case. *See id.* at 216, 716 P.2d at 1151.

[258] Hawai'i commercial partnership law provides in relevant part as follows:

Rules determining rights and duties of partners

The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(a) Each partner shall be repaid the partner's contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to the partner's share in the profits.

HAW. REV. STAT. ANN. § 425-118(a) (Michie 1993). This section was quoted later by the Hawai'i Supreme Court as it moved toward a formal acceptance of the partnership model. *See infra* note 327.

[259] Linson v. Linson, 1 Haw. App. 272, 277, 618 P.2d 748, 751 (1980).

[260] In *Raupp v. Raupp*, 3 Haw. App. 602, 658 P.2d 329 (1983), Burns instructed practitioners to introduce relevant evidence establishing an itemized description and value as of the date of marriage of all property owned by the party at the date of marriage. *See id.* at 609, 658 P.2d at 335. This would assist the court in determining the net value of premarital property as of the date of marriage. Burns recognized that the partnership did not necessarily have to begin with the formal marriage and considered the possibility that an "*economic partnership*" could have existed prior to marriage. *See id.* at 609, 658 P.2d at 335 nn. 7-8. To the extent that it did exist, Burns thought it might be appropriate to obtain values not at the date of marriage but when the *de facto* premarital partnership began. *See id.* This has more recently been labeled

looking for the birth of a partnership.

He began to more explicitly allude to the partnership model after Professor Kastely's 1984 article in which she endorsed the model and recommended how it should apply when dealing with the during-marriage appreciation of property acquired premaritally and of gifts and inheritances received during the marriage.[261] Burns adopted Kastely's position that appreciation of such separate property should be treated as marital property and divided accordingly. He also agreed with her assessment that failing to do so would suggest that marriage was "only a partial commitment" and would not encourage sharing within marriage.[262] Accordingly, in *Cassiday*, Burns instructed the trial court to reconsider its refusal to grant to the homemaker wife 50 percent of the ostensibly substantial "during marriage" appreciation of the husband's separate real property holdings.[263]

However, it was not until the Hawai'i Supreme Court reversed several of Burns' decisions and caused him to reformulate his analysis in subsequent decisions, that the partnership model shot through the surface to become the guiding principle for the division of property. Amid the sometime-heated exchanges between the two appellate courts, the partnership model remained a point of agreement and therefore served as the starting point for each new reformulation. The next section describes this period of conflict, growth and definition.

III. FORGED UNDER FIRE: THE PARTNERSHIP MODEL EMERGES

A. Developing Uniform Starting Points

It was Burns' *Cassiday* decision that suffered the first reversal by the Hawai'i Supreme Court.[264] The reversal came within twelve months of the

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"DOLT" or the "date of living together." Jackson v. Jackson, 84 Hawai'i 319, 324, 933 P.2d 1353, 1358 (Haw. Ct. App. 1997).

Burns later came up with the term "DOFSICOD" or "date of final separation in contemplation of divorce" to signal the *de facto* end of the marriage and therefore the partnership. Woodworth v. Woodworth, 7 Haw. App. 11, 11, 740 P.2d 36, 37 (1987).

[261] *See* Kastely, *supra* note 1, at 391.

[262] Cassiday v. Cassiday, 6 Haw. App. 207, 213, 716 P.2d 1145, 1149-50 n.7 (1985). Burns referred the reader to Kastely's article for the rationale of this new general rule, and thus by reference, could be said to have adopted her concerns for sharing and equalization of ownership.

[263] *See Cassiday*, 6 Haw. App. at 213, 716 P.2d at 1149-50.

[264] Cassiday v. Cassiday, 68 Haw. 383, 716 P.2d 1133 (1986).

ICA decision.[265] In a decision by Chief Justice Herman Lum,[266] the supreme court determined that the ICA's general rule which equally split the during marriage appreciation of separate property, "creat[ed] a rebuttable presumption that separate property should be evenly divided" thereby restricting the statutory grant of discretion to family court judges.[267] The court considered it a "fixed rule" that was not authorized by Hawai'i Revised Statutes section 580-47[268] and directed the trial judge to do the multi-factorial analysis required by statute and affirmed in the *Carson* decision.[269]

Although the partnership model was clearly reflected in Burns' general rules, it was in Chief Justice Lum's reversal that marriage was first clearly described as a partnership.[270] Perhaps doing no more than articulating what practitioners and judges were already thinking, the supreme court noted that "marriage [wa]s a partnership to which both partners [brought] their financial resources as well as their individual energies and efforts" and the fact that one partner brought substantially greater assets to the marriage did not make it any less of one.[271] The court then ran through a number of factors. However, this time, the court focused on those that highlighted the contributions of the homemaker spouse.[272]

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[265] The ICA decision was dated May 24, 1985. The reversal from the supreme court came on March 18, 1986, about ten months later.

[266] The opinion was authored by Chief Justice Herman Lum who, like Burns, had been assigned to the family court while sitting on the circuit court bench. Lum served as the family court's senior judge for approximately five years, succeeding Judge Samuel P. King who resigned from the bench to accept an appointment as a federal court judge. *See* 1979-1980 ST. OF HAW. ANN. REP. JUDICIARY 15.

[267] *Cassiday*, 68 Haw. at 388, 716 P.2d at 1137.

[268] In pertinent part, Hawai'i Revised Statutes section 580-47 reads as follows:

> (a) Upon granting a divorce, or thereafter if, in addition to the powers granted in subsections (c) and (d), jurisdiction of those matters is reserved under the decree by agreement of both parties or by order of court after finding that good cause exists, the court may make any further orders as shall appear *just and equitable* . . . . (2) compelling either party to provide support and maintenance of the other party; (3) finally dividing and distributing the estate of the parties, real, personal, or mixed, whether community, joint or separate . . . . In making these further orders, the court shall take into consideration: the respective merits of the parties, the relative abilities of the parties, the condition in which each party will be left by the divorce, the burdens imposed upon either party for the benefit of the children of the parties, and all other circumstances of the case.

HAW. REV. STAT. ANN. § 580-47(a) (Michie 1997)(emphasis added).

[269] *See Cassiday*, 68 Haw. at 388, 716 P.2d at 1137.

[270] *See id.* at 387, 716 P.2d at 1136.

[271] *See id.* This description of marriage as a partnership was written in the context of describing a common theme among appellate decisions, most of which were authored by Burns. The description itself drew from Professor Kastely's article. *See id.*

[272] *See id.* at 387-88, 716 P.2d at 1137.

The court remanded the case, directing the trial judge to seriously consider how "the marriage *in and of itself* affected the accumulation or preservation of Husband's separate properties."[273] In essence, the court was asking: How much better did Ben Cassiday do because he married Barbara Cassiday? It noted that during the course of a long marriage, Cassiday rose from major to brigadier general, benefitted from his wife's efforts at establishing and maintaining the home, raising the children, and fulfilling the social obligations expected of a high-ranking officer's wife.[274] It further noted that his wife's efforts had some part in ensuring his success in the military, so much so that he never had to liquidate or otherwise use any of his separate property to pay for the needs of the marital unit.[275] Thus, the court instructed the trial court to credit the wife for her contribution to the marriage itself and to factor this credit into deciding how much of the "during marriage" appreciation to award her.[276] However, it refused to uphold the ICA's rebuttable presumption even though it was premised on a notion of partnership that emphasized equality and sharing.[277] While endorsing the partnership model as a "time-honored proposition,"[278] the court seemed willing to consider that marriages were not always equal partnerships, that the contributions of one spouse, while significant, might not warrant an equal division of even marital property.[279]

Cassiday provoked a quick response from the ICA. Six months after *Cassiday*, the ICA issued its decision in *Hashimoto v. Hashimoto*.[280] Burns explained that far from being fixed, his "general rules" were intended to be no more than "uniform starting points" from which to begin the equitable

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[273] *See id.* (emphasis added).

[274] *See id.*

[275] *See id.* at 388, 716 P.2d at 1137.

[276] *See id.* at 388-89, 716 P.2d at 1137-38.

[277] *See id.* at 388, 716 P.2d at 1137.

[278] *Id.* at 387, 716 P.2d at 1136.

[279] *See id.* at 388, 716 P.2d at 1137. The court wrote: "An equal division of the marital estate may be wholly equitable in one circumstance and grossly unfair in another." *See id.* Alternatively, the court was willing to divide property unequally even if the partnership were equal, as long as other factors justified such a division, for example, if one partner squandered assets. *See id.*

Ironically, while the court struck down the "general rule" that "during marriage" appreciation of separate property should be equally divided, it characterized as "generally accepted" another general rule: that each divorcing party was entitled to the date of marriage net value of his or her premarital property and date of acquisition net value of gifts and inheritances which he or she received during the marriage. *See id.* at 390, 716 P.2d at 1138. In addition, it generated what seemed to be a rule of its own: that a trial court could award *up to* one-half of during-marriage appreciation to the non-owner spouse depending on the circumstances of the case. *See id.* at 389, 716 P.2d at 1138.

[280] 6 Haw. App. 424, 725 P.2d 520 (1986).

distribution analysis required by statute.[281] He urged that in order to promote "uniformity, stability, clarity or predictability" in judicial decisions, trial judges should begin their analysis from a series of "uniform starting points."[282] He added that if a departure from these starting points were ordered, trial judges had to describe with adequate specificity the reasons for the departure.[283] To implement this, he assembled a framework.

To begin, Burns created five categories of net market values ("NMVs"). Category 1 consisted of the total NMV of premarital property on the date of the marriage.[284] The during marriage appreciation of such property was labeled Category 2.[285] Category 3 consisted of the NMV of all gifts and inheritances acquired during the marriage while the NMV of the during marriage appreciation thereof was Category 4.[286] Category 5 was the total NMV at the date of divorce minus the NMVs from the other four categories.[287] This final category was an approximation of what would generally be considered the "marital" estate which, all things being equal, would be divided equally.

Having established these categories, Burns proceeded to set forth the following uniform starting points for dividing NMVs in each category:

(1) *Category 1* (premarital property): 100% to the owner spouse;[288]

(2) *Category 2* (appreciation of Category 1): 75% to the owner spouse, 25% to the non-owner spouse;[289]

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[281] *See id.* at 426, 725 P.2d at 522.

[282] *See id.* at 426-27, 725 P.2d at 522-23.

[283] *See id.* at 427, 725 P.2d at 523. Specificity would, in Burns' view, greatly facilitate appellate review by giving reviewing courts the benefit of knowing how the trial court reached its decision and whether the decision breached the abuse of discretion standard of review. *See id.*

[284] *See id.* at 425-26, 725 P.2d at 522. Category 1 was actually defined as "[t]he date-of-marriage net market value of all property separately owned at the date of marriage but excluding the value attributable to property that is subsequently legally gifted by the owner to the other party, to both parties, or to a third party." *Id.*

[285] *See id.* at 426, 725 P.2d at 522. Category 2 was defined as "[t]he during-the-marriage increase in the net market value of category 1 property that the owner separately owns at the time of the divorce." *Id.*

[286] *See id.* Category 3 was defined as "[t]he date-of-acquisition net market value of property separately acquired by gift or inheritance during the marriage but excluding value attributable to property that is subsequently legally gifted by the owner to the other party, to both parties, or to a third party." *Id.* Category 4 was defined as the "during-the-marriage increase in the net market value of category 3 property that the owner separately owns at the time of the divorce." *Id.*

[287] *Id.* Category 5 was actually defined as "[t]he time-of-divorce net market value of all property owned by one or both of the parties at the time of the divorce minus the net market values included in categories 1, 2, 3 and 4." *Id.*

[288] *See id.* at 425-28, 725 P.2d at 522-524.

[289] *See id.* This apportionment arose from Burns' observation that the Hawai'i Supreme Court had allowed the non-owner spouse to have 0% to 50% of the appreciated value of

(3) *Category 3* (gifts and inheritances during marriage): 100% to the owner spouse;[290]

(4) *Category 4* (appreciation of Category 3): 75% to the owner spouse, 25% to the non-owner spouse;[291] and

(5) *Category 5* ("marital" properties): 50% to each spouse.[292]

The framework reached full-bloom in *Woodworth v. Woodworth*[293] in which Burns developed the idea that some marriages, and therefore some marital partnerships, arrived at a *de facto* end prior to its legal dissolution.[294] He called this "the date of final separation in contemplation of divorce," or "DOFSICOD,"[295] and developed a Category 6 which consisted of NMVs specific to this period.[296] He determined that if DOFSICOD occurred before

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Category 1 and 3 NMVs. *See id.* at 428, 725 P.2d at 523. For his uniform starting point, Burns decided to pick the midpoint of this range or 25%. Correspondingly, the owner spouse's share would be 75%. *See id.*

[290] *See id.*

[291] *See id.*

[292] *See id.*

[293] 7 Haw. App. 11, 740 P.2d 36 (1987), *overruled in part by* Myers v. Myers, 70 Haw. 1434, 764 P.2d 1237 (1988).

[294] *See id.* Prior to the *Woodworth* decision, Burns fine-tuned the framework of uniform starting points in *Reese v. Reese*, 7 Haw. App. 163, 747 P.2d 203 (1987), *aff'd in part, vacated in part*, 69 Haw. 497, 748 P.2d 1362 (1988). The portions of the *Reese* decision that were later vacated did not affect the concept of uniform starting points.

Woodworth dealt primarily with land which the parties purchased as tenants in the entirety. *See Woodworth*, 7 Haw. App. at 14, 18-19, 740 P.2d at 39, 41. After the purchase, the parties grew increasingly estranged both emotionally and physically. *See id.* at 14, 740 P.2d at 39. In August 1982, husband discussed divorce with the wife and no attempt at reconciliation occurred thereafter. *See id.* A few months later, husband built a house on the property, spending about $39,000. *See id.* During the divorce proceedings, the trial court awarded half of the aggregate value of the house and lot to the wife. *See id.* at 15, 740 P.2d at 39. Husband then appealed, arguing that the wife deserved none of the value derived from the construction of the house since the house was built well after the date of final separation. *See id.*

[295] *See id.* at 15, 740 P.2d at 39-40. DOFSICOD was defined as the earlier of (1) the date of the completion of the trial or (2) the date when one spouse clearly and unconditionally communicated to the other by word and/or deed that the marriage in fact ended and that a divorce was being sought, and thereafter did nothing to communicate anything to the contrary. *See id.* at 15-16, 740 P.2d at 39-40.

Burns first described this idea of DOFSICOD in a footnote in *Cassiday v. Cassiday*, 6 Haw. App. 207, 209, 716 P.2d 1145, 1147 n.2 (1985), *aff'd in part, rev'd in part*, 68 Haw. 383, 716 P.2d 1133 (1986).

[296] *See id.* at 16, 740 P.2d at 40. An easy way to think of the Category 6 NMV is to consider it to be the difference between all the NMVs as of the end of trial minus the total NMVs as of the date of final separation. Technically, the ICA defined the Category 6 NMV as "[t]he difference between the NMVs, plus or minus, of all property owned by one or both spouses at the conclusion of the evidentiary part of the trial and the total of the NMVs, plus or minus, includable in categories 1, 2, 3, 4, and 5." *Id.*

the conclusion of the evidentiary part of the trial, and the net market values of the properties owned by the spouses at the conclusion of trial changed since DOFSICOD, the difference, plus or minus, should be awarded, as a starting point, to the legal owner spouse in proportion to his or her legal ownership.[297] Essentially, Burns was looking at property as it was acquired or accrued between the final separation of the parties and their divorce, and recognized that although the shell of legal status remained, the innards of the marriage disappeared at DOFSICOD, thereby warranting a departure from the assumptions made of intact marital partnerships.[298]

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[297] *See id.* at 17, 740 P.2d at 41.

[298] *See id.* In an attempt to approximate the *de facto* endpoint of the marital partnership to which the uniform starting points applied, the ICA developed DOFSICOD. The ICA, beginning in *Raupp v. Raupp*, 3 Haw. App 602, 658 P.2d 329 (1983), also considered the point at which the partnership started. *See id.*

In 1989, in *Malek v. Malek*, 7 Haw. App. 377, 768 P.2d 243 (1989), the ICA found that partnerships could begin before the onset of the legal marital relationship, as long as they developed into marriages. *See id.* at 379, 768 P.2d at 246.

In *Malek*, the parties began cohabiting regularly in December 1982 and married in April 1984. *See id.* at 378, 768 P.2d at 245-46. During the period of cohabitation, husband provided all the financial support while wife assisted him in his self-employment. *See id.* at 379, 768 P.2d at 246. In 1986, the parties separated in contemplation of divorce with the proceedings starting a year later. *See id.* at 378, 768 P.2d at 245.

At the time of the divorce, the only property of significance was husband's lease of a two-acre parcel in Maui on which a house was built. *See id.* On the date of the marriage, the net market value of the parcel was $113,000. *See id.* During the two-year marriage, the value increased by $2,000. *See id.* The family court judge awarded 50% of the appreciation and 5% of the date of marriage net market value to wife, totaling $6,150. *See id.* Both awards deviated from the applicable uniform starting points but the ICA found no abuse of discretion in the deviations and affirmed the decision. *See id.* at 382, 768 P.2d at 248.

There is a brief reference to the wife's contribution to the date of marriage net value of the property (i.e., the wife "assisted" husband in his work and in the upgrading of the house). This suggested that the family court judge gave value to the wife's premarital efforts on behalf of the partnership. *See id.* at 378-79, 768 P.2d at 245-46.

The ICA distinguished this case from a typical palimony case by stating that this premarital relation "matured" into a marriage which ultimately ended in divorce. *See id.* at 379, 768 P.2d at 246. Therefore, the Maui leasehold, although acquired premaritally, was considered part of the marriage and subject to the uniform starting point analysis then in existence.

Had the parties not married, the result would likely have been different. Appellate courts in Hawai'i have been slow in recognizing domestic or economic partnerships formed by cohabiting individuals. The Hawai'i Supreme Court has said that: "[M]arriage holds positive and negative legal consequences for each party. A person who is not legally married does not qualify for the positive legal consequences of marriage." Maria v. Freitas, 73 Haw. 275, 832 P.2d 259, 264 (1992)(internal quotations omitted).

Recent legislative enactments that created domestic partnerships entitling unmarried domestic partners to many of the economic benefits previously granted to married persons will necessarily alter this principle. 1997 Haw. Sess. Laws 1211-45.

In *Woodworth*, Burns also proposed that courts should presume that property arose from marital efforts and therefore belonged to the marriage, unless a party could show otherwise.[299] As such, the ICA clearly favored the expectation that marital partners equally share burdens and resources and should likewise share the marital estate upon dissolving their partnership. It challenged the spouse seeking to deviate from this expectation to affirmatively state and prove his case.[300]

For several years following *Woodworth*, the ICA continued to issue decisions that used this partnership-based system of uniform starting points. With the exception of the Hawai'i Supreme Court decision in *Myers v. Myers*,[301] which invalidated the uniform starting point for dividing values accrued or acquired during the period beginning at DOFSICOD and ending at divorce (i.e., Category 6),[302] this system remained largely unscathed for

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[299] *See Woodworth*, 7 Haw. App. at 17, 740 P.2d at 41. For example, Burns wrote:

> The spouse who asserts that a NMV [net market value] is not a category 5 NMV [i.e., the prototypic marital category] has the burden of proving that assertion. In the absence of sufficient proof that a NMV is other than a category 5 NMV, then that NMV is a category 5 NMV and the USP [uniform starting point] for dividing it is 50 percent to the husband and 50 percent to the wife.

Id.

[300] *See id.*

[301] 70 Haw. 143, 764 P.2d 1237 (1988).

[302] *See id.* at 150, 764 P.2d at 1242. At issue were two items of property that appreciated greatly during the two to three year period between DOFSICOD and the divorce. The first was an option agreement (referred to in the opinion as the "Kaiser Option") to purchase real property which had been the site of Kaiser Hospital and on which the Hawai'i Prince Hotel now sits. *See id.* at 146, 764 P.2d at 1240. The second was an interest in a limited partnership holding Revere Copper stock (referred to in the opinion as the "Revere Copper investment"). Both had been purchased by Mr. Myers prior to DOFSICOD as identified by the family court. *See id.* at 146-47, 764 P.2d at 1240.

The trial judge equally divided the value accrued up to DOFSICOD then, pursuant to *Woodworth*, awarded all of the post-DOFSICOD appreciation to Mr. Myers who was the sole title-holder. *See id.* at 147, 764 P.2d at 1240. After the ICA upheld this portion of the decree as consistent with *Woodworth*, Mrs. Myers appealed to the Hawai'i Supreme Court. *See id.*

While keeping intact the remainder of USP framework, the high court struck down the uniform starting point—i.e., "in proportion to legal ownership"—for property acquired or accrued during the period between DOFSICOD and the divorce (i.e., Category 6). *See id.* at 153-54, 764 P.2d at 1243-44. The court found that this starting point amounted to a presumption that impermissibly stifled the discretion given to the family court by statute. *See id.* It found that the ICA's use of titular ownership as a starting point violated Hawai'i Revised Statutes section 580-47's mandate to look beyond mere title in dividing property. *See id.* at 153, 764 P.2d at 1243.

Given that the USP for the DOFSICOD-to-divorce period was devised to acknowledge the *de facto* end of the partnership, it was ironic that the high court alluded to the same partnership model in nullifying this particular USP. Stating that a final division of marital property "[could] be decreed only when the partnership is dissolved" the supreme court ostensibly rejected the

several years and set the standards on which family law practitioners and the family court came to rely.[303]

B. Gussin v. Gussin: Uniform Starting Points Crumble But Partnership's in the Crumbs

In 1992, however, the Hawai'i Supreme Court proceeded to finish what it had started in *Myers* and nullified the entire system of uniform starting points, striking out against what it deemed to be hard and fixed rules that unduly restricted the discretion of the family court as mandated by Hawai'i Revised Statutes section 580-47. Heralded as the "most significant Hawai'i divorce case decided by the Hawai'i Supreme Court in thirty-two years,"[304] the

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ICA's notion that a *de facto* end could precede the *de jure* dissolution of a marital partnership. *See id.* at 154, 764 P.2d at 1244.

To make the point, the high court noted that while some of the post separation growth was a result of Mr. Myer's efforts and skill, at least some of it arose from external forces such as rapid changes in the yen-dollar exchange rate which contributed to the increased marketability and value of the option. *See id.* at 153-54, 764 P.2d at 1244. The court considered this "passive appreciation" to be a significant factor that both the trial court and ICA ignored. *See id.* The court suggested that because it had nothing to do with affirmative acts by Mr. Myers, this kind of appreciation should be attributed to the continuing partnership and divided accordingly. *See id.* at 154, 764 P.2d at 1244. Had the court accepted Burns' notion that the partnership in fact devolved into something less, if not disappeared altogether at DOFSICOD, it might not have stressed this distinction since the appreciation, whether passively or actively obtained, would have been deemed outside the partnership.

[303] Pursuant to *Muraoka v. Muraoka*, 7 Haw. App. 432, 776 P.2d 418 (1989), standardized balance sheets or charts (called "Muraoka Charts") used for detailing family assets and liabilities were regularly prepared and submitted to the family court for review. Not only did these sheets include a reporting of the applicable assets and liabilities, they also incorporated the categories of net market values along with the concomitant uniform starting points developed by the ICA. *See* Memo of Senior Family Court Judge Daniel G. Heely to All Family Court Judges, Staff and Attorneys Regarding Muraoka Charts dated June 14, 1991.

While the genesis of this system of uniform starting points and net market values officially occurred in 1986, its basic structure was not much of a departure from the ICA's earlier system of general rules. If anything, a labeling change occurred rather than any grand internal overhauling. Thus, by the time the supreme court nullified uniform starting points in 1992, the system had been in place for almost a decade.

Amid concerns that the supreme court would ultimately go beyond its *Myers* decision and reverse the entire system of uniform starting points, House Bill No. 2470 was introduced to expressedly authorize courts to utilize a uniform decisional process akin to the kind devised by the ICA. H.R. 2470, 16th Legis., Reg. Sess. (1992). The intent of the proposed legislation was to prevent a return to the pre-USP era. Testifying in support of the bill were leaders of the bar's family law section and the family court. *See* Yamauchi, *supra* note 16 at 438-41. Despite the favorable support, the bill failed to pass. HAW. S. JOURNAL 1992, Reg. Sess. 1517 (1992)(while the bill cleared the State House, it failed to pass out of the State Senate).

[304] Yamauchi, *supra* note 16, at 423 (quoting Special Edition, H.S.B.A. FAM. L. SEC. J. HAW. FAM. L. NO. 7, Sept. 2, 1992, at 1).

supreme court's decision in *Gussin v. Gussin*,[305] left little of the Burns-built uniform decisional process.[306]

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[305] 9 Haw. App. 279, 836 P.2d 498 (1991), *cert. granted*, 72 Haw. 618, 838 P.2d 860 (1991), *vacated*, 73 Haw. 470, 836 P.2d 484 (1992). Lori Yamauchi's article provided an interesting description of the cases and events leading to *Gussin*, and recorded the concern of practitioners and judges following *Gussin*. *See* Yamauchi, *supra* note 16, at 438-43.

[306] A year before the *Gussin* decision, Burns already appeared to sense that his uniform decisional process faced substantial opposition and imminent reversal from the supreme court. Perhaps goaded by a dissenting voice within his own court (starting with *Bennett v. Bennett*, 8 Haw. App. 415, 807 P.2d 597 (1991), Associate ICA Judge Walter Heen authored three concurring opinions expressing opposition to the system of uniform starting points), Burns elaborated on his reasons for insisting on a uniform decisional framework.

> In writing for the majority in *Bennett*, Burns reiterated that his framework was
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> . . . designed to standardize and facilitate the factual analysis, facilitate settlements, identify the reasons for a particular decision, facilitate appellate review, facilitate the continued case-by-case development of express and uniform ranges of choice applicable statewide to similar fact situations, and [brought] as much statewide consistency, uniformity, and predictability as is possible to family court decisions dividing and distributing property in divorce cases.

Bennett v. Bennett, 8 Haw. App. 415, 421, 807 P.2d 597, 601 (1991).

He then expanded on how uniform starting points made appellate review more meaningful in view of the "abuse of discretion" standard of review used in property division cases. *See id.* at 422-23, 807 P.2d at 602. Asserting that a trial judge's acceptable range of choices was of judicial and not legislative origin, Burns opined that absent any guidance in the form of uniform categories, starting points and range of choices, appellate courts had little choice but to either defer to the trial court's decision or impose a less deferential standard of review. *See id.* By having some guidelines on what choices were within the permissible range, appellate courts could better gauge if a trial court exceeded its discretion.

In *Bennett*, Burns also argued that prior supreme court decisions actually supported rather than proscribed his partnership-based framework. He wrote:

> The Hawaii Supreme Court has not disapproved of these developments. Moreover, the Hawaii Supreme Court has also imposed uniform limits on the family court's range of choice. For example, in Cassiday v. Cassiday, 68 Haw. 383, 716 P.2d 1133 (1986), the Hawaii Supreme Court concluded that "[i]t is generally accepted that each divorcing party is entitled to the date of marriage net value of his or her premarital property and the date of acquisition net value of gifts and inheritances which he or she received during the marriage" and that the "trial court may award up to half of [the during-marriage] appreciation [of separate property] to the non-owning spouse[.]" 68 Haw. at 389-90, 716 P.2d at 1138. Subsequently in Myers, it defined "marriage" as a "partnership," thereby deciding that partnership principles guide and limit the range of the family court's choices.

Bennett, 8 Haw. App. at 423, 807 P.2d at 602.

Then in *Gardner v. Gardner*, 8 Haw. App. 461, 810 P.2d 239 (1991), Burns affirmed that partnership principles guided property division in this state and that his system of uniform starting points was a working incarnation of those principles. After reviewing the progression of decisions from his court, he concluded:

> In our view, the uniform process we have developed is much better than the prior ad hoc process and is accomplishing its purposes outlined above. If there is a problem with the

In *Gussin*, the parties were married for eight years.[307] Entering the marriage, husband owned $42,982 in cash and an apartment worth $33,000.[308] During the marriage, husband sold the apartment and deposited the proceeds as well as the premarital funds into joint accounts.[309] From these joint accounts, the parties withdrew funds to purchase the jointly-held marital residence.[310] The purchase price was $300,000; the equity grew to $583,000 at the time of divorce.[311]

At the time of divorce, the estate of the parties was estimated at $820,000, the marital residence being the largest asset.[312] Of the $583,000 attributed to the marital residence, the family court first awarded $101,026 to husband, which represented a return of the date of marriage value of his cash and apartment with an adjustment for inflation.[313] The remaining value of $481,974 was divided evenly.[314] The wife filed an appeal arguing that the trial court erred in returning the date-of-marriage value of husband's premarital property.[315] She reasoned that husband's premarital property had "transmuted" into marital property or, in the alternative, had been gifted to her.[316]

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uniform process, it is with its implementation, not with the process itself. The appropriate solution to an implementation problem is to require proper implementation, not to discontinue the process.

Therefore, we reemphasize that the uniform process is only a process. USPs are only starting points. There are currently only a few limits on the family court's range of choice. Subject to these few limits, the family court currently has, and must knowledgeably exercise, a wide range of choice and equitable discretion when deciding how to divide and distribute property in divorce cases.

Id. at 469-70, 810 P.2d at 244.

Responding to Associate Judge Heen's challenge, Burns stiffly asserted:

[J]udge Tanaka and I conclude that as an appellate court we have the power to require all family court judges to start their equitable distribution analysis from uniform starting points. The primary purpose of categorization is to facilitate the uniform starting points and the uniform decisional process. If there can be no uniform starting points, then categorization and the uniform decisional process are exercises without any useful or meaningful purpose. Therefore, we reaffirm the categories, the uniform starting points, and the Muraoka decisional process.

Id. at 471, 810 P.2d at 244.

[307] *See Gussin*, 73 Haw. at 473, 836 P.2d at 487.

[308] *See id.* at 475, 836 P.2d at 487.

[309] *See id.*

[310] *See id.*

[311] *See id.*

[312] *See id.* at 473, 836 P.2d at 487.

[313] *See id.* at 476, 836 P.2d at 488.

[314] *See id.*

[315] *See id.*

[316] *See id.* The estate also included assets in Kaneohe, Kona and Kauai which had been husband's separate property. *See id.* at 477, 836 P.2d at 488. The during-marriage appreciation of these properties amounted to $120,796. *See id.* The family court awarded 100% of the date

Unlike *Myers*, which invalidated only the uniform starting point for values accrued after DOFSICOD, *Gussin* presented the court with net market values from a variety of categories, including premarital properties and their appreciation, and jointly held property acquired during the marriage. Thus, the court was in a position to cut a wider swath, and it did. Expressing the same concerns it had in *Cassiday*, the high court voided all remaining uniform starting points (i.e., for Categories 1 through 5) finding them to be "rebuttable presumptions" that "undeniably restrict[ed] the exercise of the family court's wide discretion."[317]

Cognizant, however, of the purposes and goals of the ICA's scheme,[318] the high court advised the following:

> To the extent that a certain degree of "uniformity, stability, clarity or predictability" of family court decisions can be attained, while . . . preserving the wide discretion mandated by H.R.S. [section] 580-47, judges are compelled to apply the appropriate law to the facts of each case and be guided by reason and conscience to attain a just result.[319]

The court then stated "we conclude that our acceptance of the 'partnership model of marriage' provides the necessary guidance to the family courts in exercising their discretion and to facilitate appellate review."[320]

While gutting the ICA's uniform decisional process, the *Gussin* decision affirmed the partnership model as a guiding model. However, it said little to help judges and lawyers transform rhetoric into practical application. What *Gussin* effectively did was return trial courts and attorneys to the pre-"general rule" era when each judge was called upon to discern as many relevant factors as he or she could, and to individually fashion a result that seemed equitable. The reference to "partnership principles" appeared well-intentioned but perfunctory without any cogent instructions to replace those created by the ICA.[321]

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of marriage value (with an adjustment for inflation) of these properties to husband and split the appreciation 85% to 15% in favor of the husband. *See id.* Wife objected to the application of an inflation factor to the principal which effectively lowered her 15% share in the appreciation to 12%. *See id.*

[317] *Id.* at 482, 836 P.2d at 490. The supreme court noted that Burns' relabeling of "general rules" to "uniform starting points" did not in any way resolve the high court's objections to rebuttable presumptions as stated in its *Cassiday* decision. *See id.* at 481, 836 P.2d at 490.

[318] The high court called the ICA's purposes and goals "commendable." *See id.* at 485, 836 P.2d at 492.

[319] *Id.* at 486, 836 P.2d at 492.

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

[321] In *Gussin*, Chief Justice Herman Lum wrote a dissent in defense of Burns' process of uniform starting points. Lum wrote that in the interest of giving litigants some modicum of predictability, the use of reference points from which to begin (and not end) an analysis was not violative of the Hawaii Revised Statute section 580-47(a)'s grant of judicial discretion in the

C. Tougas v. Tougas: A Begrudging About - (Saving) Face; Partnership Gets its Imprimatur

The supreme court's sudden dismantling of a familiar and well-accepted system of standards was predictably disruptive.[322] In addition, the discordance of seeing the court's support of partnership principles on one hand, and its rejection of rules arising from those principles on the other, was discomfiting.[323] Compelled by this, the Hawai'i Supreme Court in *Tougas v. Tougas*[324] made an apparent attempt to fill the void. While reaffirming its

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resolution of property disputes. *See Gussin*, 73 Haw. at 494-95, 836 P.2d at 496 (Lum, C.J., dissenting). Ironically, it was Chief Justice Lum who authored the 1986 *Cassiday* decision which reversed the ICA's "general rules." *See* Cassiday v. Cassiday, 68 Haw. 383, 716 P.2d 1133 (1986).

[322] Following *Gussin*, the *Journal of Hawai'i Family Law*, which represented the voice of the practicing family law bar, predicted dire consequences:

> The effect of *Gussin* is potentially quite adverse.
>
> (a) Because the requirement of the preparation and presentation of balance sheets detailing all family assets and liabilities under Muraoka v. Muraoka, 7 Haw. App. 432, 776 P.2d 418 (1989) has been effectively abolished by *Gussin*, there is a serious concern that many Family court practitioners will no longer take the time, and divorcing clients will no longer want to expend the resources required, to adequately organize and present the financial aspects of their cases, the result being that many cases will now be negotiated and tried without sufficiently comprehensive information regarding the nature and extent of the marital estate.
>
> (b) As a result of *Gussin's* invalidation of all of the guidelines that have heretofore allowed attorneys and judges to predict a reasonable range of outcomes, fewer cases will settle as each divorcing party will more likely believe that at least some judge unrestricted by any guidelines will agree with their subjective view of what is or is not "just and equitable" under the circumstances.
>
> (c) Cases will cost more to prepare and present, given the increased uncertainty as to what information is, or is not, essential or even relevant to the resolution of the economic issues in the case.
>
> (d) Outcomes will become more diverse, depending almost entirely on the individual ethics, values, and morality of the particular judge deciding the case.
>
> (e) Cases which are now pending in the family court may have to be delayed or suspended to allow attorneys to assess whether the fact that *Gussin* has completely changed the ground rules for dividing property incident to divorce requires an entirely new presentation of facts in each case.

Special Edition, H.S.B.A. FAM. L. SEC. J. HAW. FAM. L. NO. 7, Sept. 2, 1992, at 1-2.

[323] *See id.* at 2.

[324] 76 Hawai'i 19, 868 P.2d 437 (1994). This case presented a richer fact pattern when compared to *Gussin*. Ray Tougas had worked in the commercial underwater diving industry prior to marriage. *See id.* at 22, 868 P.2d at 440. Carol Tougas completed graduate work in public health administration prior to the marriage and had been a finalist for a position with the Hawaii Medical Service Association. *See id.* She went to work instead with husband who was then manager of Isle Dive. *See id.* Soon thereafter, the parties pooled their resources to form

rejection of the "hard and fixed" rules embodied in the ICA's framework of uniform starting points, the *Tougas* court clearly but cautiously responded to the confusion and discontent that followed *Gussin*.

First, the supreme court retained the ICA's five categories of net market values[325] and affirmed the ICA's assignment of partnership terms to at least three of the categories. Then, quoting a Burns-authored opinion, the court approved the following description:

> The NMVs [net market values] in Categories 1 [premarital property] and 3 [property acquired during marriage by gift or inheritance] are the parties' capital contributions to the marital partnership. The NMVs in Categories 2 ["during marriage" appreciation of Category 1] and 4 ["during marriage" appreciation of Category 3] are the during-the-marriage increase in the NMVs of Categories 1 and 3 properties owned at DOCOEPOT ["date of the conclusion of the

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their own commercial diving company with the wife in charge of administrative duties and the husband conducting diving services. *See id.* This all occurred during the parties' period of premarital cohabitation; living expenses were shared at the time. *See id.*

The parties' business flourished. The efforts of both contributed to the success. *See id.* The parties married in 1979 after five years of living together. *See id.* Just prior to the marriage, Ray purchased two condos. *See id.* The parties jointly bought a marital residence. *See id.* After the birth of a child in 1980, Carol worked part-time, conducting business from home. *See id.* at 22-23, 868 P.2d at 440-41.

During the marriage, the parties acquired additional properties and investments by way of a real estate investment company owned by Carol's father, Calvin Bright of California. *See id.* at 23, 868 P.2d at 441. Carol was also a partner/beneficiary of a partnership created by her parents prior to the Tougas marriage; this partnership was intended to benefit Carol and her siblings to the exclusion of spouses and significant others. *See id.* Ray signed a release of any interest in the partnership. *See id.* The value of the partnership assets was apparently significant. A second partnership was later created during the Tougas marriage and was intended to benefit only the Bright children although no specific release was signed by Ray. *See id.*

The parties separated in November of 1985 and Ray filed for divorce in January 1987. *See id.* Prior to trial, Ray filed a motion to compel discovery of the value of the Bright partnerships. *See id.* He argued that knowing the values of Carol's separate holdings was essential to making a fair and fully informed split of the marital estate, as well as, in correctly deciding child and spousal support. This resulted in a series of court proceedings in both California and Hawai'i which engendered full faith and credit issues. *See id.* at 24-25, 868 P.2d at 442-43. After a California appellate court granted Ray's request for financial information, Hawai'i's family court concluded that information regarding Carol's separate holdings, including her partnership holdings, was relevant to assessing her financial condition after the divorce and determining child and spousal support. *See id.* at 29, 868 P.2d at 447.

The family court judge evenly divided the marital residence. *See id.* at 25, 868 P.2d at 443. She also awarded Ray all of the premarital value of the diving business and 75% of the post marital value. *See id.* Carol's interests in the two Bright partnerships were left intact and she received the remaining 25% of the family business' post marital value. *See id.* Both parties appealed. *See id.*

[325] *See id.* at 27, 868 P.2d at 445.

> evidentiary part of the trial" - effectively, the date of divorce]. Category 5 is the DOCOEPOT NMV in excess of the Categories 1, 2, 3, and 4 NMVs. In other words, category 5 is the net profit or loss of the marital partnership after deducting the partners' capital contributions and the during-the-marriage increase in the NMV of property that was a capital contribution to the partnership and is still owned at DOCOEPOT.[326]

Referring to commercial partnership principles, under Hawai'i Revised Statutes section 425-118(a), the court acknowledged that "[e]ach partner shall be repaid the partner's contributions, . . . and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, . . . sustained by the partnership according to the partner's share in the profits."[327] The court then added "if there is no agreement between the husband and wife defining the respective property interests, partnership principles dictate an equal division of the marital estate 'where the only facts proved are the marriage itself and the existence of jointly owned property.'"[328] This could be fairly read to approach, if not endorse, the ICA's starting points for Category 1, 3 and 5; i.e., all things being equal, 100 percent of separate property to the owner spouse, and an even split of the marital property.[329]

Then in a surprising turn, the court acknowledged that while family court judges were accorded wide discretion, it was legitimate to expect a degree of "uniformity, stability, clarity or predictability" in judicial decision making, and that trial judges were therefore "compelled to apply *the appropriate law* to the facts of each case and be guided by reason and conscience to attain a just result."[330] The "appropriate law," declared the court, was the partnership model.[331]

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[326] *Id.* at 27, 868 P.2d at 437 (quoting Gardner v. Gardner, 8 Haw. App. 461, 467, 810 P.2d 239, 240 (1991)).

[327] *Id.* at 27-28, 868 P.2d at 445-46 (quoting *Gardner*, 8 Haw. App. at 464-65, 810 P.2d at 242).

[328] *Id.* at 28, 868 P.2d at 446 (quoting Gussin v. Gussin, 73 Haw. 470, 484, 836 P.2d 484, 491 (1992)).

[329] Less clear was whether *Tougas* provided guidance for the treatment of during-marriage appreciation of separate property, i.e., Categories 2 and 4. In quoting commercial property concepts, the supreme court left open the possibility that such appreciation could be considered "profits" of the partnership and therefore be divided equally. However, this seems somewhat discordant with the court's decision in *Cassiday* which capped at 50% an award of such appreciation to the non-owner spouse. The *Cassiday* decision viewed an even split as one extreme within a range of possibilities rather than a commonly expected result. This was resolved in more recent decisions.

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

[331] *Id.*

In essence, the *Tougas* decision was a begrudging concession to the ICA. *Tougas* acknowledged that partnership principles provided the foundation for decision making in property division, but that deviation would be required if these principles produced an unjust result. The high court cautioned against perfunctory applications and required that reason and good conscience determine the appropriateness of the partnership model.[332] Thus, in indirect terms, the court approved a process that provided a place from which decision makers could start but then quickly detour if appropriate. Forced to expand upon the partnership rhetoric of the *Gussin* decision, the *Tougas* court ostensibly tried to meet the call for certainty, uniformity, stability and predictability, while avoiding an embarrassing concession to the ICA's system of uniform starting points.

D. Hussey v. Hussey: Burns Gets the Last Word (For Now)

While accepting the Hawai'i Supreme Court's "concession,"[333] the ICA clearly favored more clarity and precision than the *Tougas* decision provided. Using *Tougas* and its explicit and more detailed endorsement of the partnership model, the ICA began work on a new structure that in some respects was more elaborate than the one voided in *Gussin*. Because its commitment to the partnership model was already demonstrated in its string of decisions spanning over a dozen years, this new structure was less an advancement of the model than it was a pragmatic device to ensure the kind of clarity that the ICA sought since the early 1980's.

The ICA was silent after *Gussin*. But seven months after the Hawai'i Supreme Court's *Tougas* decision, the ICA was ready to launch its response.[334] The lob was at once cautious and bold; cautious in how it threaded within the lines drawn by *Gussin*, bold in how it thrusted forward using what it had (and maybe more). The ICA's response came in the form

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[332] *See id.*

[333] Burns saw *Tougas* as an attempt by the high court to right its course. He described it as a return to sanity, akin to passing through adolescence and headed toward full adulthood:

> To me it's been like being involved with the growth of a child. Those of you who are parents who have lived through that process will understand. Our child was a terrible teen in 1992 when the Hawai'i Supreme Court's opinion in *Gussin* undid most of what had been accomplished in the prior twelve years. It took fifteen months for our child to pass through the terrible teen period, regain sanity and return to the path of maturity. That happened when the Hawai'i Supreme Court in 1994 filed its opinion in *Tougas*. And our child still has a way to go to becoming a mature child.

Chief Judge James Burns, Comments at the Family Law Section/HICLE Annual Divorce Update (Dec. 7, 1995).

[334] *Tougas* was decided on February 7, 1994. *Hussey* was issued on September 30, 1994.

of *Hussey v. Hussey*[335] which set the tone and direction for all post-*Gussin* ICA decisions to date.[336]

Benjamin and Rebecca Hussey were married on June 22, 1974, and had three children who were ages 16, 15, and 13, at the time of the divorce proceedings in May 1991.[337] The parties separated in April 1990.[338]

The divorce decree, filed on October 21, 1991, awarded custody of the children to plaintiff Rebecca and ordered Benjamin to pay $330 per month in child support.[339] At the time of the trial, Rebecca's gross income was $1,110 per month and Benjamin's was $1,216 per month.[340]

On the issue of property division, the trial court ordered the following awards which triggered Rebecca's appeal:

To Benjamin:

1. A residence at 3229 Ho'olulu Street in Kapahulu ("Kapahulu House"). Benjamin had inherited a remainder interest in the property subject to his uncle's life estate in 1967, several years before the marriage.[341] The uncle, who was age eighty-one at the time of trial, lived in the structure with Benjamin.[342] At trial, the fair market value ("FMV") was set at $410,000, a marked jump from a previous FMV of $84,500 in February 1977.[343] There was no evidence of the FMV at the time of marriage.[344]

The Kapahulu House was the marital residence from the time of marriage in June 1974 to the April 1990 separation.[345] The property was used to secure a $120,000 loan taken jointly by the parties and Benjamin's uncle.[346] This debt culminated a series of mortgage debts incurred during the marriage to pay the parties' personal debts and family expenses.[347]

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[335] 77 Hawai'i 202, 881 P.2d 1270 (Haw. Ct. App. 1994).

[336] At this writing, the ICA has reported four decisions after *Hussey*, including: Epp v. Epp, 80 Hawai'i 79, 905 P.2d 54 (Haw. Ct. App. 1995); Markham v. Markham, 80 Hawai'i 274, 909 P.2d 602 (Haw. Ct. App. 1996); Kreytak v. Kreytak, 82 Hawai'i 543, 923 P.2d 960 (Haw. Ct. App. 1996); and Jackson v. Jackson, 84 Hawai'i 319, 933 P.2d 1353 (Haw. Ct. App. 1997). *See also infra* note 433.

[337] *See Hussey*, 77 Hawai'i at 204, 881 P.2d at 1272.

[338] *See id.*

[339] *See id.*

[340] *See id.*

[341] *See id.*

[342] *See id.*

[343] *See id.*

[344] *See id.*

[345] *See id.*

[346] *See id.*

[347] *See id.*

2. A $5,100 truck subject to a $4,000 debt.[348]

To Rebecca:

1. A residence at 1478 Kaleilani Street in Pearl City ("Pearl City House").[349] Rebecca had inherited the property from her mother who had died in 1983 but whose estate had not closed until 1989.[350] The trial court received no evidence regarding the FMV when Rebecca's interest vested in 1983.[351] The date-of-trial value was $175,000 subject to Rebecca's mortgage debt of $80,000, a part of which was used to make late payments on the debt secured by the Kapahulu house.[352]

2. A $2,000 bank money market certificate inherited from her mother.[353]

3. The proceeds from the sale of her 1987 Mazda with an estimated value of $11,000.[354] The court received no evidence on how much was received from the sale.[355]

Cast in terms of the categories of net market values preserved in *Tougas*, the award was as follows:

	Rebecca	*Benjamin*
Category 1		$ 84,500
Category 2		$205,500
Category 3	$97,000	
Category 4		
Category 5	$11,00	$1,100[356]

What apparently triggered Rebecca's challenge was how the trial court treated the "during marriage" appreciation of the Kapahulu House. The court gave all $205,500[357] to Benjamin although: 1) the property had been used to secure a loan that paid for marital and family debts;[358] 2) the loan was repaid in part by Rebecca;[359] and 3) Rebecca had resided on the property for most of

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[348] *See id.*

[349] *See id.*

[350] *See id.*

[351] *See id.*

[352] *See id.* at 204-05, 881 P.2d at 1272-73.

[353] *See id.* at 205, 881 P.2d at 1273.

[354] *See id.*

[355] *See id.*

[356] *Id.*

[357] The $205,500 figure was derived by subtracting the FMV in February 1977 ($84,500) from the FMV ($410,000 - $120,000 encumbrance) at the time of the divorce hearing. The family court apparently thought that the February 1977 FMV was an adequate substitute for the date-of-marriage FMV three years before. *See id.* at 204-05, 881 P.2d at 1272-73.

[358] *See id.* at 204, 881 P.2d at 1272.

[359] *See id.* at 205, 881 P.2d at 1273.

the parties' seventeen-year marriage.[360] The court reasoned that the appreciation was largely a passive one to which Rebecca contributed little, if anything at all.[361] In addition, the trial judge thought it unfair to force the sale of the home in order to apportion to Rebecca a share of the appreciation.[362]

For the ICA, this provided the fodder for its first foray since the *Gussin-Tougas* decisions. It began by recounting the lines drawn by the high court's decisions, including their clear reference to the use of partnership principles to guide and limit the range of the trial judge's statutorily mandated discretion.[363]

Then came the creative part. To start, the court defined three new terms: 1) Premarital Separate Property; 2) Marital Separate Property; and 3) Marital Partnership Property.[364] Premarital Separate Property ("PSP") referred to all property owned by each spouse immediately prior to marriage or to cohabitation culminating in marriage.[365] Upon marriage, all PSP converted to either Marital Separate Property or Marital Partnership Property.[366] The court determined that Marital Separate Property ("MSP") did not belong to the marital partnership and therefore could not be divided upon dissolution of the partnership.[367] Correspondingly, the court found that only property belonging to the marital partnership—i.e., Marital Partnership Property—could be divided.[368]

To determine what did not belong to the partnership, the ICA developed three categories of excluded property. These included all property, belonging to one or both spouses, that:

> (1) was excluded from the marital partnership by an agreement in conformity with Hawai'i's Uniform Premarital Agreement Act (Hawai'i Revised Statutes Chapter 572D);[369]
> (2) was excluded from the marital partnership by a valid contract;[370] or
> (3) was (a) acquired by gift or inheritance during the marriage, then (b) expressedly classified by the donee/heir spouse as his or her own separate property, and (c) after acquisition, maintained by itself and/or by sources other

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[360] *See id.* at 204, 881 P.2d at 1272.
[361] *See id.* at 205, 881 P.2d at 1273.
[362] *See id.*
[363] *See id.* at 206, 881 P.2d at 1274.
[364] *See id.* at 206-07, 881 P.2d at 1274-75.
[365] *See id.* at 206, 881 P.2d at 1274.
[366] *See id.*
[367] *See id.* at 207, 881 P.2d at 1275.
[368] *See id.*
[369] *See id.*
[370] *See id.*

> than one or both spouses and funded by sources other than MPP or marital partnership income.[371]

Anything that meets one of the above definitions is MSP, while all else is MPP. The former is not divisible, the latter is. Where MSP conceivably impacts the final division is how it contributes to "the respective separate condition of the spouses."[372] For example, while MSP cannot itself be divided, it may, as a matter of fairness, sway a court to consider a lesser award of MPP to a spouse already in possession of a very large cache of MSP.

After determining what belongs to the partnership and is therefore available for division, *Hussey* instructs courts to appropriately slot the properties into the five categories of net market values. Tracking the *Gussin-Tougas* line that "[e]ach partner shall be repaid the partner's contributions . . . and share equally in the profits and surplus remaining after [satisfaction of] all liabilities, including those to partners," and drawing from *Tougas* the idea that partnerships assume the equality of all valid and relevant circumstances, the ICA advanced the following:

> (1) That all Category 1 and 3 properties be considered "partnership contributions" and should therefore be repaid in whole to the contributing spouse; and
> (2) That Category 2, 4 and 5 properties represent profits (or losses, if negative) of the partnership and should therefore be attributed in equal shares to each spouse.[373]

As with its earlier scheme, *Hussey* directed trial courts to deviate from this division when all valid and relevant considerations are not equal.[374]

While cast in terms of the partnership model set forth by the *Gussin* and *Tougas* decisions, *Hussey*, as a practical matter, was not a grand swing from its pre-*Gussin* predecessors. Where valid and relevant circumstances are equal, Category 1 and 3 net market values ("NMVs") continue to go to the contributing partner spouse (formerly the "owner" or "donee" spouse) while the Category 5 NMV is cleaved down the middle. The difference is in the Category 2 and 4 NMV which went from 75-25 in favor of the owner or donee spouse, to a 50-50 split.[375]

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[371] *See id.*

[372] *Id.*

[373] *Id.* at 207-08, 881 P.2d at 1275-76.

[374] *See id.* at 208, 881 P.2d at 1276.

[375] Actually, this scheme is reminiscent of what existed before the Hawai'i Supreme Court's *Cassiday* decision in 1986 which abolished the ICA's network of "general rules". The pre-*Cassiday* general rules also prescribed a 100-0 split of Category 1 and 3 type property and a 50-50 split of Category 2, 4 and 5 properties. *See supra* notes 252-53, 255 and 257 and accompanying text.

Having rebuilt its sand castle,[376] the ICA was ready to go again. It seized upon the family court judge's rationale for awarding all of the appreciation on the Kapahulu House to Benjamin. Under the new scheme, the appreciated value (Category 2) would be divided equally if all valid and relevant considerations were equal.[377]

The fact that the trial court had chosen to direct no part of the appreciation to Rebecca suggested that it found valid and relevant factors tilting against her. As noted earlier, the family court judge determined that the marked growth in the value of the Kapahulu House had been a passive one, a function of local real estate conditions during the marriage.[378] What the judge was looking for was evidence of Rebecca's direct and specific contribution to the increased value. For example, if some of the marital debts had been incurred to improve the property, the trial court might have been inclined to make an award to Rebecca.[379]

The ICA rejected this, finding instead that:

> A spouse's involvement or non-involvement in the existence of a Category 2 NMV is not a valid and relevant consideration for deviating from the Partnership Model. The fact that the spouse-non-owner did not directly and materially

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[376] In my family law lectures, I have characterized the development of case law from *Woodworth* to *Hussey* as sand castles continually being built, knocked down and rebuilt by Burns. Like the building of sand castles, the new structure never quite looks like the one just leveled. One rebuilds with what is available guided in part by a memory of the previous structure's best reproducible features.

[377] At the time of trial, *Gussin* and *Tougas* had not yet been decided. Thus, the guiding principles at trial were derived from the ICA's line of decisions following the supreme court's 1986 *Cassiday* holding. Accordingly, the starting point for Category 2 net market values was 75% to the owner spouse (Benjamin, in this case) and 25% for the non-owner spouse (Rebecca). *See Hussey*, 77 Hawai'i at 208, 881 P.2d at 1276. Awarding 100% of the appreciated value to Benjamin meant that the trial court needed to have valid and relevant considerations for taking the 25%, which would have otherwise been awarded to Rebecca, and giving it to Benjamin.

[378] "Like the real estate in Hawaii, the home just being where it's at[,] irregardless [sic] probably of the state that it's in[,] the appreciation worked on itself and it just built up just because it was in Kapahulu in a nice location." *Id.* at 202, 881 P.2d at 1273.

[379] The trial judge made the following statement:

> [Y]ou [Rebecca] make an argument that the property . . . was a marital asset and that both parties contributed to the build up of the appreciation of the property. Unfortunately, I cannot agree with that . . . I didn't hear a shred of evidence that said that . . . [t]he only testimony I heard was that the money was used to buy cars, pay off credit card loans, buy clothes for the children and other household items . . . [s]o I cannot agree . . . that this property was used . . . for the building up of the property and the appreciation that has gone with it.

Id. at 205, 881 P.2d at 1273.

> contribute to a Category 2 NMV is not a valid and relevant consideration for awarding the spouse-non-owner less than one-half of that Category 2 NMV.[380]

The matter was then remanded to the trial court for reconsideration.[381]

With its *Hussey* decision, the ICA broke a two-year silence,[382] returning with a framework that, while employing different terms, functioned much like the one used before the Hawai'i Supreme Court's *Gussin* 1992 decision. If there was a major change, it was in how property could be designated as non-partnership or "marital separate property" and therefore excluded from division.[383] The court required clear and definitive evidence proving the intent

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[380] *Id.* at 208, 881 P.2d at 1276.

[381] *See id.* at 208-09, 881 P.2d at 1276-77.

[382] This is not to say that the ICA was completely silent for the two year period between *Gussin* and *Hussey*. It continued to issue decisions impacting aspects of domestic relations. However, it was in *Hussey* that the court took its next significant step toward advancing the partnership model.

[383] The ICA stated that while one's marital separate property could neither be divided nor serve as an offset against one's share of the marital partnership property, such property could be used by a trial court to "alter . . . the ultimate distribution of [Marital Partnership Property] based on the respective separate conditions of the spouses." *Id.* at 207, 881 P.2d at 1275 (quoting Tougas v. Tougas, 76 Hawai'i 19, 32, 868 P.2d 437, 450 (1994)). This ability to glance back at marital separate property indicates that although the marital partnership model derives certain principles from commercial partnerships, it is not a clone.

In delineating a category of property to be excluded from the partnership, the court recognized the divide between the marriage as a partnership entity and the non-partnership interests that the individual spouses might hold. This is consistent with commercial partnerships in which partners maintain assets (and a life) outside the partnership. Upon dissolution, such assets are not ordinarily subject to division and distribution to other partner.

On the other hand, the court leaves trial judges with the option to look at a spouse's non-partnership holdings to help make an equitable distribution of the marital estate. *See id.* Thus, a spouse with large marital separate property holdings might be awarded a smaller share of the partnership pie. This is not ordinary business partnership practice. Taking its lead from Hawai'i Revised Statutes section 580-47 and the *Tougas* opinion which noted that the family court should consider the condition of the parties after the divorce, the ICA determined that, in some cases, doing so meant having to look at a spouse's marital separate property. How a trial court actually reviews and factors in marital separate property remains unanswered. How it avoids effectively using marital separate property as a rough offset against a marital partnership property award may pose a difficult challenge.

Notwithstanding this new conundrum, assessing each parties' condition after the divorce to include a review of each parties' extra-partnership holdings highlights a presumed centrality of marriage and curtails the erosion of marital sharing that occurs when spouses are permitted to insulate certain properties from the partnership. Why do we care far less about the condition of two parting commercial partners if their condition resulted from the application of a valid agreement, the provisions of a partnership statute, or both? Could it be that we simply expect much more of marriage partners, as well as, of marriages? Thus, we resist attempts to contractually limit marital obligations because they reflect an individual self-interest that contradicts our cultural expectation of altruism, compromise and mutuality within marriage.

and act of insulating property from the partnership. How much and what kind of evidence is needed to meet the court's standard of proof, at least where intramarital gifts and inheritances are concerned,[384] remains subject to debate.

The *Hussey* decision resurrects the structure - and with it, the certainty, stability, predictability, and uniformity long sought by the ICA - that was ostensibly leveled by the *Gussin* decision. By adding a mechanism for excluding property from the partnership, the ICA drew a palpable boundary between what belonged and did not belong to the partnership. In doing so, the ICA gave the marital partnership model a more tangible and developed feel. It was as if the ICA, having construed the *Tougas* decision as a "green light" to proceed with the partnership model, found the verve to elevate the model to another level. Whether this move actually goes beyond what the Hawai'i Supreme Court intended may well be fodder for another appellate decision.[385]

But more than resurrecting an analytical framework to guide the day-to-day decisions of parties, practitioners and judges, the *Hussey* decision highlighted the expectations of the partnership model. The next and final section describes and discusses these expectations.

IV. HUSSEY AND HEIGHTENED EXPECTATIONS

The partnership model of marriage is seductive in its ideal of the egalitarian marriage premised on equal power, sharing, and mutual commitment. It attempts to integrate and promote current cultural ideals regarding marriage and gender positions.

Apart from encapsulating these ideals, the model has a remedial aspect. With the advent of at-will divorces, a method had to be devised to secure some modicum of wealth for a dependent spouse (which more often than not meant a female homemaker), who previously relied on long-term marriages as the

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And so, while we may permit spouses to remove property from the partnership via agreement, we may also hold them to an obligation to relieve need or compensate for losses arising from the now-dissolved marriage. Looking at the size of extra-partnership holdings to help weigh the post-divorce disruptions experienced by each partner signals the ICA's reluctance to fully segregate the non-partnership sphere from the marital partnership.

[384] Gifts or inheritances received during marriage can become marital separate property if they are "expressly classified" by the recipient spouse as such. *See supra* note 371 and accompanying text. What "expressedly classified" entails is an arguable point.

[385] One could argue, for example, that Hawai'i Revised Statutes section 580-47(a)(3), which mandates the division of the parties' estate, "whether community, joint or separate," would prohibit the "stashing away" of separate property. While courts and legislatures have long recognized the right of spouses to make and enforce agreements among themselves, an overextension of the right to exclude properties from the partnership may have the effect of stepping back into the days of title-based property distribution.

primary source of financial support.[386] Thus, the partnership model distanced itself from title-based theories of property division which favored the spouse who legally owned or funded property. It replaced these theories with one which assumed that spouses contributed to the marriage in different but equally powerful ways and were therefore entitled to an equal share of the marital partnership property. This is not to say that the traditional breadwinner-homemaker pairing is the dominant marital arrangement or even a prevalent one requiring constant remediation. The partnership model should be flexible enough to reach all combinations of divided labor within marriages, but be particularly responsive to arrangements that have historically left one spouse at a severe disadvantage. To say that the model has a remedial aspect refers to this capacity to respond when called to do so.

In Hawai'i, appellate courts never alluded to this remedial aspect but shaped a version of the partnership model that promoted it. Spurred by Hawai'i Revised Statutes section 580-47(a)(3), which mandated the division and distribution of the parties' estate, "whether community, joint or separate," Hawai'i courts cast a wide net on what was at least theoretically divisible and distributable.[387] That the appreciation of separate property during the marriage was also subject to distribution, at least on a limited basis,[388] added to the divisible estate. By maximizing the "size of the pot," Hawai'i courts were positioned to increase the size and amount of property awards to a

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[386] *See supra* notes 41, 77, 111, and 159 and accompanying text.

[387] *See supra* note 25 and accompanying text. Hawai'i remains in the minority of states that permits the division of non-marital property. *See* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Children's Issues Take Spotlight*, 29 FAM. L.Q. 741, 774 (1996).

[388] In *Cassiday v. Cassiday*, 68 Haw. 383, 716 P.2d 1133 (1986), the Hawai'i Supreme Court affirmed the ICA's position that appreciation of separate property during marriage could be divided and distributed to the spouse who did not own the principle property. *See id.* at 388, 716 P.2d at 1137. However, the high court capped the award at 50%. *See id.* at 389, 716 P.2d at 1138. This remains the high court's position.

In *Hussey v. Hussey*, the ICA seemed to suggest that such appreciation should receive treatment similar to Category 5 property; i.e., start with an equal division and allow deviation if valid and relevant considerations justify it. 77 Hawai'i 202, 207-08, 881 P.2d 1270, 1275-76. The court was strangely silent about the 50% cap. In its first decision following *Hussey*, *Epp v. Epp*, the ICA again grouped Category 2 property with Category 5, finding that both represented profits of the partnership to be divided equally. 80 Hawai'i 79, 91-92, 905 P.2d 54, 66-68 (Haw. Ct. App. 1995). The suggestion was that beginning with *Hussey*, Category 2 and 4 properties were to be treated like Category 5 without the 50% cap on awards to the non-owner spouse. This, too, would have favored the maximization of property available for division. However, in *Markham v. Markham*, the ICA clarified its position, realigning it with the 50% cap set forth in *Cassiday*. 80 Hawai'i 274, 286, 910 P.2d 602, 614 (Haw. Ct. App. 1996).

dependent spouse.[389] However, the size of the pot is only relevant if adequate and fair distributions are made. This is where the partnership model, as rebuilt by the *Hussey* decision and its progeny,[390] is ultimately tested.

Hussey did more than lay out a straightforward scheme which approximated the property distribution provisions of Hawai'i's commercial partnership statute. It reasserted expectations that exceeded those ordinarily held among business partners.[391] Having received an apparent albeit reluctant endorsement from the *Tougas* opinion, the ICA leapt at the chance to spell "partnership" in capital letters.

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[389] The ICA's focus on net market values rather than on individual items of property tends to favor the marital partnership over individual ownership interests. For example, returning the "date-of-marriage" net market value of premarital property to the owner spouse while splitting the appreciation accrued during marriage, facilitates a disassembling of separate property. As a practical matter, parties seeking to preserve an item of separate property may have to provide some form of an equalization payment.

The courts also widened its net by adopting a liberal definition of what was "property." In *Linson v. Linson*, the ICA construed the divisible and distributable "estate of the parties" to include "anything of present or prospective value." 1 Haw. App. 272, 278, 618 P.2d 748, 751 (1980). The *Linson* case involved non-vested retirement benefits.

In addition, the courts' lengthening of the period of the marital partnership from the time of non-marital cohabitation, assuming that the cohabitation led to marriage, *Malek v. Malek*, 7 Haw. App. 377, 768 P.2d 243 (1989), through the date of the divorce hearing, *Myers v. Myers*, 70 Haw. 143, 764 P.2d 1237 (1988), effectively maximized the period during which property was deemed part of the marital estate.

The ICA also placed the burden of proof upon a party seeking to categorize property outside Category 5. *See* Woodworth v. Woodworth, 7 Haw. App. 11, 17, 740 P.2d 36, 41 (1987). This also had the effect of keeping property within the partnership rather than outside of it.

On the other hand, the *Hussey* court's decision to create a category of property that was excluded from the partnership and not subject to division has the apparent effect of diminishing the pot. However, this diminution may, in some cases, not be as great as it appears. *See supra* note 383 and accompanying text.

One clearer instance in which Hawai'i courts appeared to protect separate property was in the rejection of "transmutation," a process by which separate property is presumably "transformed" to marital property when certain acts—such as the commingling of separate property with marital property—occur. *See* Gussin v. Gussin, 73 Haw. 470, 487, 836 P.2d 484, 492-93 (1992). Instead, the party who argues that a transformation occurred bears the burden of proving the elements of a gift—donative intent, acceptance and delivery. *See id.* at 489, 836 P.2d at 494. It should be noted, however, that the rejection of transmutation had more to do with the supreme court's aversion to "rebuttable presumptions" than protecting separate property. *See id.* at 488, 836 P.2d at 493.

[390] *See supra* note 336.

[391] There have been concerns that the allusion of the supreme court and ICA to commercial partnership law represent an undue attempt to constrain marital partnerships to the mold and personality of business entities. *See* Yamauchi, *supra* note 16, at 441 (a quote from Charles Kleintop, Chair of the Hawai'i State Bar's Family Law Section in 1992, suggested that some of the assumptions in a business partnership were not transferable to a marital partnership, such as the impersonal arms-length position between commercial partners).

First, it strengthened the expectation that all premarital properties (Category 1) and gifts and inheritances acquired during marriage (Category 3) were contributions to the marital enterprise for the purpose of advancing and generating profits for the marriage. If a partner chose not to make the contribution, he had to affirmatively act to indicate so.[392] Like capital contributions or advances that commercial partners bring into a venture, Category 1 and 3 properties are assumed to provide resources which may be used to advance and fund the operations of the marriage. However, unlike commercial ventures where partners decide what portion of their personal resources are to be invested into the partnership, Hawai'i's marital partnerships start with the premise reversed. Consistent with the sharing aspect of marital partnerships, spouses are presumed willing to contribute *all* premarital properties, and gifts and inheritances acquired during marriage, to the partnership.[393] By placing the burden on a spouse to specifically exclude her separate property from the partnership, the ICA created an expectation that favored mutuality over individual self-interest.[394]

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[392] *See Hussey*, 77 Hawai'i at 207-08, 881 P.2d at 1275-76.

[393] While the property is deemed a capital contribution, it remains the "separate" property of the owner spouse unless it is clear that a gift to the partnership was made. This duality of being contributed while remaining separate, finds its roots in the Spanish Civil Code which was the primogenitor of the partnership model.

The Spanish law of community was one "of acquests and gains *during* the marriage" thereby leaving property acquired before the marriage as the non-communal or separate property of the owner spouse. *See* 1 WILLIAM QUINBY DEFUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 149 (1943)(emphasis added). However, it was assumed under the civil code system "that each spouse would bring into the marriage some property, and in the early days of a primitive society, this was usually the case." MCCLANAHAN, *supra* note 30, at 40. The husband usually brought land, and perhaps, money, cattle and agricultural or shop equipment, the wife usually brought money, goods and chattels, and perhaps land. *See id.* This was the capital with which the marital partnership was formed. *See id.*

Thus, the expectation was not that one's premarital property would lose its separate identity and merge fully into the partnership but that it would serve as capital or the raw material with which the partnership advanced itself financially and otherwise. It was the *profits* arising from the use of such separate property that would become true marital property to be divided equally among the spouses. *See Epp*, 80 Hawai'i at 92, 905 P.2d at 67 (quoting Gardner v. Gardner, 8 Haw. App. 461, 464, 810 P.2d 239, 242 (1991)). The raw material itself would remain the separate property of the owner spouse to give him or her some independent financial means after family needs were adequately met. *See* Joan M. Krauskopf & Rhonda C. Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558, 589 (1974).

Thus, it follows that on divorce, the owner spouse is returned his or her contribution if funds remain after partnership debts are paid and no circumstance exist to justify awarding a share of the property to the non-owner spouse.

[394] If the sweetness and romance of most weddings are any indication, an assumption favoring mutuality represents the norm more often than not. Newlyweds ride on hopes of unspoken and unabridged commitments which include the sharing of premarital estates. It is

The *Tougas* court's decision to continue using net market values helped drive the point home. Free to deconstruct property into categories of values, the ICA could assert once again that a contributing spouse could only expect to recoup the value of his initial contribution and not the physical property itself. This reinforced the fact that the property was indeed contributed.[395]

The ICA made the point again this year in *Jackson v. Jackson*.[396] The court was faced with the question of whether to give a spouse Category 1 credit for

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the heat of a dissolving marriage that erodes the memory of once noble aspirations and remolds parties to the self-interested positioning that more typifies business partners.

If the low incidence of written prenuptial agreements continues to be the norm, the *Hussey* decision will tend to uphold the assumption that parties willingly contribute their separate properties to the partnership.

[395] In *Hussey*, for example, the trial court awarded to the spouses the real property that each acquired as separate property. 77 Hawai'i at 204, 881 P.2d at 1272. Thus, the husband received the marital residence to which he acquired title premaritally while the wife received the house and land in Pearl City which she obtained by way of an inheritance during the marriage. *See id.* The family court seemed content that each spouse left the marriage with a home, and found it fair (and probably convenient) to tie the award to the separate estate of each spouse.

The problem, however, was that the husband's Kapahulu House had, by the trial court's finding, netted an appreciation of about $200,000 during the seventeen-year marriage while the wife's property had not enjoyed any appreciation. *See id.* at 205, 881 P.2d at 1273 (actually, the trial court had used several questionable premises for assessing value and appreciation, premises that were left unaddressed by the appellate court). Thus, the family court's decision, which was essentially a title-based one, left each spouse with homes of vastly different values (husband's was worth about $285,000, wife's was valued at $97,000). *See id.*

The family court justified its decision by pointing out that much of the appreciation in husband's Kapahulu House had essentially been passive and not due to any direct contribution by the wife. *See id.* The trial judge also rejected the fact that the spouses had used the property to secure a mortgage obtained to cover family debts. *See id.* The judge indicated that he might have felt differently had the mortgage been used to actively improve the property. *See id.* The trial judge also found it unjust to force the husband to liquidate the property just to give the wife her share of the appreciation. *See id.*

Writing for the ICA, Burns found that the trial judge had acted inappropriately. *See id.* at 206, 881 P.2d at 1273. Assuming that all valid and relevant considerations were equal, Burns determined that each spouse should have recovered the date-of-marriage or date-of-acquisition value of his or her separate property and been awarded a 50% share of the during-marriage appreciation of such property. *See id.* at 207-08, 881 P.2d at 1275-76. Burns found nothing in the trial court's reasoning to justify a deviation from this, and rejected the trial judge's statement that it was unfair to order the sale of the Kapahulu House just so the wife could receive a share of its "during marriage" appreciation. *See id.* at 208, 881 P.2d at 1276.

In fact, the Kapahulu House had been used as contemplated by the partnership model. While remaining in the separate estate of the husband, it was offered and used as the family home for sixteen years. Its equity was used to borrow money so the personal and household debts of the spouses and their children could be paid. Similarly, wife had contributed her separate real property to secure a loan, a part of which was used to cover the debt secured by her husband's separate real property.

[396] 84 Hawai'i 319, 933 P.2d 1353 (Haw. Ct. App. 1997).

premarital property that no longer existed at the time of the divorce.[397] There had been a sense that if property did not exist at the time of divorce, its NMVs could be ignored.[398] However in *Jackson*, the ICA affirmed that if premarital property was contributed, but was no longer in existence for reasons other than gifting (which would either place the property into a category other than Category 1 or outside the partnership), the contributing spouse should have restored to him the initial amount of the contribution.[399] This decision goes out on a limb to acknowledge the contribution by authorizing its return to the contributing spouse, even while decreasing the amount of net market values available for equal distribution.[400] In so doing, the ICA elevated the term "contribution" beyond rhetoric and gave it a bite.

All things equal, it is the profits (i.e., net market values under Categories 2, 4 and 5) generated by these contributions that the marital partners should expect to share equally regardless of who made the contribution or its nature, extent and size.[401] In a sharing relationship such as the one embodied by the partnership model, spouses ideally give their all, not to enjoy a profit commensurate with their individual effort, but to earn a gain that is brought home for the benefit of the marital unit.[402]

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[397] *See id.* at 335-36, 933 P.2d at 1369-70.

[398] In fact, husband stated that the family court had adopted an unspoken policy of denying Category 1 credit if the subject property did not exist at DOCOEPOT. *See id.* at 335, 933 P.2d at 1369 n.10.

[399] The court actually stated, "[i]f a party does not own the Category 1 property at the DOCOEPOT, that Category 1 NMV is a part of the total of the DOCOEPOT NMVs and is subtracted from the Category 5 NMVs." *Id.* at 336, 993 P.2d at 1370.

[400] An example in the *Jackson* case was the value of seventeen lots in Haiku, Maui which were owned by husband's general contracting firm, Jackson Construction, which in turn, was a subsidiary of husband's successful drywalling company Oahu Interiors. *See id.* at 323, 326, 336, 933 P.2d at 1357, 1360, 1370. The lots were valued at about $567,000 at the date of marriage. *See id.* at 336, 933 P.2d at 1370. Before the end of the marriage, the lots were sold and therefore no longer in the marital estate at the time of the divorce. *See id.* at 326, 933 P.2d at 1360. It is assumed that the proceeds of the sale were absorbed into the general assets of Jackson Construction.

If the net market value of Jackson Construction increased during the marriage, that increase, which could have included growth of the funds earned through the sale of the Haiku properties, would have been placed into Category 2 which as a starting premise, could be divided 50-50. The ICA's decision effectively secured $567,000 of the company's net market value at divorce and credited it to the husband in recognition of his initial contribution.

[401] The ICA stated the principle this way: "The legal principle that unequal contributions by the partners to an equal partnership do not change the equality of the partnership applies to unequal contributions at the start of the marital partnership and to unequal contributions during the marital partnership." Epp v. Epp, 80 Hawai'i 79, 94, 905 P.2d 54, 69 (1995).

[402] Thus, in both *Epp*, 80 Hawai'i at 94, 905 P.2d at 69, and *Jackson*, 84 Hawai'i at 333-34, 933 P.2d at 1367-68, the ICA rejected arguments that the size and extent of a party's Category

Although we intuitively legitimize sharing of marital profits that appear in the form of Category 5 net market values (such as that of the marital residence acquired and owned jointly by the spouses or a joint bank account opened by the spouses and funded by their marital earnings), doing so for the "during marriage" appreciation (Categories 2 and 4) of separate property is less automatic. In fact, states have run the gamut in viewing the appreciation of separate property, ranging from those that define the growth in separate property as "separate" to those that consider such growth to be the product of marital labor and therefore "marital."[403]

Even before the *Hussey* decision, Hawai'i's appellate courts tended to weigh in on the side of awarding a portion of such appreciation to the non-owner spouse.[404] *Hussey* unequivocally reasserted this position, stating that the Category 2 and 4 net market values (i.e., the "during marriage" appreciation of Category 1 and 3 properties respectively) were marital profits and therefore belonged to the marital partners rather than to the owner spouse.[405] By doing this, the ICA not only expanded the range of marital, as opposed to separate properties, but emphasized the expectation that the toil of spouses should always be turned toward the betterment of the marital enterprise.[406] Thus, when a spouse spends time and effort during the marriage improving property acquired premaritally, and the property increases in value, she should understand that the appreciation belongs equally to her and her spouse. The result would be the same even if she solely used other separate property to

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1 contributions to the development of Category 2 and Category 5 NMVs entitled that party to a larger distribution of those net market values.

[403] Reynolds, *supra* note 30, at 286. Reynold's article contains an informative description of this range.

[404] Recall that in *Cassiday v. Cassiday*, the Hawai'i Supreme Court rejected the ICA's use of general rules, reasoning that such rules unduly burdened the trial court's statutorily mandated discretion to fashion an equitable distribution of property. 68 Haw. 383, 388, 716 P.2d 1133, 1137 (1986). But even while (temporarily) putting an end to the ICA's practice of generating rules, the high court stated its own rule: that a trial court could award up to one-half of the appreciation of separate property to the non-owner spouse, if it was fair and equitable to do so. *See id.* Although the one-half cap marked the court's regard for separate estates and their identity, it also suggested the court's view that the intra-marital growth of separate estates could be marital and therefore distributable to the "non-owner" spouse at divorce.

[405] Hussey v. Hussey, 77 Hawai'i 202, 207-08, 881 P.2d 1270, 1275-76 (Haw. Ct. App. 1994).

[406] In referring to the Spanish civil code and Visigothic laws and customs as primogenitor to American community property law, William DeFuniak wrote:

> [A]lthough each spouse retained ownership of his or her separate property, each unselfishly and unhesitantly had at heart the success and well-being of the marital union and that, accordingly, the fruits and income of all property of each naturally were to be devoted to the benefit of the marital union.

1 DEFUNIAK, *supra* note 393, at 180.

produce the result and her husband did not directly participate in developing the growth of the property.

The ICA labeled such effort "marital partnership activity" or a form of marital labor.[407] Using this "partnership" label, the court asserted that the post-divorce sharing of the during-marriage growth in separate property had little to do with the non-owner spouse's specific contributions to the growth.[408] In the past, courts struggled to find and roughly equalize contributions (i.e., homemaking vs. breadwinning, direct vs. indirect) to justify sharing the appreciation.[409] This is no longer the case, at least not since *Hussey*.[410] Classifying an owner spouse's efforts as a form of *marital* labor makes *that* spouse's activity sufficient to create an entitlement for the entire partnership. The alternative would have been to follow the more intuitive path and describe such efforts in terms of separate gain or self-interest. Choosing against this path reflects the court's unflinching commitment to promoting the marital partnership.

The court's path could also be a discomfiting one. For example, when the ICA in its *Epp* decision wrote, "(d)uring a marriage, both partners enjoy the consequences of one partner's successes,"[411] did it intend to allow a slothful partner to fully benefit from the toils of the other? The partnership model

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[407] *See* Epp v. Epp, 80 Hawai'i 79, 91, 905 P.2d 54, 66 (Haw. Ct. App. 1995); *see also* Jackson v. Jackson, 84 Hawai'i 319, 333, 933 P.2d 1353, 1367 (Haw. Ct. App. 1997).

[408] In a number of post-*Hussey* cases, the ICA summarily rejects as irrelevant and invalid the argument that the owner spouse's skill and effort solely resulted in the growth of his separate property. For example, the ICA in *Epp* ordered the trial court to reconsider its award of 100% of Category 2 net market values to the owner-wife, rejecting the wife's argument that her husband's involvement in the property was nil, that his involvement did not go beyond the bald fact of the marital partnership, and that the couple operated in fact as a non-partnership. *See Epp*, 80 Hawai'i at 92, 905 P.2d at 67. Because there appeared to be no evidence of any written agreement regarding the separate properties in question, the court seemed prepared to assume a legal and *de facto* marital partnership and to proceed from there. *See id.* at 92-93, 905 P.2d at 67-68.

[409] In *Cassiday v. Cassiday*, although the supreme court still looked at specific contributions from the non-owner spouse, it began to inch away from this kind of analysis and toward a new partnership-centered theory which considered how the marriage itself contributed to the preservation or accumulation of separate property. 68 Haw. 383, 387, 716 P.2d 1133, 1137 (1986).

[410] In *Hussey v. Hussey*, the ICA announced that "(a) spouse's involvement or non-involvement in the existence of a Category 2 NMV [net market value] is not a valid and relevant consideration for deviating from the Partnership Model." 77 Hawai'i 202, 208, 881 P.2d 1270, 1276 (Haw. Ct. App. 1994). In determining the relevance of Rebecca Hussey's lack of direct contribution to the "during marriage" appreciation of the Kapahulu home, the court wrote, "that the spouse-non-owner did not directly and materially contribute to a Category 2 NMV is not a valid and relevant consideration for awarding the spouse-non-owner less than one-half of that Category 2 NMV." *Id.*

[411] *Epp*, 80 Hawai'i at 92, 905 P.2d at 67 (quoting Hatayama v. Hatayama, 9 Haw. App. 1, 12, 818 P.2d 277, 283 (1991)).

should assume and encourage full commitment to the marital enterprise by *both* spouses.[412] Thus, while judges may no longer need to wrestle with how a non-owner spouse specifically helped to increase the value of the other spouse's separate property, they should hold fast to expectations that each spouse strove to advance the family and the marital unit. Ideally, the marital partnership is one which fosters acceptance of a 50% return on a 110% effort by both partners.

Applying the label "marital partnership activity" to the work of an individual spouse upon his separate property is consistent with the whole partnership construct. If Category 1 and 3 properties have in a real way been integrated into the partnership in the form of capital or an advance, it follows that working on such properties to increase its value has a similarly integrated quality. Also, if there is an overarching expectation of sharing, a partner who expends efforts for individual gain does so at the expense of the marriage, an expense that can be more easily recouped if the profits are deemed marital rather than separate. To expect otherwise would work against the partnership. If the marriage cannot exact a price upon the single-minded efforts of one spouse to accumulate individual wealth while supposedly laboring under some expectation of sharing, there would be no disincentive for pursuing the development of one's separate estate to the detriment of the partnership. It would diminish the meaning of Category 1 and 3 net market values as contributions.

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[412] In *Jackson v. Jackson*, 84 Hawai'i 319, 933 P.2d 1353 (Haw. Ct. App. 1997), the ICA implied this expectation. In rejecting the argument that the wife was not entitled to a larger share of the appreciation in husband's Category 1 property because of her non-involvement in the growth of that property, the court wrote the following:

> Marital partner B's during-the-marriage noninvolvement in the management and maintenance of marital partner A's premarital investment property is no more a relevant and valid factual consideration for reducing marital partner B's Partnership Model share than marital partner B's preparing all of marital partner A's meals or doing all of the housework are relevant and valid factual considerations for increasing marital partner B's Partnership Model share.

Id. at 333, 933 P.2d at 1367.

That the court decided not to "bean-count" specific contributions to the growth of a particular property or to the size of the marital estate did not mean that it stopped expecting each spouse to apply some threshold of effort or resources to the advancement of the marital unit. This threshold should at minimum reflect a good faith effort to contribute to the marital unit in the many different and important ways that family members are called on to pitch in. Meeting that threshold, whether a spouse's efforts occurred in the workplace, at home, or both, should generally entitle the spouse to an equal partner's share of the marital estate.

If the court were to cease having high expectations of each spouse, a spouse could choose to breeze through the marriage without "lifting a finger" then expect to collect his partnership share of the marital estate at divorce. This would be an unfair result.

The ICA provided a way to avoid these stringent expectations. By creating a category of "marital separate property" into which spouses may affirmatively and clearly segregate separate property from the partnership, the court allowed spouses to "switch off" the partnership rules for those properties.[413] Those who feel strongly enough to buck the norms of marital sharing are given both the method to, and the burden of, setting alternative expectations.[414] Failure to act affirms the normative partnership.

Hussey and its progeny embrace heightened expectations of the marital partnership and notions of sharing. If Karl Llewellyn was correct about how divorce laws reflect our notions about marriage,[415] these cases place the state of marriage in good stead. To the extent that laws project a desired set of norms and values, and influence our expectations within marriage, these cases set our sights in the right direction. Most would agree that we continue to idealize marriage and families as core vessels for love, nurturance and mutual obligation, and should permit spouses to hold each other to standards of behavior consistent with this ideal. A model that strives to hold this ideal as its premise cannot be too far afield.

Bred from this ideal, Hawai'i's incarnation of the marital partnership model serves as a vehicle for redistributing property to spouses who may have come into the marriage with relatively few assets or who, because of primary caregiving duties within the marriage, developed a lesser capacity for acquiring wealth independently. This is the model's remedial aspect. With this in mind, we close with two cautionary notes, or perhaps, reminders.

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[413] *See Hussey*, 77 Hawai'i at 206-07, 881 P.2d at 1274-75.

[414] However, should the norm of sharing and the expectations of the partnership model articulated in *Hussey* and its progeny govern marriages that preceded these opinions? For example, spouses who never anticipated these decisions, may not have thought to enter into a premarital agreement in order to exclude certain premarital properties. While the parties may have informally agreed to maintain separate estates and lives, the lack of a valid premarital agreement would appear to bar them now from asserting a result consistent with their earlier understanding. The concern is less for those who are willing to agree on a property division that is consistent with those early understandings. The problem is where the parties cannot agree in which case the partnership rules operate as a set of default provisions to produce a certain result.

Maybe the question begs another: are the expectations of Hawai'i's incarnation of the partnership model so reflective of commonly and deeply held beliefs that few could actually complain about retroactive applicability? Recall the supreme court's reference to a "*time-honored* proposition that marriage is a partnership." Cassiday v. Cassiday, 68 Haw. 383, 387, 716 P.2d 1133, 1136 (1986)(emphasis added).

[415] Or rather that "ideology of marriage" shapes divorce law. Llewellyn wrote: "(A)s we turn to review the changes occurring in the ways by which single marriages serve their radiant functions, we shall find also the social changes mirrored, distorted but unmistakable, in the rules and practice of marriage dissolution." Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 694 (1990).

First, are we excessively seeing things as we wish and not necessarily as they really are? The partnership model as finally operationalized in *Hussey* essentially provides another set of starting points that favor sharing.[416] This premise is a legitimate and good one in view of the altruistic and high-minded expectations most enter marriages with.

However, the cases that follow *Hussey* demonstrate a particularly strong tethering to the partnership template, even when facts suggest that the marriage at issue was not the equal sharing relationship contemplated by the partnership model. Thus, attempts to show that a marriage was an unrelenting episode of misery and isolation are foreclosed as an improper resort to fault-finding.[417] Likewise, the ICA has turned away attempts to show that a marriage ceased being a partnership prior to the divorce, relying on the 1988 supreme court decision of *Myers v. Myers*.[418] This tethering to partnership

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[416] Seen in another way, it provides a set of default provisions which looms over negotiating parties, serving a constant reminder of what the result might be if parties neither settle on an alternative vision nor convince a judge that a result other than one generated by partnership rules is appropriate.

[417] In *Jackson v. Jackson*, husband tried to prove that the marriage had been a short and unhappy one and that, in some important respects, the parties maintained separate lives. *See* Jackson v. Jackson, 84 Hawai'i 319, 333, 933 P.2d 1353, 1367 (Haw. Ct. App. 1997). The ICA rejected the relevance of the bitterness within the marriage, finding it to be an undue resort to fault-finding. *See id.* at 334, 933 P.2d at 1368. The court's long-standing policy has been to consider fault irrelevant unless it can be shown that a spouse's misconduct actually resulted in an erosion of the marital estate such as if one were to actively waste the estate in anticipation of a divorce. *See* Markham v. Markham, 80 Hawai'i 274, 280, 909 P.2d 602, 608 (Haw. Ct. App. 1996).

A small but growing call for the return of fault-based divorce as a response to the alleged failure of no-fault divorce to eliminate the pain or bitterness of marital breakdown has occurred in the past few years. *See* John Leland, *Tightening the Knot*, NEWSWEEK, Feb. 19, 1996, at 72-73; Joe Frolik, *Broken Homes: Our Ideas On Divorce May Be Wrong*, HONOLULU STAR BULLETIN, Sept. 23, 1995, at B-1. Notwithstanding the growth of this movement, one must ask whether we can and should isolate the role of fault in property division from the concern for re-erecting fault as a barrier to divorce. *See generally* Morse, *supra* note 21.

[418] In *Markham v. Markham*, the ICA stated:

> (W)e observe that the family court's use of the separation date as the termination point of the marriage relationship for the purpose of property division is incorrect. Under the 'partnership model of marriage we have accepted[,]' a "final division of marriage property can be decreed only when the partnership is dissolved" and not "after a declaration by either [spouse] that the marriage has ended[.]" Hence, the termination point of the marriage partnership for purposes of property division is the conclusion of the divorce trial.

80 Hawai'i at 286-87, 909 P.2d at 614-15 (quoting Myers v. Myers, 70 Haw. 143, 154, 764 P.2d 1237, 1244 (1988)).

The court, however, provided a safety valve by adding the following:

> However, any award based on property acquired by a spouse or the appreciation of property between the date of the parties' separation and the conclusion of the divorce trial

principles would also explain the court's reluctance to recognize "spots" of unpartnerlike behavior as a basis for awarding pieces of property to the owners [419] Thus, whether looking at the whole marriage, periods within the marriage, or conduct related to certain properties, the ICA has insisted on its vision of marriage as a collaborative partnership, setting an ostensibly high bar against rebuttal.[420]

While the remedial and redistributive character of the partnership model might continue to justify this insistance, the court must be careful that its reliance on fiction, no matter how noble its reasons are, adheres sufficiently to the facts and circumstances within a particular marriage and to community notions of fairness. To do otherwise would seriously undermine confidence in the court and its decisions,[421] and may exceed the supreme court's intent in allowing the partnership model to guide divorce-related property division.[422]

Because it is the redistributive character of the partnership model that in part fuels its existence, attention needs to be given to whether it actually achieves its purposes. This raises the second note of caution. Commentators have written on the perceived failures of the partnership model to achieve

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is a matter left to the court's discretion in determining what "may or may not be just and equitable when all the circumstances are considered."

Id. at 287, 909 P.2d at 615 (quoting *Myers*, 70 Haw. at 154, 764 P.2d at 1244).

[419] *See, e.g.*, Epp v. Epp, 80 Hawai'i 79, 92-93, 905 P.2d 54, 67-68 (1995); *Jackson*, 84 Hawai'i at 333, 933 P.2d at 1367.

[420] The current edition of the Hawaii Institute for Continuing Legal Education's ("HICLE") *Hawaii Divorce Manual* (5th ed., 1996) contains a section entitled "Summary of the Law" written by William Darrah, Esq. Darrah listed twenty-one circumstances in which appellate courts have determined that a deviation from partnership principles was or was not proper. These were culled from cases spanning the period of 1980 to 1996. This relatively small number of circumstances can be reduced to categories such as "Economic Misconduct and Waste," "Acting Like Non-Partners," "Income Opportunities," "Spousal Contributions/Non-Contributions," and "Invading Categories in the Name of Sharing." A review of these strongly indicates the ICA's reluctance to deviate from the partnership model, at least when parties seek to deviate on grounds of unpartnerlike behavior or over/under contribution to a particular property. *See* 1 HICLE HAWAII DIVORCE MANUAL 1-16 to 1-18 (1996).

[421] Not to mention making it difficult for practitioners to explain the law to unconvinced clients.

[422] The thrust of the supreme court's position in both *Gussin v. Gussin* and *Tougas v. Tougas* was the preservation of trial judge discretion as mandated by Hawai'i Revised Statutes section 580-47. *See* Gussin v. Gussin, 73 Haw. 470, 478-86, 836 P.2d 484, 488-92 (1992); *see also* Tougas v. Tougas, 76 Hawai'i 19, 26-28, 868 P.2d 437, 444-46 (1994). That the court added (arguably as dicta) its acceptance of the partnership model to its analysis came as a rather lukewarm response to the ICA's insistence for some kind of guidance in divorce-related property division. *See Gussin*, 73 Haw. at 486, 836 P.2d at 492; *see also Tougas*, 76 Hawai'i at 27-28, 868 P.2d at 445-46. An overzealous application of partnership-based rules during the post-*Gussin-Tougas* period may be viewed by the Hawai'i Supreme Court as an undue restriction upon the statutory discretion of trial judges.

economic equity among divorcing parties.[423] The focal point of these attacks has been the inadequacy of the model's response to the plight of the spouse who bore the primary caregiving responsibilities in the marital home and irretrievably lost earning opportunities and capacity as a result.[424]

Different mechanisms have been suggested to achieve more equitable results.[425] Some have suggested some form of increased sharing of post-divorce income to take into account the one source of wealth—the primary wage earner's earning capacity —which may have significantly increased but

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[423] *See, e.g.*, Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 553-60 (1990); Smith, *supra* note 415, at 730-40; Reynolds, *supra* note 209, at 896; Starnes, *supra* note 5, at 108-11.

[424] In Hawai'i, a study was done by Heather Hammer, Ph.D. to determine the economic impact of divorce. Looking at two random samples (in one sample, alimony was awarded, in the other, no award was made) of 1989 divorce cases from the family court on the island of Oahu, Hammer sought to measure the economic well-being of divorcing parties during the marriage, at the time of divorce, during the period immediately following the divorce, and at apoint four years post-divorce. Information for the latter period was to be culled from a subsequent questionnaire mailed to the participants of the study in January 1994.

Hammer produced a preliminary report which detailed the first phase of the study. *See* HEATHER HAMMER, THE ECONOMIC IMPACT OF DIVORCE IN HAWAII-PRELIMINARY REPORT FOR PHASE I OF THE STUDY (1993)(copy on file with author). Phase II was to look at the period four years after the divorce. However, because most of the 1994 questionnaires were not returned and many of the original participants could not be located, drawing statistically valid results was impossible. Interview with L. Dew Kaneshiro, Project Director of the Equality and Access to the Courts Project, Office of the Administrative Director, Hawai'i State Judiciary (June 2, 1997).

The Phase I report was nonetheless revealing. It found that consistent with the research findings in other jurisdictions, the per capita family income of women declined significantly post-divorce and that the per capita family income of men increased. *See* HAMMER, *supra* at 5. In the Alimony Sample (i.e., where alimony was awarded to the woman), per capital family income declined to 76.3% of their pre-divorce per capita income level. *See id.* at 6. In the Non-Alimony Sample, the dip was to 79.2% of the pre-divorce value. *See id.* In contrast, men in the Alimony Sample, enjoyed an average increase of 137.8% of their pre-divorce per capita family income; for the Non-Alimony Sample, the increase was similar. *See id.*

Hammer also looked at the redistribution of net real property values among the divorcing parties. There she found that certain groups of individuals, most often comprised of women, experienced decreases from the pre-divorce levels. *See id.* at 10. Of 17 groups with significant declines in net real property values, 13 groups were comprised of women. *See id.* Groups of women bore 76.5% of all significant declines. *See id.*

At the time the research sample was developed (1989), the partnership model was already functionally in place. Thus, the results may have some nexus to the effectiveness of the model. In any case, the results are troubling. No attempt was made to explain why the results turned out the way they did. On the other hand, one might ask: "Are women faring better under the model than without it?" Not that an affirmative answer would make things better, but it would suggest that the model is a proper forward step upon which to pause and ponder the next step.

[425] *See supra* note 423.

not in an always visible way.[426] While on one hand, this may harken back to the days when one spouse was dependent upon the other, it also recognizes the choices that the caregiving spouse made and avoids penalizing her for having made them.[427] The "clean-break"[428] thrust of the UMDA remolded our thinking about alimony, reducing it largely to a rehabilitative function.[429] If the court is in fact interested in wealth redistribution that accounts for sacrifices in earning capability made by familial caregiving spouses, it must continue to consider the role of post-divorce income sharing as an adjunct to the partnership model.[430] In doing so, the court should recognize that some level of an individual's post-divorce need or loss may forever be rooted in the now-dissolved marriage and that "clean break" notwithstanding, the party in a better financial position may have an obligation that goes beyond a period of rehabilitation.[431]

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[426] *See, e.g.*, Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 63-67 (1996).

[427] *Cf.* Stephen D. Sugarman, *Dividing Financial Interests on Divorce, in* DIVORCE REFORM AT THE CROSSROADS 130, 144-45 (Stephen D. Sugarman & Herma Kay Hill eds., 1990)(describing how certain divorce rules might be desirable to help couples arrange for their preferred allocation of marital roles).

[428] "Clean break" refers to the finality sought in the break up of a marriage. *See* Brinig, *supra* note 7, at 107.

[429] *See* Regan, *supra* note 37, at 2314-15.

[430] This does not disregard the fact that between divorcing parties, there is often too little income and too few assets to ensure even minimal economic comfort much less an approximation of the standard of living to which the parties became accustomed during the marriage. But to the extent possible, property and income should both be on the table when it comes to looking at what is available to meet needs and compensate loss attendant to the divorce.

[431] We already see this in cases where the marriage was lengthy and the homemaker spouse was in no position to achieve a level of rehabilitation that could help her approach the standard of living to which she was accustomed. But even for an individual who continues to maintain primary child care and homemaking responsibilities while independently achieving a modicum of self-sufficiency and wealth, there may be justification to continue some form of income sharing as a fair reflection of an otherwise unrecoverable earning capacity (and of the increased earning capacity of the party who had been the primary wage earning spouse) linked to the decision to "tend the hearth" during the marriage.

The American Law Institute ("ALI") is currently working to finalize its *Principles of the Law of Family Dissolution: Analysis and Recommendation* (hereinafter "Principles"). In recognition of the fact that one divorcing party may have suffered an otherwise uncompensated loss arising from the marriage, the proposed final draft of the ALI's Principles sets forth a chapter entitled "Compensatory Spousal Payments" that goes beyond our current understanding of need-based alimony. The chapter recharacterizes a proper remedy as "compensation for loss" rather than "relief of need." A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS at 261 (Tentative Draft No. 1, Mar. 15, 1995). This reconceptualization would justify a compensatory award even where the recipient did not demonstrate a need. The award would respond not to a plea of need but a claim to entitlement. *See id.* at 262.

V. CONCLUSION

The partnership model encapsulates a well-accepted ideal of marriage to form a response to the challenge of fairly dividing property without undue emphasis on whose name is on the title, or who contributed the funds to acquire it. It recognizes that important contributions come in more than monetary forms and that they often represent an accumulation of small, mundane efforts that fuel a marriage and family life. Thus, it justifies equal distributions of the marital estate even to spouses who stayed at home and managed the domestic sphere. In Hawai'i, the model is particularly designed to favor the marital estate and compels a party to affirmatively exclude property from the marital partnership. The fact that it may not actually accomplish its remedial goals or that it may be imposed on marriages that never operated on the premises of the model (i.e., were not partnerships) should provide at least two foci for further examination.

Although not perfect, Hawai'i's partnership model provides a good conceptual framework to guide the work of the courts. It represents a modern development in the long and ongoing movement away from firmly entrenched patriarchal norms which engulfed Hawai'i soon after the arrival of the missionaries in 1820. It is possible because of evolving social processes, the same processes that will no doubt require retooling at a later time.

Professor Kastely said the following in an address to the Family Law Section of the Hawai'i State Bar Association soon after the *Gussin* decision: "The challenge of *Gussin* is the persistent, the permanent challenge of the common law—to develop open and flexible ways to articulate the response to the genuine claims of justice made by individuals."[432] If applied with a reasoned hand, the partnership model can provide one such response.[433]

Under the ALI's proposed principles, compensatory losses could include (1) an earning capacity loss incurred during marriage and arising from one spouse's disproportionate share of the care of children or to other individuals such as elderly relatives, (2) a loss which a spouse incurs when a marriage is dissolved before that spouse realizes a fair return from his or her investment in the other spouse's earning capacity and (3) in the case of a long marriage, a loss in living standard experienced at divorce by the spouse who has less wealth or earning capacity. *See id.* at 271-72.

[432] Yamauchi, *supra* note 16, at 451.

[433] *Author's note:* Just prior to publication, the ICA reported several additional decisions that reflect its continued regard for the partnership model. These include *Whitman v. Whitman*, No. 20570 (Apr. 21, 1998) *Kuroda v. Kuroda*, No. 18913 (May 19, 1998) and *Wong v. Wong*, No. 19721 (May 22, 1998).

Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i

by Paul M. Sullivan*

I. INTRODUCTION

The legal concepts of "custom" and "usage,"[1] founded in the common law but historically given little or no significance in the jurisprudence of most states,[2] are currently the subjects of intense debate in the State of Hawai'i. At the heart of the debate is a perceived conflict between, on the one hand, deeply-rooted customs and traditions of American and English law surrounding private property ownership and on the other, recent claims by persons with ancestral links to precontact[3] Hawai'i asserting "traditional and customary

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[1] For excellent general reviews of the history and use (ancient and modern) of the term "custom," see generally Lew E. Delo, *The English Doctrine of Custom in Oregon Property Law: State ex rel. Thornton v. Hay*, 4 ENVTL. L. 383 (1974) and David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996)[hereinafter Bederman].

Technically, "usage" has a meaning in the law separate from "custom"; BLACK'S LAW DICTIONARY 385 (6th ed. 1990) defines the two terms as follows:

> *Custom and usage.* A usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates. It results from a long series of actions, constantly repeated, which have, by such repetition and by uninterrupted acquiescence, acquired the force of a tacit and common consent.
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> . . .
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> Usage distinguished. "Usage" is a repetition of acts, and differs from "custom" in that the latter is the law or general rule which arises from such repetition; while there may be usage without custom, there cannot be custom without a usage accompanying or preceding it.

Id. (citations omitted). While these definitions give an introductory framework for the discussion which follows, they do not reflect the contention which the application and, in some cases, the redefinition of these terms have recently created. *See generally* Bederman, *supra*.

[2] *See* Steve A. McKeon, Note, *Public Access to Beaches*, 22 STANFORD L. REV. 564, 583 (1970)[hereinafter McKeon]; Bederman, *supra* note 1.

[3] This term refers to the time before 1778, the year when the British explorer Captain James Cook discovered the islands and made their existence generally known to the Western world.

rights" to use private land of others for various gathering, cultural and religious activities.

The fundamental issues echo those which Hawai'i's government faced and resolved once before, in the mid-nineteenth century, when Hawai'i was evolving almost overnight from a neolithic culture under a feudal absolute monarchy into a modern constitutional government.[4] The controversies both then and now illuminate how tension and uncertainty result when ill-defined, unwritten "custom" is proposed or accepted as a valid source of rights in the real property of others whose traditional expectations include exclusive possessory rights and security of title.

II. OVERVIEW

In the nineteenth century, two separate but related revolutionary changes took place in the Kingdom of Hawai'i. The first was the abolition in 1819 of the *kapu* system of religious and political governance and its eventual replacement with Christianity and a constitutional monarchy.[5] The second was the redefinition of rights in real property through the Great Mahele of 1848 and the related legislation which preceded and followed it.[6]

In the first of these revolutions, the religious foundation of both private and public life was officially abolished, along with the divine or quasi-divine status of the highest chiefs ("*ali'i*") and many of the prerogatives of the chiefly class.[7] The religious observances and cultural practices based on the *kapu* system were generally abandoned,[8] a process greatly accelerated by the Christian missionaries who first arrived in the islands in 1820.[9] In the second of these revolutions, the precontact feudal land tenure was replaced by a system of individual and allodial land ownership which, with few exceptions, followed the common law of England and America.[10] These two revolutions effectually replaced the absolutist monarchy administering a feudal system based on unwritten custom with a constitutional monarchy based on written laws and Western structures of government and property.

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[4] Perhaps the single most valuable resource on the subject is RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM (1938) (3 vols.) [hereinafter KUYKENDALL]. Shorter histories include RALPH S. KUYKENDALL & A. GROVE DAY, HAWAII: A HISTORY (1961), and GAVAN DAWS, SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS (1968).

[5] *See infra* notes 60-71 and accompanying text.

[6] *See infra* notes 90-149 and accompanying text.

[7] *See id.*

[8] *See* 1 KUYKENDALL, *supra* note 4, at 65-70.

[9] *See id.* at 100-16.

[10] *See infra* notes 90-149 and accompanying text.

Some recent decisions of the Hawai'i Supreme Court reflect a profound discontent among that court's members with, at least, the changes in property law wrought by these two nineteenth-century social transformations. They also suggest that future decisions of the court may take a decidedly counter-revolutionary posture. In the most recent of these, *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission* ("*PASH*"),[11] the court addressed claims concerning asserted gathering and access rights based on article XII, section 7 of the State of Hawai'i Constitution[12] and in Hawai'i Revised Statutes ("HRS") section 7-1,[13] as well as in state statutes dealing with specific areas of land use decision-making.[14] These rights are usually spoken of as "Native Hawaiian traditional and customary rights," the term "Native Hawaiian" referring to persons descended from precontact inhabitants of the Hawaiian Islands.[15] In *PASH*, these rights were set squarely in

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[11] 79 Hawai'i 425, 903 P.2d 1246 (1995), *cert. denied sub. nom.* Nansay Hawai'i, Inc. v. Public Access Shoreline Hawai'i, 116 S. Ct. 1559 (1996)[hereinafter *PASH*].

[12] Article XII, § 7 of the Hawai'i Constitution, provides as follows:

> The 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, subject to the right of the State to regulate such rights.

HAW. CONST., art. XII, § 7.

[13] Hawai'i Revised Statutes § 7-1 provides as follows:

> Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on lands granted in fee simple, provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

HAW. REV. STAT. ANN. § 7-1 (Michie 1995).

[14] *See, e.g.*, Hawai'i State Water Code, HAW. REV. STAT. § 174C-101(c) (1987)(*as amended* 1991) providing:

> Traditional and customary rights of ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter. Such traditional and customary rights shall include, but not be limited to, the cultivation or propagation of taro on one's own kuleana and the gathering of hihiwai, opae, o'opu, limu, thatch, ti-leaf, aho cord, and medicinal plants for subsistence, cultural and religious purposes.

HAW. REV. STAT. § 174C-101(c).

[15] "Native Hawaiian" is a term which must be approached with care. In 1920, Congress passed the Hawaiian Homes Commission Act ("HHCA"), set out at HAW. REV. STAT. ANN. vol. 15, p. 331 (Michie 1995), which set aside certain of the public lands of the Territory of Hawai'i for homesteading by "native Hawaiians." A "native Hawaiian" was defined in that statute (HHCA § 201(7)) as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." *Id.* Hawai'i Revised Statutes ("HRS"),

opposition to the "western notions of exclusivity" associated with ownership of real property—notions which, under U.S. constitutional law, have long been regarded as a fundamental element of the right of private property.[16] The *PASH* court, moreover, in broad *dicta*, sought to remove what it perceived to be constraints upon the establishment and the exercise of such rights, and thus, at least to the extent that dicta may control subsequent decisions,[17] elevated these "rights" to something hitherto unknown and even unsuspected.

The *PASH* case has generated considerable argument over fundamental issues of private property rights, specifically: (1) the degree to which an owner of real property may prevent the entry of others claiming either "traditional and customary" rights under article XII, section 7 or the gathering rights set out at HRS section 7-1; and (2) the extent to which agencies of the state must or may, in exercising their statutory responsibilities, support the exercise of such rights against the desires of a landowner seeking some sort of action or approval by such agency. Underlying these issues is another and even more fundamental issue: whether the *PASH* decision, together with or

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chapter 10, which establishes the Office of Hawaiian Affairs, defines "native Hawaiian" in much the same way as:

> [A]ny descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

HAW. REV. STAT. ANN. § 10-2 (Michie 1995).

"Hawaiian" is defined in HAW. REV. STAT. ANN. § 10-2 as:

> [A]ny descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.

Id.

The term "Native Hawaiian" (upper case "N") is used principally in federal statutes providing benefits to persons of Hawaiian ancestry, and is usually defined much the same as "Hawaiian" in HAW. REV. STAT. ANN. § 10-2. *See, e.g.*, Native American Graves Protection and Repatriation Act, 25 U.S.C.A. § 3001 (West 1997). It is also used in common parlance to refer to anyone with Hawaiian ancestry.

Whichever term is involved, the operative test is purely race or ancestry. Ancestry has been treated, at least in recent United States Supreme Court jurisprudence, as a functional equivalent of race. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[16] *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987).

[17] In this connection *see* Robinson v. Ariyoshi, 65 Haw. 641, 655, 658 P.2d 287, 298 (1982)(proposing that a statement of a superior court be considered binding on inferior tribunals, "even though technically dictum, where it was 'passed upon by the court with as great care and deliberation as if it had been necessary to decide it, was closely connected with the question upon which the case was decided, and the opinion was expressed with a view to settling a question that would in all probability have to be decided before the litigation was ended'")(citing Nobrega v. Nobrega, 14 Haw. 152, 155 (1902)).

separately from its immediate precursors and article XII, section 7 of the state constitution, has so radically and unexpectedly changed the established law of the state with respect to private property rights as to have worked a taking of private property without compensation in violation of the U.S Constitution.

This article first reviews the place of custom and usage in American law generally and in Hawai'i law specifically, with special attention to customs concerning the control and use of land. It then explains how the development of Hawai'i's real property law in the nineteenth century left no room for the survival of customary access and gathering rights except as expressly preserved in what is now HRS section 7-1. The article then considers two fairly recent cases where custom and usage have been applied by the Hawai'i Supreme Court in decisions which were subsequently challenged, with some degree of success, as unconstitutional takings. It concludes with a discussion of the *PASH* case, including the many issues of interpretation and application which *PASH* left unresolved, and explores some possible bases for a constitutional challenge to the *PASH* case itself or to future decisions of judicial and administrative tribunals based on *PASH*.

III. THE BACKGROUND AND DEVELOPMENT OF CUSTOM IN ENGLISH AND AMERICAN COMMON LAW

The English common law, from which American common law is derived, was founded on the ancient customs of the kingdom. In his *Commentaries on the Laws of England*, William Blackstone described these as customs "used time out of mind . . . whereof the memory of man runneth not to the contrary."[18] Blackstone identified three types of custom making up the common law:

> 1. General customs, which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2. Particular customs, which for the most part affect only the inhabitants of particular districts. 3. Certain particular laws, which by custom are adopted and used by some particular courts, of pretty general and extensive jurisdiction.[19]

The first of these forms of custom, the "general rules of universal applicability," concerned such issues as inheritance of property, the manner and form of acquiring and transferring property, the obligations of contracts and the remedies of civil injuries. They were to be found in judicial precedents, binding in subsequent cases under the rule of *stare decisis*.[20]

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[18] 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 67 (U. Chicago facsimile ed., 1979)[hereinafter BLACKSTONE].

[19] *Id.*

[20] On the subject of *stare decisis*, *see id.* at 69:

In the United States, the term "custom" as a foundation for a claimed right has come to refer to Blackstone's second category of custom, that is: "particular customs, which for the most part affect only the inhabitants of particular districts."[21] Blackstone identified seven requirements for the establishment of such a custom as a rule of law varying the general common law:

> a. It must have been used so long "that the memory of man runneth not to the contrary."
> b. It must have been continued without interruption. This does not mean that the use was constant, but that the right itself continued to exist.
> c. It must have been peaceable, and acquiesced in, not subject to contention and dispute, since customs owe their origin to "common consent."
> d. Customs must be reasonable, or if not of obvious purpose, at least not unreasonable.
> e. Customs must be certain, and their application definite and ascertainable.
> f. Customs, although established by consent, must be compulsory once they are established.
> g. Customs must be consistent with each other, and not contradictory to other customs.[22]

This sort of custom as a source of law has not generally been favored in the United States, but in 1969, the Oregon Supreme Court "breathed life into what had been for practical purposes a dead doctrine in this country."[23] In *Oregon ex rel. Thornton v. Hay*,[24] the court upheld a public right of recreational use of all dry-sand beaches along the coast on grounds of a custom which, it stated, "meets every one of Blackstone's requisites."[25]

The doctrine of custom has been invoked in other states with less success. The Maine Supreme Court in *Bell v. Town of Wells*[26] noted that "[v]ery few

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> [F]or it is an established rule to abide by former precedents, where the same points come again in litigation; as well as to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land, not delegated to pronounce a new law, but to maintain and expound the old one.

Id.

[21] *Id.* at 67.

[22] *See id.* at 76-78.

[23] McKeon, *supra* note 2, at 583.

[24] 462 P.2d 671 (Or. 1969).

[25] *Id.* at 677; *But see* McDonald v. Halvorson, 780 P.2d 714 (Or. 1989); Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993), *cert. denied*, 114 S. Ct. 1332 (1994)(Scalia, J., dissenting).

[26] 557 A.2d 168 (Me. 1989).

American states recognize the English doctrine of public easements by local custom[,]"[27] and stated:

> [T]here is a serious question whether application of the local custom doctrine to conditions prevailing in Maine near the end of the 20th century is necessarily consistent with the desired stability and certainty of real estate titles.[28]

In that case, however, the court expressly declined to decide whether easements by local custom could be established under Maine's common law, because it concluded that in any case, two of Blackstone's seven elements for establishing a custom as law could not be met.[29] Similarly, in *Idaho ex rel. Haman v. Fox*,[30] the Idaho Supreme Court noted the limited acceptance of the doctrine of custom,[31] and while it held that the doctrine was part of Idaho's common law, it upheld the findings of the lower court that six of the seven requisite elements had not been met. It noted that a usage in effect from at least 1912 did not constitute "use from time immemorial."[32]

IV. HAWAIIAN CUSTOM IN THE PRECONTACT PERIOD

Our knowledge of custom in precontact Hawai'i, a preliterate society where history and traditions were passed on orally, is necessarily limited. We do have, however, the written recollections of two remarkable nineteenth century authors, Samuel Kamakau and David Malo, whose lives spanned the period of Hawai'i's transition from the precontact social order to a constitutional Hawaiian monarchy in the Western model.[33] These men described the

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[27] *Id.* at 179.

[28] *Id.*

[29] *See id.*

[30] 594 P.2d 1093 (Idaho 1979).

[31] *See id.* at 1101. The court stated:

> Virtually all commentators agree that, until recently, the law of custom was a dead letter in the United States. Aside from two New Hampshire cases decided in the 1850's no state had applied the doctrine. As recently as 1935 New York refused to accept customary usage as a means of claiming an easement in a private beach for bathing and boating. *Gillies v. Orienta Beach Club*, 159 Misc. 675, 289 N.Y.S. 733 (1935). The doctrine was exhumed, however, by the Supreme Court of Oregon in *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969), where it was held that the public had acquired customary rights to a privately owned dry sand stretch of beach on the Oregon coast.

Id.

[32] *See id.*; *see also* Department of Natural Resources v. Mayor of Ocean City, 332 A.2d 630 (Md. 1975). For a review of the application of custom in various U.S. jurisdictions *see generally* Bederman, *supra* note 1.

[33] Lilikala Kame'eleihiwa, *Introduction* to SAMUEL KAMAKAU, RULING CHIEFS OF HAWAII iv-v (Rev. ed. 1992). Samuel Kamakau lived from 1815 to 1876. *See id.* Malcolm Chun, *Introduction* to DAVIDA MALO, KA MO'OLELO HAWAI'I x, xvii (Malcolm Chun trans., 1996). David Malo lived from 1795 to 1853. *See id.*

traditions and customs of their times and the times of their immediate ancestors, and passed down many stories of the generations before that. Other valuable sources are the decisions of the early jurists of the Hawaiian kingdom in the middle and late nineteenth century, who were integrating Hawaiian traditional norms, customs and social systems with the "new" Western model adopted by the Hawaiian monarchs and chiefs of the period.[34] Thus we have, if not a perfect record, at least a valuable source of contemporary observations of vital features of eighteenth and early nineteenth century Hawaiian custom.

Both Malo and Kamakau described in detail the social and political conditions which prevailed during the period beginning before Western contact and continuing through the constitutional and governmental changes of the mid-nineteenth century. Their works reveal a highly-developed precontact culture with an established social structure which regulated or affected nearly all aspects of life from birth[35] to burial[36] and extended to such matters as fishing,[37] various crafts,[38] the growing of crops,[39] and the distribution and use of land[40] and water.[41] Overarching all of these was the *kapu* system, a tightly-integrated set of religious and social norms which placed supreme authority in the hereditary *ali'i* and in the ruling chiefs of each island or major island division.[42]

While most of the customs these authors describe were positive and often admirable, there were such darker elements as human sacrifice,[43] infanticide,[44]

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[34] *See, e.g.*, Keelikolani v. Robinson, 2 Haw. 522 (1862)(regarding adoption); Peck v. Bailey, 8 Haw. 658 (1867)(regarding water rights).

[35] *See* DAVID MALO, HAWAIIAN ANTIQUITIES 87-95 (Nathaniel Emerson, trans., 1951)[hereinafter MALO]. This is by far the most widely available translation and is used throughout this article. A new translation of this work by Malcolm Naea Chun has recently been published (DAVIDA MALO, KA MO'OLELO HAWAI'I (Malcolm Chun trans., 1996)).

[36] *See id.* at 96-107; S. M. KAMAKAU, KA PO'E KAHIKO - THE PEOPLE OF OLD 33-44 (Mary Kawena Pukui, trans., Dorothy B. Barrere, ed., 1964)[hereinafter KAMAKAU, THE PEOPLE OF OLD]

[37] *See* MALO, *supra* note 35, at 208-13; S. M. KAMAKAU, THE WORKS OF THE PEOPLE OF OLD 59-91 (Mary Kawena Pukui, trans., Dorothy B. Barrere, ed., 1976) (1976)[hereinafter KAMAKAU, WORKS].

[38] *See* KAMAKAU, WORKS, *supra* note 37, at 95-125.

[39] *See* MALO, *supra* note 35, at 208-14; *see also* KAMAKAU, WORKS, *supra* note 37, 23-55.

[40] *See, e.g.*, PRINCIPLES ADOPTED BY THE BOARD OF COMMISSIONERS TO QUIET LAND TITLES, IN THEIR ADJUDICATION OF CLAIMS PRESENTED TO THEM. Laws 1848, p. 81, *reprinted in* 2 REVISED LAWS OF HAWAII 2124 (1925)[hereinafter PRINCIPLES].

[41] *See* WELLS A. HUTCHINS, THE HAWAIIAN SYSTEM OF WATER RIGHTS 47-143 (1946)[hereinafter HUTCHINS].

[42] *See generally* 1 KUYKENDALL, *supra* note 4, at 7-10.

[43] *See* KAMAKAU, WORKS, *supra* note 37, at 130-31; *see also* MALO, *supra* note 35, at 159-87.

[44] *See* SAMUEL KAMAKAU, RULING CHIEFS OF HAWAII 234 (Rev. ed. 1992)[hereinafter KAMAKAU, RULING CHIEFS].

frequent wars between chiefs with serious impacts on the population in the islands[45] and the placement of unlimited power of life and death in the hands of the chiefs—power which was sometimes used cruelly and arbitrarily, with few or no avenues of appeal for the victim.[46] Among the chiefs and especially the chiefs of highest rank, incest was encouraged and even required, because the degree of a chief's nobility was determined by his or her bloodline, and incest was an effective means of securing offspring who best preserved the purity of the parental strain.[47] Polygamy and polyandry were also practiced, most often among the upper or wealthy classes.[48]

Under the *kapu* system, the ruling ali'i and their subordinate chiefs exercised nearly absolute authority over inferiors and commoners, and had extraordinary discretion in the use of that power.[49] While some chiefs ruled

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[45] *See id.* at 232-33.

[46] *See, e.g.*, KAMAKAU, RULING CHIEFS, *supra* note 44, at 231-32; MALO, *supra* note 35, at 58.

[47] *See* MALO, *supra* note 35, at 54-57.

[48] *See* MALO, *supra* note 35, at 74; *see also* KAMAKAU, THE PEOPLE OF OLD, *supra* note 36, at 25.

[49] David Malo writes:

> The king, however, had no laws regulating property, or land, regarding the payment or collection of debts, regulating affairs and transactions among the common people, not to mention a great many other things. Every thing [sic] went according to the will or whim of the king, whether it concerned land, or people, or anything else—not according to law. All the chiefs under the king, including the *konohiki* who managed their lands for them, regulated land matters and everything else according to their own notions. There was no judge, nor any court of justice, to sit in judgment on wrong-doers of any sort. Retaliation with violence or murder was the rule in ancient times. To run away and hide one's self was the only recourse for an offender in those days, not a trial in a court of justice as at the present time. If a man's wife was abducted from him he would go to the king with a dog as a gift, appealing to him to cause the return of the wife—or the woman for the return of the husband—but the return of the wife, or of the husband, if brought about, was caused by the gift of the dog, not in pursuance of any law. If any one had suffered from a great robbery, or had a large debt owing him, it was only by the good will of the debtor, not by the operation of any law regulating such matters that he could recover or obtain justice. Men and chiefs acted strangely in those days.

MALO, *supra* note 35, at 57-58. To like effect is Kamakau:

> If a chief became angry with a commoner he would dispossess him and leave him landless, but the commoners submitted to the chiefs and consented afterwards to endure hard labor and work like slaves under the chiefs. It was not for a commoner to do as he liked as if what he had was his own. If a chief saw that a man was becoming affluent, was a man of importance in the back country, had built him a good house, and had several men under him, the chief would take everything away from him and seize the land, leaving the man with only the clothes on his back. Men feared in the old days being driven away and having to take to the highway, or even to have suspicion fasten upon them and be killed, as often happened in the old days.

KAMAKAU, RULING CHIEFS, *supra* note 44, at 229.

well, others did not, and the sole remedy of the people for an oppressive chief was to rebel,[50] or perhaps to seek another chief to overcome the oppressor.[51] It would appear, however, that only exceptionally severe oppression would provoke rebellion. Malo notes that "[o]nly a small portion of the kings ruled with kindness; the large majority simply lorded it over the people[,]"[52] from which it may fairly be implied that if such conduct had routinely resulted in revolt, it would not have been so common. Even kings who ruled well ruled absolutely, and the *kapu* system itself prescribed draconian punishment for infringing the *kapu* (prohibitions) concerning chiefly prerogatives or immunities or the isolation of commoners from the chiefs.[53]

This is not to say that there were no commonly accepted principles of right and wrong. In fact, there were relatively clear understandings of good and evil behavior, but there was evidently no consistent enforcement of these principles, and much depended on the strength or rank of the actor.[54] There were also those within the system of government whose job it was to advise

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[50] *See* MALO, *supra* note 35, at 58. Malo writes:

> There was a great difference between chiefs. Some were given to robbery, spoliation, murder, extortion, ravishing, There were few kings who conducted themselves properly as Kamehameha I did. He looked well after the peace of the land. On account of the rascality of some of the chiefs to the common people, warlike contests frequently broke out between certain chiefs and the people, and many of the former were killed in battle by the commoners. The people made war against bad kings in old times.

Id. See also KAMAKAU, RULING CHIEFS, *supra* note 44, at 230 ("The chiefs did not rule alike on all the islands. It is said that on Oahu and Kauai the chiefs did not oppress the common people. They did not tax them heavily and they gave the people land where they could live at peace and in a settled fashion.").

Kamakau also reports that one district, Ka'u on the island of Hawai'i, was quite direct about removing unsatisfactory chiefs:

> The Ka'u clan . . . to which Kupake'e belonged were called Ka'u Makaha. They were a group who protected their own chief as long as he was kind to them and treated them well, but unhesitatingly slew him if he caused them unnecessary suffering. To alien chiefs they paid no attention whatever.

Id. at 205.

[51] *See, e.g.*, the story of 'Umi-a-Liloa in KAMAKAU, RULING CHIEFS, *supra* note 44, at 12-14.

[52] *See* MALO, *supra* note 35, at 61.

[53] *See id.* at 56-57. For example, Malo states:

> The great chiefs were entirely exclusive, being hedged about with many tabus, and a large number of people were slain for breaking, or infringing upon, these tabus. The tabus that hedged about an *alii* were exceedingly strict and severe. . . . If the shadow of a man fell upon the house of a tabu chief, that man must be put to death, and so with any one whose shadow fell upon the back of the chief, or upon his robe or *malo*, or upon anything that belonged to the chief. If any one passed through the private doorway of a tabu chief, or climbed over the stockade about his residence, he was put to death.

Id.

[54] *See id.* at 52-68; *see also* KAMAKAU, RULING CHIEFS, *supra* note 44, at 229.

at least the kings or ruling chiefs in wise and righteous behavior.[55] It would appear, however, that the constraint on misbehavior was not the rule of law, but the rule of superior force.[56]

With specific reference to the rights of the chiefs and people in land, the same general rule applied: no consistent system of enforceable rights existed apart from the will of the superior. Nevertheless, there were well established customs concerning relationships among both chiefs and common people with respect to land, customs which would be viewed as creating "rights" in the Western sense when the land revolution of the 1840's took place. This customary relationship was essentially feudal and tenurial, with a system of mutual duties and responsibilities concerning the control and use of land. This relationship was described in the 1847 *Principles Adopted by the Board of Commissioners to Quiet Land Titles, in their Adjudication of Claims Presented to Them*, ("*Principles*"):[57]

> [W]hen the islands were conquered by Kamehameha I, he followed the example of his predecessors, and divided out the lands among his principal warrior chiefs, retaining however, a portion in his hands, to be cultivated or managed by his own immediate servants or attendants. Each principal chief divided his lands anew, and gave them out to an inferior order of chiefs, or persons of rank, by whom they were subdivided again and again; after passing through the hands of four, five or six persons, from the King down to the lowest class of tenants. All these persons were considered to have rights in the lands, or the productions of them. The proportions of these rights were not very clearly defined, but were nevertheless universally acknowledged.

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[55] *See* MALO, *supra* note 35, at 187-88. In this regard, Malo wrote:

> There were two strong forces, or parties, in the government. One, the *kahuna* who attended to the idol worship; the other the *kalaimoku*, or king's chief councillor [sic]. These two were the ones who controlled the government and led its head, the king, as they thought best. If the head of the government declined to follow their advice, the government went to another, on account of the fault of its head, that is the king. The high priest, *kahuna o na ki'i*, controlled the king in matters of religion, *haipule*, (he was the keeper of the king's conscience). The *kalaimoku*, chief councillor [sic] or prime minister, guided him in regulating the affairs of administration and in all that related to the common people.

Id.

[56] *See, e.g.*, KAMAKAU, RULING CHIEFS, *supra* note 44, at 133-41. Kamakau describes how Kahahana, ruling chief of O'ahu, ordered the death of his *kahuna* Ka'opulupulu and was neither rebelled against nor shunned by his people. Kahahana was overthrown soon after the event, but by Kahekili, a rival chief from Maui, and not because he was a lawbreaker. Far from being rejected by his former subjects, many of these continued to provide him with food and shelter even after he had become a fugitive. *Id.*

[57] Laws 1848, p. 41, *reprinted in* REVISED LAWS OF HAWAII 1925, Vol. II, p. 2124.

> The tenures were in one sense feudal, but they were not military, for the claims of the superior on the inferior were mainly either for produce of the land or for labor, military service being rarely or never required of the lower orders. All persons possessing landed property, whether superior landlords, tenants or sub-tenants, owed and paid to the King not only a land tax, which he assessed at pleasure, but also, service which was called for at discretion, on all the grades from the highest down. They also owed and paid some portion of the productions of the land, in addition to the yearly taxes. They owed obedience at all times. All these were rendered not only by natives, but also by foreigners who received lands from Kamehameha I and Kamehameha II . . . and a failure to render any of these has always been considered a just cause for which to forfeit the lands.[58]

In the mid-nineteenth century, this system set aside the customary norms and absolute monarchy which had been its twin foundations. Over the course of roughly three decades it transformed itself into a Western-style constitutional monarchy based on a formal written constitution, written statutes, and the rule of law.[59]

V. CHANGE AND DEVELOPMENT OF CUSTOM IN THE KINGDOM OF HAWAI'I

A. New Ways of Thought - The Abolition of the Kapu System

The end of the *kapu* system came in 1819.[60] It was apparently not a sudden change, but one which had been building for many years as the Hawaiians compared their own rules of behavior with those of visiting Westerners.[61] The

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[58] *Id.* at 2125.

[59] For an excellent start on the full story of the development of the Hawaiian kingdom, from Western contact in 1778 through the dramatic governmental and societal changes of the middle and late nineteenth century, *see supra* note 4. The full story is beyond the scope of this paper, but that story has been the subject of a number of responsible historical works. *See supra* note 4.

[60] *See generally* 1 KUYKENDALL, *supra* note 4, at 65-70.

[61] *See id.* at 67. Kuykendall wrote:

> The example of the foreigners, their disregard for kapu, and their occasional efforts to convince the Hawaiians by argument that their system was wrong, were the most potent forces undermining the beliefs of the people. There were incidents related by visitors to the island showing that some of the people were willing to disregard the kapus if they could do this without being seen by the priests and chiefs. Some of the people evidently sensed the fact that the gods would not punish them if the priests knew nothing about their violations of the kapu. Kaahumanu had eaten bananas [a food prohibited to women] secretly without any ill consequences. Her brother Keeaumoku is known to have spoken contemptuously of the whole system even before the death of Kamehameha I. The Hawaiians had heard of the overthrow of the kapu and religious system in the Society Islands by King Pomare and this no doubt had influence in Hawaii.

Id.

timing of the event, however, was apparently tied to the death of Kamehameha I in May of 1819, because Kamehameha I was a firm adherent and supporter of the *kapu* system.[62] The circumstances are well described elsewhere[63] and will not be repeated here except to note that the change was not accomplished peacefully.[64] Kamehameha I, when he named Liholiho his heir to the kingdom after his death, made an equally significant appointment by entrusting his war god, Kuka'ilimoku, to a nephew, Kekuaokalani. When Kekuaokalani held fast to the traditional religion in the face of Liholiho's participation in the abolition of the *kapu* system, the issue was resolved by war at the Battle of Kuamo'o where the forces of Kekuaokalani were defeated and Kekuaokalani was killed.[65] A secondary rebellion in the Hamakua area of the island of Hawai'i was put down soon afterward.[66]

This "official" abolition of the *kapu* system, of course, did not work an overnight change in behavior and belief,[67] but the following year saw the beginning of a Christian missionary effort that would in large measure complete the change.[68] The missionaries taught the practical skills of reading, writing and arithmetic as well as Christianity,[69] and with patience and perseverance, they obtained first the permission and then the support of the kingdom's rulers for their activities.[70] In a relatively short time, the customs and practices of Christianity had supplanted those of the *kapu* system as the religion of the Hawaiian kingdom.[71]

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[62] *See* KAMAKAU, RULING CHIEFS, *supra* note 44, at 179-80.

[63] *See* 1 KUYKENDALL, *supra* note 4, at 65-70 and works cited therein; KAMAKAU, RULING CHIEFS, *supra* note 44, at 219-28.

[64] *See id.*

[65] *See id.* at 69; KAMAKAU, RULING CHIEFS, *supra* note 44, at 227-28.

[66] *See* 1 KUYKENDALL, *supra* note 4, at 69.

[67] *See id.* at 69-70. According to Kuykendall:

> The appeal to arms had confirmed the decree of the king, and the old religion as an organized system was abandoned; the old kapus were no longer enforced. Believers in the old order were confounded by the apparent inability of its gods to stem the tide of infidelity; but as mentioned before, the old beliefs lived on in the consciousness of many of the people; and many an idol secretly preserved was secretly worshipped. Discontinuance of the formal religious services in the heiaus [temples] and of the makahiki celebration left a kind of vacuum in the social life of the nation. Finally, it may be remarked that while the revolution did certainly weaken very greatly the power of the priests, it did not altogether destroy their power; and the power of the chiefs was scarcely touched.

Id.

[68] *See generally* 1 KUYKENDALL, *supra* note 4, at 100-16.

[69] *See id.* at 104-13.

[70] *See id.*

[71] *See id.* at 116. Kuykendall summarizes it thus:

> Did the new religion take hold of the Hawaiian people? No doubt on this point will be entertained by one who makes a candid study of the subject. Unquestionably there was

B. New Ways of Governance—The Kingly Gift of A Constitution

The second revolution replaced the rule of the chiefs with the rule of law.[72] In 1839, in response to a variety of forces,[73] Kamehameha III promulgated first a Declaration of Rights and then, in 1840, a constitution to establish a written, public declaration of the form and nature of the kingdom's government.[74] In

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much superficiality, particularly in many of the conversions during the great revival [of 1837-1840]; the Hawaiian churches had their full quota of "backsliders"; and there were innumerable instances of the survival of "idolatrous" and "heathenish" beliefs and practices. On the other hand, the record is full of examples of sincere and consistent Christian piety and good conduct, and the Hawaiian churches can point with just pride to such characters as Puaaiki ("Blind Bartimeus"), Kamakau of Kaawaloa, the heroic Kapiolani, immortalized in verse by the poet Tennyson, the "new" Kaahumanu, and those Hawaiians, like Kekela, Kauwealoha, and Kanoa, who carried the gospel to the other islands in the Pacific. By 1840 Hawaii was officially a Christian nation. King Kamehameha III never became a member of the church, but in the constitution which he gave to his people in 1840 it was decreed "that no law shall be enacted which is at variance with the word of the Lord Jehovah, or at variance with the general spirit of His word. All laws of the Islands shall be in consistence with the general spirit of God's law."

Id.

[72] The initial stages of this process are succinctly described by the kingdom's own court in *Estate of Kamehameha IV*, 2 Haw. 715, 720 (1864):

> In the year 1839 began that peaceful but complete revolution in the entire polity of the Kingdom which was finally consummated by the adoption of the present constitution in the year 1852. His Majesty Kamehameha III began by declaring protection for the persons and private rights of all his people from the highest to the lowest. In 1840 he granted the first constitution by which he declared and established the equality before the law of all his subjects, chiefs and people alike. By that Constitution, he voluntarily divested himself of some of his powers and attributes as an absolute ruler, and conferred certain political rights upon his subjects, admitting them to a share with himself in legislation and government. This was the beginning of a government as contradistinguished from the person of the King, who was thenceforth to be regarded rather as the executive chief and political head of the nation than its absolute governor. Certain kinds of public property began to be recognized as Government property, and not as the King's. Taxes which were previously applied to the King's own use were collected and set apart as a public revenue for government purposes, and in 1841 His Majesty appointed a Treasury Board to manage and control the property and income of the Government. But the political changes introduced at that period did not affect in the least the King's rights as a great feudal Chief or Suzerain of the Kingdom. He had not as yet yielded any of those rights.

Estate of Kamehameha IV, 2 Haw. at 720.

[73] *See* 1 KUYKENDALL, *supra* note 4, at 157-59.

[74] For the text of the 1840 Constitution, *see* THE FUNDAMENTAL LAW OF HAWAII 1-10 (Lorrin A. Thurston ed., 1904)[hereinafter FUNDAMENTAL LAW]; for the Laws of 1842, *see id.* at 10-136. It is noteworthy that the translator's Preface to the Laws of 1842 includes the following:

these documents, the king, for the first time, set limits on his authority and granted to his subjects specific rights to security of their persons and property against unjust exactions by the chiefs.[75] He established a formal system of sharing the decisions of government both with the chiefs and with the people; the constitution established a unicameral legislature which included not only certain chiefs, but also representatives of the people, elected by universal male suffrage.[76]

In laws published between 1823 and 1842 and codified in the Laws of 1842, the rights and arbitrary powers of the *ali'i* (chiefs) and *konohiki* (landlords) were curtailed.[77] The labor "tax" accruing both to the King and to the *konohiki* was regularized and in some cases commuted to a money payment.[78] In other sweeping social changes, new forms of marriage were prescribed,[79] marriages within specified degrees of consanguinity were prohibited to all, and certain marriages to foreigners were restricted.[80] Adultery and "lewdness" were prohibited.[81] Traditional and customary fishing "rights" were withdrawn by the king, then redefined and reissued through statute.[82] The traditional subjection of the common people to multiple layers of superior landlords, all with claims to their labor and the products of their land, was abolished.[83] Compared with the customary and traditional practices they replaced, these enactments constituted broad and dramatic changes in fundamental social structures.

> At these Islands, as well as in more civilized countries, there is something like a system of common law, independent of special statutes. It consists partly in their ancient taboos, and partly in the practices of the celebrated chiefs as the history of them has been handed down by tradition, and at the present period the principles of the Bible are fully adopted. The established customs of civilized nations have also in most cases the force of law in these Islands provided that custom is known.

FUNDAMENTAL LAW, *supra*, at vii.

[75] The 1840 Constitution declared, for example:

> Protection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, while they conform to the laws of the kingdom, and nothing whatever shall be taken from any individual except by express provision of the laws. Whatever chief shall act perseveringly in violation of this constitution, shall no longer remain a chief of the Hawaiian Islands, and the same shall be true of the Governors, officers, and all land agents.

FUNDAMENTAL LAW, *supra* note 74, at 1.

[76] *See id.* at 5-6.

[77] *See, e.g., id.* at 27-30.

[78] *See id.* at 14-17, 113-14.

[79] *See id.* at 45-48.

[80] *See id.* at 46-48.

[81] *See id.* at 96-101.

[82] *See id.* at 21-23.

[83] *See id.* at 23.

This was still, however, a transitional stage. Notwithstanding the many changes, the old customs were not wholly abandoned; for example, in the first paragraph of the Laws of 1842 appears the following:

> The subjection of the people to the chiefs, from former ages down, is a subject well understood, as is also a portion of the ancient laws. That subjection and those laws are not now as a matter of course discontinued, but there are at the present time many new laws, with which it is well that all the people should become acquainted.[84]

Among the "ancient laws" not entirely disposed of in these statutes were those supporting the feudal, tenurial relationship between landlord and land occupier. The land[85] and the labor[86] taxes were still obligations of the land occupier, and if he defaulted in the land tax he could be dispossessed.[87] A tenant was not permitted to abandon his farm without cause,[88] and land could be readily reassigned from one tenant to another, or even from one landlord to another, if it were not put to productive use.[89]

But further changes were imminent.

C. A Paradigm of the New Order—The Great Mahele

The final stage in this land revolution concerned the abolition of the feudal relationship. While it was generally recognized and acknowledged by the early 1840's that both chiefs and commoners had rights in land, there was no precise definition of those rights.[90] To resolve this uncertainty the kingdom

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[84] *Id.* at 10.

[85] *See id.* at 13-14.

[86] *See id.* at 14-17.

[87] *See id.* at 13.

[88] *See id.* at 6.

[89] *See id.* at 14, 17-20; *see also id.* at 14-15 (concerning descent of land to heirs).

[90] *See* LOUIS CANNELORA, THE ORIGIN OF HAWAII LAND TITLES AND OF THE RIGHTS OF NATIVE TENANTS 6 (1974)[hereinafter CANNELORA].

> The Constitution of 1840 recited that although all of the land belonged to Kamehameha I, "it was not his own private property. It belonged to chiefs and people in common, of whom Kamehameha I was the head, and had management of the landed property." This was the first acknowledgment by a Hawaii sovereign that his subjects had some proprietary interest in the land. But the Constitution provided no means by which the undivided interests of the King, the chiefs and the common people in the same land could be separated, nor did it establish any procedure under which the people could acquire fee title to land.

Id.

established a commission[91] to "settle land titles."[92] Through this commission, the previously undivided rights of the people of the kingdom to the lands of the kingdom were to be separated out and precisely defined, first generally, for the various classes of society, and then specifically, to settle the individual rights of members of those classes with respect to specific parcels of land.[93] The board recognized three classes of persons having vested rights in the land: the King or government, the landlords, and the tenants.[94] To determine the respective rights of these classes, it looked to ancient custom and tradition.[95]

To allocate these undivided rights to individuals, a series of partitions or *mahele* were made, all known collectively as the Great Mahele.[96] In 1848, the first phase of the divisions took place between the King and the chiefs or *konohiki*.[97] This resulted in 245 separate *mahele* with individual chiefs or *konohiki*, following which the King retained a major part of the lands of the kingdom as his personal and individual property, subject only to the rights of tenants.[98] A chief receiving land would have to pay a "commutation" to the

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[91] To oversee the division of lands among the three broad classes of persons recognized as having rights in the land (the King or government, the landlords or *konohiki*, and the tenants), a Board of Commissioners to Quiet Land Titles was established. FUNDAMENTAL LAW, *supra* note 74, at 137. It announced its guiding philosophy in the PRINCIPLES, *supra* note 40.

[92] *See* Thurston v. Bishop, 7 Haw. 421 (1888).

> Claims of one character and another to the possession of land had grown up, but there was no certainty about them, and all was confusion; and finally, after years of discussion had between the King, the chiefs and their foreign councillors [sic], the plan of a Board of Commissioners to Quiet Land Titles was evolved, and finally established by law, for the purpose of settling these claims and affording an opportunity to all persons to procure valid paper titles emanating from the Government representing the sovereignty, the source of all title to land in this Kingdom, to the land which they claimed.

Id. at 428.

[93] *See* PRINCIPLES, *supra* note 40, at 2126. *See also generally* U.S. PACIFIC COMMAND, FINAL ENVIRONMENTAL IMPACT STATEMENT: LAND USE AND DEVELOPMENT PLAN, BELLOWS AIR FORCE STATION, WAIMANALO, Hawaii (1995) § 6.6, at 6-8 to 6-12, and Appendix D-8 (letter from Melvin N. Kaku, Director Environmental Planning Division, Pacific Division, Naval Facilities Engineering Command to Stephen Kubota (October 26, 1995)).

[94] *See* PRINCIPLES, *supra* note 40, at 2126. The terms "King" and "government" are used interchangeably in the *Principles*. *See id.*

[95] In describing the testimony given in the course of its proceedings, the commission noted:

> The testimony elicited is of the best and highest kind. It has been given immediately by a large number of persons, of a great variety of character, many of them old men, perfectly acquainted with the ancient usages of the country; some were landlords, and some were tenants. There has been no contradictory testimony, and all have agreed on all essential points.

Id. at 2126.

[96] *See* JON J. CHINEN, THE GREAT MAHELE, HAWAII'S LAND DIVISION OF 1848 15-20 (1958)[hereinafter CHINEN].

[97] *See id.*

[98] *See generally* CANNELORA, *supra* note 90, at 12-13.

government, in land or other property, to discharge the government's claim,[99] and the grants to the chiefs were also made subject to the rights of tenants,[100] whose rights to their farms and homes were to be protected.[101]

The King's lands reserved in the Mahele were divided once again, to effectuate a division between his privately-held lands and those which would be allocated to the Government.[102] The King accordingly executed two documents, one conveying to the government the lands to be reserved for government use, the other retaining explicitly to himself, in fee simple, certain specified lands.[103] The lands conveyed to the government became known as government lands; the lands retained by the King became known as Crown lands.[104]

The separation of rights between king and chiefs was soon extended to the tenants.[105] In 1850, tenants or occupants of land ("*hoa'aina*") were given the right to obtain fee simple titles to those parts of the lands of the government, the King or the chief or *konohiki* which they actually occupied and improved, subject to Land Commission approval.[106] The tenants, however, were not required to pay a commutation. Other government lands were made available for purchase by those who did not already have sufficient land.[107]

Thus, the overall effect of the Mahele was to terminate the shared-ownership, feudal relationship described in the Constitution of 1840. Through the Mahele, these diffuse and poorly-defined rights were specified and

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[99] The Mahele, in and of itself, did not award lands to any individual; it simply removed any claims of the king to the land in question, and authorized the individual to seek an award of the land from the Land Commission. *See* CANNELORA, *supra* note 90, at 15. The decree of the Land Commission was termed a Land Commission Award, which gave "complete title" except for the government's right to commutation; once this was paid (in cash or in land) the claimant received a Royal Patent to the land. *See* CHINEN, *supra* note 96, at 13-14.

[100] *See* PRINCIPLES, *supra* note 40, at 2136.

[101] *See* Territory v. Liliuokalani, 14 Haw. 88, 95 (1902); Pai 'Ohana v. U.S., 875 F. Supp. 680 (D. Haw. 1995), *aff'd* 76 F.3d 280 (9th Cir. 1996).

[102] Concerning the King's motives, Cannelora provides the following:

> "The records of the discussion in Council show plainly his Majesty's anxious desire to free his lands from the burden of being considered public domain, and as such, subjected to the danger of confiscation in the event of his islands being seized by any foreign power, and also his wish to enjoy complete control over his property." (Estate of Kamehameha IV, [1864] 2 H. 715.) "It appeared to the King that the land thus released to him might be subjected to commutation in like manner with the lands of the chiefs. . . . Moved by these considerations . . . he proceeded . . . to set apart for the use of the government the larger portion of his royal domain, reserving to himself what he deemed a reasonable amount of land as his own estate." (Harris v. Carter [1877] 6 H. 195.)

CANNELORA, *supra* note 90, at 14.

[103] *See* Estate of Kamehameha IV, 2 Haw. 715 (1864).

[104] *See* CHINEN, *supra* note 96, at 26.

[105] *See* CANNELORA, *supra* note 90, at 17-19.

[106] *See id.* at 17; *see also* CHINEN, *supra* note 96, at 29.

[107] *See* 1 KUYKENDALL, *supra* note 4, at 291.

allocated to the King, to the government and to individuals. Following the Mahele, the king, the government, the chiefs and the common people each had no property rights in the lands of the others, and no rights to use or control those lands of others, except as the law might otherwise provide.[108] There could no longer be any broadly-shared rights in the Crown or government lands, or in the lands allocated to chiefs and commoners.[109]

D. Oni v. Meek—Judicial Confirmation of the New Order

Unquestionably, transition from a feudal tenure to individual fee simple ownership in the Western mode was the express intent of those—native and immigrant alike—who fostered and carried forward this revolution; this was stated in the *Principles*,[110] and confirmed in the case of *Oni v. Meek*.[111]

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[108] Among the rights otherwise provided for were the sovereign prerogatives of the king (*see* PRINCIPLES, *supra* note 40, at 2128), statutorily enumerated gathering rights of tenants (*see* Oni v. Meek, 2 Haw. 87 (1858)), and rights of access to *kuleana* lots (*see* CANNELORA, *supra* note 90, at 18).

[109] This point was made in *Territory v. Liliuokalani* in which the Territorial Attorney General attempted unsuccessfully to construe the reservation of the "rights of native tenants" as a sort of generalized public servitude or trust reservation of beach access for the "people." 14 Haw. 88 (1902). He sought thereby to prevent the removal of sand and gravel by a licensee of the former Queen Liliuokalani from the shoreline area fronting her property between high and low water. *See id.* at 89. He pointed out that the royal patent and award of the land, which expressly included land to *low* water, also contained the words "*koe nae ke kuleana o na kanaka*" which was a standard clause reserving the rights of native tenants. *See id.* at 95. He argued that these words reserved "to the people all the rights below high water mark not expressly recognized as private rights," including "all rights excepting the rights to fish and the rights to remove coral rock." *Id.* He concluded that "[t]he people's kuleana was the land between high water mark and low water mark." *Id.* The court disagreed, holding that "the words quoted have a well understood meaning as used in conveyances within this Territory and . . . they, as well as the English equivalent 'reserving however the people's kuleana therein,' mean the reservations of the house lots and taro patches or gardens of natives lying within the boundaries of the tract granted." *Id. See also* Pai 'Ohana v. U.S., 875 F. Supp. 680 (D. Haw. 1995), *aff'd* 76 F.3d 280 (9th Cir. 1996).

[110] *See* PRINCIPLES, *supra* note 40, which states in part:

The following benefits will result from these investigations and awards:

> 1st. They will separate the rights of the King and Government, hitherto blended, and leave the owner, whether in fee, or for life, or for years, to the free agency and independent proprietorship of his lands as confirmed. . . . *To separate these rights, and disembarass the owner or temporary possessor from this clog upon his free agency, is beneficial to that proprietor in the highest degree, and also to the body politic; for it not only sets apart definitely what belongs to the claimant, but untying his hands, enables him to use his property more freely, by mortgaging it for commercial objects, and by building upon it, with the definite prospect that it will descend to his heirs.* This will tend more rapidly to an export, and to a permanency of commercial relations, without which, there can never be such a revenue as to enable the government to foster its internal improvements.

Oni was a *hoa'aina* or tenant in the *ahupua'a*[112] of Honouliuli on Oahu.[113] Most of the *kula* (dry or pasture) land in the *ahupua'a* was under lease to Meek.[114] Horses had first been introduced to the area in 1833 and had become numerous, and it had become common practice for the *hoa'aina* to pasture their horses on the *kula* land of the *ahupua'a* together with the horses of the *konohiki* (landlord).[115] The court described the origin of the controversy as follows:

> It appears further that, about the year 1851, after the enactment of the new laws, relating to the tenure of land, a large number of the hoaainas of Honouliuli, including . . . some who had obtained awards for their kuleanas and others who had not, came to Mr. Haalelea, the konohiki, and expressing their understanding and belief that under the new order of things they would be cut off from the enjoyment of some of their accustomed rights and privileges, including the right or privilege of pasturage they offered to continue to labor for him, as formerly, upon the konohiki's labor days, in consideration of his allowing them to enjoy all their accustomed rights and privileges, to which proposition he agreed; and since that time all the hoaainas who have duly performed their labor on the konohiki's days, have been permitted to pasture their horses on the kula land as formerly; and that the plaintiff is one of those who have continued to labor according to that agreement. It appears, also, that within the three years last past the defendant has repeatedly notified the hoaainas to remove their horses from the kula lands leased by him.[116]

Oni argued that he held a right of pasturage by custom and by statute.[117] The court noted the possible difficulty of showing that a custom that must have originated after 1833 had existed "time out of mind," but declined to rule on that issue.[118] Instead, the court addressed directly the conflict of the

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> 2nd. . . . The patents and leases are recorded in duplicate, in the Department of the Interior. This will enable the foundation of every one's right to be known to the Government, and inquiring parties. No pretended ownerships can exist without the means of undeceiving the public in regard to them. *Subsequent purchasers and mortgagees need not be in ignorance of prior defects in the title, or of prior incumbrances.*

Id. at 2184 (emphasis added).

[111] 2 Haw. 87 (1858).

[112] An *ahupua'a* is a "land division usually extending from the uplands to the sea[.]" MARY KAWENA PUKUI AND SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 9 (1986). "The ideal *ahupua'a* extended from the sea to the mountains, enabling the chief of the *ahupua'a* and his followers to obtain fish and seaweeds at the seashore, taro, bananas, and sweet potatoes from the lowlands, and forest products from the mountains." CHINEN, *supra* note 96, at 3.

[113] *See Oni*, 2 Haw. at 87, 89.

[114] *See id.* at 87.

[115] *See id.* at 89.

[116] *Id.* at 89-90.

[117] *See id.* at 89.

[118] *See id.* at 90. The Kingdom courts tended to be liberal, at least for several years following the Mahele, in applying such temporal standards. *See, e.g.*, Rooke v. Nicholson, 1

claimed custom with the statutes then governing land tenure, and found that the alleged custom was "so unreasonable, so uncertain, and so repugnant to the spirit of the present laws, that it ought not to be sustained by judicial authority."[119] The court observed that the asserted custom, if it existed at all, was an incident of Oni's tenure under the "old law" of the land tax and the labor tax.[120] The court pointed out that if Oni had secured a *kuleana* award and held his land in fee simple, he would be freed from the land and labor taxes and the landlord would be freed from the claims Oni would otherwise have had upon him.[121] The court also noted that even if Oni had not obtained an award of his *kuleana*, he could not claim to have a continuing tenancy under the "old law" because he had acknowledged to his landlord that the "old law" was no longer in effect and that under the new law, an exchange of services for land use and other privileges could only be achieved by contract.[122]

Haw. 508 (1856), holding that a continuous and unmolested use of a way since 1841 was sufficient to create a right of way by prescription, even though under traditional common law standards, twenty years' use would be required. The court stated that "to require twenty years' continuous use, to create a prescriptive right of way in this country, would be unreasonable, because that length of time has not yet elapsed since landed property was divided, and the titles to it clearly defined." *Id.* The cases of *Kanaina v. Long*, 3 Haw. 332 (1872), and *Swan v. Colburn*, 5 Haw. 394 (1885), however, reflect a return to the common law standard in later years.

[119] *Oni*, 2 Haw. at 90.

[120] *See id.*

[121] *See id.*

[122] *See id.* The court stated:

> [I]t is perfectly clear that, if the plaintiff is a hoaaina, holding his land by virtue of a fee simple award from the Land Commission, he has no pretense for claiming a right of pasturage by *custom*, for so far as that right ever was customary, it was annexed to the holding of land by a far different tenure from that by which he now holds--a tenure by which the hoaaina was bound to labor a certain number of days in each month, for the immediate lord of the land, and a like number of days for the King or Government, as payment or rent, both for the use of the land and for the enjoyment of the other rights and privileges appurtenant thereto, whereas the very fact that the plaintiff holds his land by virtue of a fee simple title, frees him forever from the labor formerly due to the Government and to the konohiki; he no longer owes, nor can he be called upon to perform such labor, by law, as payment for the use of his land, or for the enjoyment of any right or privilege, and if he performs such labor it is neither by force of law or custom, but in fulfillment of a private contract. Again, if the plaintiff claims to be a hoaaina of Honouliuli, holding his land, not independently, upon an award from the Land Commission, but according to ancient tenure, in dependence upon the konohiki, and that, therefore he is entitled to the right of pasturage, by custom, he is met by the testimony of the principal witnesses introduced by himself, to the effect that, in the year 1851, he, in common with the other hoaainas of Honouliuli, admitted that his former right or privilege of pasturage was determined, by the operation of the new laws affecting the tenure of land, and that he has since been permitted to enjoy the right of pasturage for his horses, not by force of law or custom, but in consideration of certain labor which he has

Having thus disposed of Oni's claim under a theory of custom, the court proceeded to deal with Oni's claim of rights by statute.[123] That claim was based on an 1846 law enumerating the rights of the *hoa'aina*, among which was the right to "pasture his horse and cow and other animals on the land, but not in such numbers as to prevent the *konohiki* from pasturing his."[124] The court noted that the statute in question had been passed

> [A]t a time when the old system as to the tenure of lands was still in existence, and before the passage of new laws upon the subject of land titles, the operation of the Land Commission, and the great division of 1848 had brought about and perfected that entire revolution in the law affecting rights in land, and land titles, which has taken place since the year 1846.[125]

It concluded that while this earlier law had never been expressly repealed, it had been "impliedly annulled and superseded" by later law on the same subject.[126] Specifically, the court held that as to the earlier statute:

> [T]he enumeration therein contained, of certain specific rights of the hoaaina, apart from his right to the land he cultivated, has been superseded by the specification of the same rights, contained in the seventh section of the Act of August, 1850, which specification reads as follows, viz: "When the landlords have taken allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house timber, aho cord, thatch, or ti leaf, from the land on which they live, for their own private use, should they need them, but they shall not have a right to take such articles to sell for profit."[127]

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performed, in accordance with a special contract with the konohiki to that effect, made at a time when the right of pasturage could not have been said, with any show of reason, to have become established by ancient custom. And whatever private agreement as to pasturage may have existed between the plaintiff and the konohiki, that, of course, cannot affect the defendant's rights under his leases, unless he had special notice of such agreement, and bound himself to respect its terms.

Id.

[123] *See id.* at 91.

[124] *Id.* at 91. The section of the statute in question read as follows:

The rights of the hoaaina in the land consist of his own taro patches, and all other places which he himself cultivates for his own use; and if he wish to extend his cultivation on unoccupied parts, he has the right to do so. He has, also, rights in the grass land, if there be any under his care, and he may take grass for his own use or for sale, and may also take fuel and timber from the mountains for himself. He may also pasture his horse and cow and other animals on the land, but not in such numbers as to prevent the konohiki from pasturing his. He cannot make agreement with others for pasturage of their animals without the consent of his konohiki, and the Minister of the Interior.

Id. (quoting the language of the Joint Resolution of 1846).

[125] *Id.* at 92.

[126] *See id.*

[127] *Id.* at 94-95. The "Act of August 1850" refers to the act of August 6, 1850 (L. 1850 at 202), the predecessor of the current HAW. REV. STAT. ANN. § 7-1.

The court then drove the point home:

> That it was the intention of the Legislature to declare, in this enactment, *all* the specific rights of the hoaaina (excepting fishing rights) which should be held to prevail against the fee simple title of the konohiki, we have no doubt.[128]

The word "all" appears in italics in the court's opinion, evidently as a studied and resolute affirmation of the end of the feudal order for *both* tenants and landlords.

The court went on to hold that the legislature had intended, by the 1850 statute, to put an end to the right claimed by the plaintiff because it was "inconsistent with the new system, and therefore was not reserved on the change of the law."[129] The court noted that in "several subsequent sessions of the Legislature, petitions were presented for the enactment of a law granting to the common people the right of pasturage on the lands of the *konohikis*, but without success, on the ground that it would interfere with vested rights."[130] To prevent any misunderstanding, the court concluded:

> We understand the latest enumeration, by the Legislature, of the specific rights of the hoaaina, to be restrictive as against the rights of the konohiki and the Government, and we think, therefore, that the maxim *expressio unius est exclusio alterius* . . . must be held to apply in this case, with conclusive force; and that, too, without any distinction as to whether the plaintiff is a kuleana holder or otherwise; our understanding of the term *people*, as used in the seventh section of the Act of 1850, being that it is synonymous with the term *tenants*, as used in the law relating to private fisheries, of which we expressed our view in the recent case of Haalelea vs. Montgomery.[131]

Thus, with *Oni v. Meek*, the issue of "traditional and customary rights" of *hoa'aina*—understood at that time to mean ahupua'a tenants or other lawful occupants of land in an *ahupua'a*[132]—was firmly and conclusively settled.

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[128] *Id.* at 95 (emphasis in original).

[129] *Id.*

[130] *Id.* Perhaps because the title of the *konohiki* was subject only to the *hoa'aina* rights specifically enumerated in the 1850 statute, and the imposition of additional limitations on *konohiki* titles would enlarge the rights of the *hoa'aina* by diminishing those of the *konohiki*. *See id.*

[131] *Oni*, 2 Haw. at 95-96.

[132] Concerning the 1858 court's understanding of the term "*hoa'aina*," *see* Haalelea v. Montgomery, 2 Haw. 62 (1858), in which the court stated:

> We understand the word tenant, as used in this connection [the definition of rights of piscary or fishing declared in an 1839 statute establishing rights, among others, of "the landlords, and . . . the tenants of their several lands"] to have lost its ancient restricted meaning, and to be almost synonymous, at the present time, with the word occupant, or occupier, and that every person occupying lawfully, any part of "Honouliuli" is a tenant within the meaning of the law.

Haalela, 2 Haw. at 71.

Only those rights which were enumerated in what is now HRS section 7-1 survived the *Mahele* and the Act of 1850.[133] The inescapable corollary was that *all other* traditional and customary entitlements of native tenants were terminated. *Oni v. Meek* was an important case, and the court was fully aware that its decision would be of broad and lasting significance.[134] It remained unquestioned law for almost 125 years, and survives today in far better health than its detractors might desire.

E. Integrating Hawaiian Customs with the Common Law of Property

In resolving questions concerning the kingdom's new order, the kingdom's courts tended to look, with respectful independence, to English and American common law. The jurists of the Hawaiian kingdom had not felt fettered by the English or American common law in all its detail. For example, in *Thurston v. Allen*,[135] the court stated:

> We do not regard the common law of England as being in force here *eo nomine* and as a whole. Its principles and provisions are in force so far as they have been expressly or by necessary implication incorporated into our laws by enactment of the Legislature, or have been adopted by the rulings of the courts of record, or have become a part of the common law of this kingdom by universal usage, but no further.[136]

Consistent with this, early judicial decisions of the kingdom on adoptions and the devolution of property at death[137] and particularly on matters of water

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[133] For additional authority on this point, *see* Dowsett v. Maukeala, 10 Haw. 166 (1895). Authors David M. Forman and Stephen M. Knight also propose a restrictive interpretation of *Oni* which would essentially limit it to its facts. *See* David M. Forman & Stephen M. Knight, *Native Hawaiian Cultural Practices Under Threat*, 1 Hawaii Bar Journal (No. 13) 1, 8-13 (1974) [hereinafter Forman & Knight]. This thesis, however, is most difficult to reconcile with the *Oni* court's broad and unqualified language and its manifest awareness of the sweeping consequences of its decision.

[134] Indeed, all parties appear to have been aware that the case was of special significance. The court noted in the introductory paragraph of its decision that "defendant agreed that judgment should be entered against him in the Court below, reserving by consent his right to appeal, in order that the case, which involves some questions of great importance, and will determine the rights of many other persons besides the present plaintiff and defendant, might be heard and decided by this Court." *Oni*, 2 Haw. at 87.

[135] 8 Haw. 392 (1892).

[136] *Id.* at 398. *See also* De Freitas v. Coke, 46 Haw. 425, 429, 380 P.2d 762, 765 (1963)(stating that "[p]rior to 1892, the courts of Hawaii rejected the common law rules in certain aspects, thus establishing Hawaii's own judicial precedent").

[137] *See, e.g.*, Kiaiaina v. Kahanu, 3 Haw. 368 (1871)(a child adopted "according to Hawaiian custom and usage, made prior to the written law" entitled to inherit); Estate of His Majesty Kamehameha IV, 2 Haw. 715, 718 (1864)(stating that "[i]t is conceded that the Court, in order to enable it to give a just construction to the act of the 7th of June, 1848, is at liberty to refer not

rights[138] reflected a studied concern for protecting the reasonable expectations of Hawai'i's populace based on custom.

Nevertheless, the law of the kingdom was in most respects the common law of England and America. In *Thurston v. Allen*, the court noted:

> We were much impressed with the statement made at the argument by Mr. Peterson, of counsel for the plaintiffs, that of the nine hundred reported cases of this Court, in only about nine cases, or one per cent, has this Court departed from the common law on the point under consideration.[139]

Specifically in the matter of real property rights, the courts departed from the English and American common law on a number of occasions. These departures, however, were not to accommodate pre-Mahele customs and traditions, but to avoid common law rules which were "based on conditions that no longer exist, and when [the common law] had come to be generally recognized as merely technical and subversive of justice or the intentions of the parties to instruments and when it had in consequence been generally altered or abrogated by statute elsewhere."[140] Indeed, in the case of *Kahinu*

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only to the two instruments executed by his Majesty Kamehameha III on the 8th of March, 1848 [separating Crown from government lands], which were unquestionably the foundation of the Legislative enactment, but also to *Hawaiian history, custom*, legislation and polity, as well as to the records of the Privy Council, and the acts of the parties immediately interested subsequent to the great division")(emphasis added).

[138] *See* HUTCHINS, *supra* note 41, at 47-143. With respect to rights to surface water in streams, *see generally* Robinson v. Ariyoshi, 441 F. Supp. 559 (1977)("Robinson I"), *aff'd in part, vacated in part and remanded*, 753 F.2d 1468 (9th Cir. 1985)("Robinson III"), *vacated and remanded*, 477 U.S. 902 (1986) and 796 F.2d 339 (1986), *aff'd on reconsideration*, 676 F. Supp. 1002 (1987), *reversed and remanded*, 887 F.2d 215 (9th Cir. 1989); *see also* Justice Levinson's dissent in the decision following rehearing in McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973), *aff'd on rehearing*, 55 Haw. 260, 517 P.2d 26 (1973), *appeal dismissed and certs. denied*, 417 U.S. 962 and 417 U.S. 976 (1974).

[139] Thurston v. Allen, 8 Haw. 392, 398-99 (1892).

[140] Branca v. Makuakane, 13 Haw. 499, 505 (1901). The court provided examples as follows:

> Among the cases in which the court has declined to follow the common law as to real property the following may be mentioned: Wood v. Ladd, 1 [Haw.] 17, seal not essential to a mortgage; Campbell v. Manu, 4 [Haw.] 459, seal not essential to a deed; (see also In re Congdon, 6 [Haw.] 633, seal not essential to a bond); In the matter of Vida, 1 [Haw.] 63, dower in leasehold estate of long duration; Kuuku v. Kawainui, 4 [Haw.] 515, Puukaiakea v. Hiaa, 5 [Haw.] 484, and Kuuku v. Kawainui, 4 [Haw.] 515 (sic), conveyance of freehold *in futuro*; (see also Judd v. Hooper, 1 [Haw.] 13, livery of seisin; Awa v. Horner, 5 [Haw.] 543, deed to two or more creates tenancy in common; Thurston v. Allen, 8 [Haw.] 392, same as to tenancy in common, also Rule in Shelley's Case not law here; In re Keliiahonui, 9 [Haw.] 6, Mossman v. Government, 10 [Haw.] 421 and Ninia v. Wilder, 12 [Haw.] 104, conveyance by disseissee valid; Rooke v. Queen's Hospital, 12 [Haw.] 374, estates tail and fees simple conditional cannot exist here.

Id. at 505-06.

v. Aea[141] the common law of America and England was applied and affirmed as the law of the kingdom with respect to defining real and personal property, and a claim based on traditional practice was rejected. The case involved a dispute between natives over title to a lot and a house thereon.[142] The defendant claimed title to all personalty of the former owner of the lot.[143] He asserted that the personal property included the house on the lot, since it had been customary in earlier times for house frames to be moved from one location to another.[144] The court stated:

> The building here in question is a two-story wooden building, erected during the lifetime of the said Nahinu, and is no more to be regarded as personalty because it was occupied by natives than if occupied by foreigners. To declare that a permanent structure of this kind is personal property because natives in former times frequently removed their house frame to another locality, would be to define real and personal property, not by its inherent nature, but by the views of those who held it. Such an adjudication would involve us in a changeable and contradictory system of law. The only safe way is to regard real and personal property as defined by our statutes, Sections 483 and 484 of the Civil Code, to intend and mean the same kind of property so designated in American, English, and Continental law.[145]

In 1892, this long process of integrating Hawaiian customary law with American and English common law was completed when the kingdom accepted the common law of England as its own "except as otherwise expressly provided by the Hawaiian Constitution or laws, or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage."[146] At the time of this enactment, of course, "Hawaiian judicial precedent" in the form of *Oni v. Meek* and *Kahinu v. Aea* had already established that (subject to what is now HRS section 7-1) Hawai'i's definitions of real and personal

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[141] 6 Haw. 68 (1872).

[142] *See id.*

[143] *See id.*

[144] *See id.*

[145] *Id.* at 69. The cited sections of the 1859 Civil Code pertain to property taxes. *See id.* Section 484 imposed a tax on "all real property within the kingdom, not specially exempted from taxation" and provides that "[t]he term 'real property,' with respect to the assessment and collection of revenue, shall be deemed to include all lands and town lots, with the buildings, structures, and other things erected on, or affixed to the same." *Id.* Section 483 concerns personal property taxes and states that "[t]he term 'personal property' shall be construed to include all household furniture, goods and chattels, wares and merchandise, all ships and vessels whether at home or abroad, all moneys in hand and moneys loaned, all mortgages, public stocks, stocks in corporations, and every species of property not included in real estate." *Id.* That the court did not consider the definitions limited to tax cases is indicated not only by the unqualified language of the court's decision, but by the fact that *Kahinu* was not itself a tax case. *See id.*

[146] *See* Laws of 1892, Ch. 57, Section 5.

property were those of English and American common law. In fact, *Oni v. Meek* was reaffirmed in 1895, only a few years after the passage of the 1892 law, in the case of *Dowsett v. Maukeala*.[147]

Thus we find that in moving from the absolute monarchy of Kamehameha I to a constitutional monarchy, there was an enduring commitment on the part of the King, the chiefs and their Western advisors to preserve many positive elements of Hawaiian custom as the law of the kingdom. At the same time, however, there was a counterbalancing commitment on the part of these same officials and the kingdom's judiciary to restructure traditional and customary rights and to administer them in accordance with Western legal concepts.[148] As rights in land which were formerly regulated by custom and chiefly prerogative became subjects of written law in the Western fashion, the officials of the kingdom looked to Western judicial tradition rather than to Hawaiian custom when interpreting, protecting and enforcing those rights.[149]

VI. CUSTOMARY LAW DEVELOPMENTS AFTER STATEHOOD

Throughout much of Hawai'i's later judicial history, and particularly in its modern history, custom and usage have continued to play an important role. These terms have usually been used together and interchangeably, either as a single term or as synonyms,[150] without strict regard for their technical

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[147] 10 Haw. 166 (1895). In *Dowsett*, the court noted: "In *Oni v. Meek*, 2 Haw. 87, this court held that the Act [of August 6, 1850, now HRS § 7-1] repealed the former legislation and the ancient tenure, but in the 7th section preserved to the people, whether hoaainas by ancient custom or kuleana holders, certain specific rights, as to take firewood, house timber, thatch, etc. for their own use." *Id.* at 170.

[148] *See generally* 1 KUYKENDALL, *supra* note 4, at 157-61, 241-45.

[149] *See, e.g.*, Haalelea v. Montgomery, 2 Haw. 62, 71 (1858)(citing Kent's *Commentaries* and other common law scholars in developing the law pertaining to creation and transfer of fishing rights); Estate of Nakuapa, 3 Haw. 342, 345-46 (1872)(referring to the law of Massachusetts and to Roman law in upholding traditional Hawaiian custom of adoption as entitling adopted child to inherit parent's estate); Peck v. Bailey, 8 Haw. 658, 664 (1867)(applying both Hawaiian custom and American common law cases in upholding rights of a water user with rights established "by immemorial usage" under Hawaiian custom to change the use of water).

[150] *See, e.g., In re Application of Ashford*, 50 Haw. 314, 440 P.2d 76 (1968), where the court speaks generally of "ancient tradition, custom and usage" (without distinguishing between these terms) as pertinent to location of the seaward boundary of property, *and Palama v. Sheehan*, 50 Haw. 298, 300, 440 P.2d 95, 97 (1968), where the court stated that it was "necessary to examine ancient Hawaiian tradition, custom and usage" and proceeded to a historical discussion without making any distinction between tradition, custom and usage as different terms. *But see Coady v. Ship "Lewis"*, 1 Haw. 303 (1856), discussing and applying "custom" and "usage" with specific attention to the distinction between them in a mercantile context.

distinctions.[151] Whether used together or separately, they denote unwritten traditions with a dignity akin to, and sometimes rising to, the force of law. As so used, they fall more precisely within the concept of "custom" than within the somewhat less obligatory concept of "usage" in its more technical sense.[152]

The most general statement of the significance of usage in current Hawai'i law is found in HRS section 1-1 as follows:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii 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;[153] 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.[154]

As an element within the structure of HRS section 1-1, "usage" (treating that term, consistently with its general use in Hawai'i case law, as roughly synonymous with "custom") appears to have, at best, a co-equal dignity with other sources of common law, that is: HRS section 1-1 on its face gives "Hawaiian usage" no primacy over the general common law of the state as developed through case law or modified by statute. It must, of course, yield to conflicting provisions of state statutory law,[155] as well as federal law and the U.S. Constitution.[156]

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[151] Early cases tended to hold most closely to the traditional meanings of these terms and to respect the differences between them. *See, e.g.*, Coady v. Ship "Lewis", 1 Haw. 303 (1856); *cf.* Oni v. Meek, 2 Haw. 89 (1858).

[152] *See* BLACKSTONE, *supra* note 18, at 76-78; *see generally supra* note 1.

[153] The statute as enacted in 1892, and as carried forward into the law of the Republic of Hawaii, referred to "Hawaiian national usage." *See* Mossman v. The Hawaiian Government, 10 Haw. 421, 434 (1896).

[154] It might be noted that as used in HRS § 1-1, the term "usage" can in fact be read as consistent with the distinctions described *supra* at note 1; that is, not as a change in the common law in and of itself, but as a precursor to such change. So interpreted, § 1-1 does not accord to "usage" the role and the significance of "law," but treats it instead, consistently with its precise definition, as a pattern of behavior among citizens which can acquire the stature of "custom" and the force of law when the character of the usage meets the tests of antiquity, repetition, acquiescence and common consent. This has traditionally been the means by which usage "establishes" a specific rule within the state's general common law. *See* Thurston v. Allen, 8 Haw. 392 (1892).

[155] Blackstone refers to this as a corollary of the requirement of antiquity where he says: "For which reason no custom can prevail against an express act of parliament; since the statute itself is a proof of a time when such a custom did not exist." 1 BLACKSTONE, *supra* note 18, at 76-77; *see also* Bederman, *supra* note 1, at 1386 n.46; 21A AM. JUR. 2D, *Customs and Usages*, § 16, "Conflict with statutory or constitutional provisions" (1981).

[156] *See* 21A AM. JUR. 2D *Customs and Usages* § 16, "Conflict with statutory or constitutional provisions" (1981); *see also* U.S. CONST. art. VI, cl. 2, which provides:

Beginning in the late 1960s, the Hawai'i Supreme Court, aided by a constitutional convention in 1978,[157] focused new attention and debate on the place of Hawaiian custom and usage in the state's law, particularly in the areas of land and water rights. While the precise point of origin of this new focus is somewhat difficult to define, the 1968 case of *Application of Ashford*, [158] is a convenient starting place for discussion. *Ashford* held that the term "*ma ke kai*" in a deed of shorefront land, referring to the line dividing private land from adjoining public submerged land, meant the "upper reaches of the waves as represented by the edge of vegetation or the line of debris" rather than the intersection of the shore and the plane of mean high water as determined by the U.S. Coast and Geodetic Survey.[159] In reaching this decision, the court, citing HRS section 1-1, relied upon the statements of "*kama'aina* witnesses"[160] (placed on the record at trial but excluded as evidence upon objection) concerning "ancient tradition, custom and usage."[161] Justice Marumoto dissented, and in a lengthy and scholarly opinion argued that "[a]ncient tradition, custom, practice and usage have nothing to do in resolving this question."[162] He disagreed that the proffered testimony constituted "*kama'aina* testimony" since it came not from true *kama'aina* but from persons who testified only to what they had once heard from *kama'aina* now deceased.[163] Justice Marumoto concluded that "[t]he historical materials referred to in this dissent show that there was nothing in ancient tradition, custom, practice or usage which dictated the use of the vegetation line"[164] as the meaning of the term "*ma ke kai*" and pointed out that "[f]or well nigh 50 years, all three branches of the Hawaiian government, legislative, executive and judicial, have recognized mean high water line as the location of the high water mark in situations involving private rights and not an internal problem

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This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

[157] *See generally* PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978 (2 vols., 1978).

[158] 50 Haw. 314, 440 P.2d 76 (1968).

[159] *Id.* at 315, 440 P.2d at 77.

[160] *See* In the Matter of the Boundaries of Pulehulani, 4 Haw. 239, 245 (1879)(defining *kama'aina* witnesses as "persons familiar from childhood with any locality").

[161] *See Ashford*, 50 Haw. at 316, 440 P.2d at 78.

[162] *Id.* at 330, 440 P.2d at 86.

[163] *Id.* at 329, 440 P.2d at 85.

[164] *Id.* at 344, 440 P.2d at 93.

in the administration of government lands."[165]

Justice Marumoto stopped short of claiming that the change in legal principle effected by the *Ashford* decision was unconstitutional, but in a subsequent case, *Sotomura v. County of Hawaii*,[166] the plaintiff made precisely that allegation. The Sotomuras owned shorefront property on the island of Hawai'i which the County of Hawai'i sought to acquire in a condemnation action.[167] The land had previously been registered in the State Land Court, and in that proceeding, in accordance with then established practice, the location of the high water mark was fixed along the seaweed line, that is: the line of growth of seaweed along the seashore.[168] A question arose concerning whether there had been a loss of land by erosion, and in deciding the issue, the trial judge adopted the *Ashford* "debris line" test for locating the seaward boundary of the Sotomuras' uneroded land, rather than the seaweed line.[169] He then divided the land taken by the State into two parcels, that below the erosion line and that above it, for valuation purposes, and valued the seaward parcel at $1.00.[170] The difference between the former and current seaweed lines was about three feet, while the difference between the old seaweed line and the current debris line was about 43 feet.[171] The Sotomuras claimed that use of the current and former seaweed lines to measure erosion would have reduced the loss to erosion and thus increased their award by $37,920.[172]

On appeal to the Hawai'i Supreme Court, the Sotomuras argued (among other points) that the *Ashford* case had no application to registered land.[173] The Hawai'i Supreme Court held that the *Ashford* test did apply, in preference to the original monument (the seaweed line) that governed the location of the seaward boundary in the judgment registering their title.[174] The court then went further and held, on a point not raised or argued by either party, that the Sotomuras had lost *title* to a portion of their lot by erosion, that the seaward boundary should be established at the vegetation line (rather than at the debris line), and that the Sotomuras were not entitled to compensation for the land seaward of that line, because the State, and not the Sotomuras, actually owned

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[165] *Id.* at 345, 440 P.2d at 94.

[166] 460 F. Supp. 473 (D. Haw. 1978).

[167] *See id.* at 474.

[168] *See id.* at 475.

[169] *See id.* The district court observed that in the state trial court, the issue was not ownership, but value; there was no claim by any party that the Sotomuras did not own the land in question. *See id.*

[170] *See id.* at 476.

[171] *See id.*

[172] *See id.*

[173] County of Hawaii v. Sotomura, 55 Haw. 176, 178, 517 P.2d 57, 59 (1973).

[174] *See id.* at 180, 517 P.2d at 61.

it.[175] The Sotomuras petitioned for a rehearing, claiming that the court's redefinition of the high water mark had effected a taking of their property without compensation, but the petition was denied without argument.[176]

The Sotomuras then filed suit in federal district court asserting on various grounds that the decision of the Hawai'i Supreme Court had worked an unconstitutional taking of their property.[177] The district court held that the Sotomuras had been denied procedural due process by not being afforded an opportunity to present their constitutional claims to the state supreme court.[178] More importantly for the law of custom, it decided that the Sotomuras had been denied substantive due process, because the Hawai'i Supreme Court's decision "was so radical a departure from prior state law as to constitute a taking of the Owners' property by the State of Hawai'i without just compensation. . . ."[179] The district court observed:

> This Court fails to find any legal, historical, factual or other precedent or basis for the conclusions of the Hawaii Supreme Court that, following erosion, the monument by which the seaward boundary of seashore land in Hawaii is to be fixed is the upper reaches of the wash of the waves. To the contrary, the evidence introduced in this case firmly establishes that the common law, followed by both legal precedent and historical practice, fixes the high water mark and seaward boundaries with reference to the tides, as opposed to the run or reach of the waves on the shore.[180]

The district court declared the decision in *Ashford* to have been *dictum*, pointing out that it was based on testimony which was excluded from that case in the trial court, and stated:

> As noted above, the reputation evidence offered in *Ashford* related to unregistered land on an island different from the one herein involved and was not admitted against the adverse party. Here, no evidence of reputation or of the common practice involved in relocating seaward boundaries after erosion was offered at the eminent domain trial. Notwithstanding the lack of any foundation in *Ashford* or the trial record, the Court nevertheless announced that *Ashford* constituted "judicial recognition of long-standing public use of Hawaii's beaches to an easily recognizable boundary that has ripened into a customary right." This was based on the Court's reliance upon an Oregon case [*State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969)] and its own interpretation of the doctrine of custom as authority. However, unlike the situation in the Oregon case, no evidence was offered here in either the State trial court or this Court that Lot 3

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[175] *See id.* at 184, 517 P.2d at 63.

[176] Sotomura v. County of Hawaii, 460 F. Supp. 473, 477 (D. Haw. 1978).

[177] *See id.*

[178] *See id.*

[179] *Id.* at 483.

[180] *Id.* at 480.

> was ever publicly used. Even had there been, the Owners were entitled to protection against adverse or prescriptive use by the express provisions of § 501-87, Hawaii Revised Statutes. Nor was any evidence offered to establish customary right. To the contrary, evidence introduced in this Court with respect to Waikiki Beach, Hawaii's most widely-known and heavily-used beach, belies the existence of any such right.[181]

The *Sotomura* case was not appealed by the State of Hawai'i. It therefore stands today to cast continuing doubt not only on the constitutional validity of the Hawai'i Supreme Court's decisions in both *Sotomura* and its predecessor, *Ashford*, but on the manner in which the Hawai'i Supreme Court applied "tradition, custom and usage" as a source of law.

A similar cloud of doubt lies over Hawai'i's water law and also involves the application of ancient Hawaiian custom and usage. Before Western contact, the inhabitants of the Hawaiian islands had developed a "sophisticated system of water regulation" overseen by the *konohiki* of each *ahupua'a* in the interests of both agricultural and domestic use.[182] Wells Hutchins, in THE HAWAIIAN SYSTEM OF WATER RIGHTS,[183] explains:

> The system . . . is not based upon the common law, or the civil law or the doctrine of prior appropriation; it is the crystallization into legal form of customs that were developed among the natives before the coming of the white man. These customs, therefore, are truly of ancient origin and they necessarily antedated any written legislation on the subject of water.[184]

This system was further developed during the kingdom and afterward into a system of private property rights well suited to Hawai'i's agricultural economy, but rooted firmly in Hawai'i's ancient past.[185]

In 1973 the Hawai'i Supreme Court rendered its decision in *McBryde Sugar Co. v. Robinson*[186] on an appeal of a trial court decision adjudicating rights of various water users in the Hanapepe Valley on the island of Kauai.[187] That litigation had begun in 1959 and had been developed under the water law as it had existed until that point.[188] The Hawai'i Supreme Court, however, while

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[181] *Id.* at 479-80.

[182] *See* McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330, *aff'd on rehearing*, 55 Haw. 260, 517 P.2d 26 (1973)(Levinson, J., dissenting from opinion on rehearing, 55 Haw. at 292, 517 P.2d at 44).

[183] HUTCHINS, *supra* note 41, at 47.

[184] *Id.*

[185] *See generally* HUTCHINS, *supra* note 41, at 47-143.

[186] *See generally* McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330, *aff'd on rehearing*, 55 Haw. 260, 517 P.2d 26 (1973).

[187] *See McBryde*, 54 Haw. at 176, 504 P.2d at 1333.

[188] *See* Robinson v. Ariyoshi, 441 F. Supp. 559, *aff'd in part, vacated in part and remanded*, 753 F.2d 1468 (1985), *vacated and remanded*, 477 U.S. 902 (1986) and 796 F.2d 339 (1986),

basing its ruling on traditional Hawai'i water law principles on some of the points raised, rendered a decision on other issues, not briefed or argued by the parties, which dramatically altered the prevailing law.[189] In petitions for rehearing, the parties argued, among other issues, that the changes wrought by the court's decision constituted an unconstitutional taking of their private property rights.[190] The court rendered a *per curiam* decision on rehearing in which it ignored the constitutional issues and made no change in its original decision.[191]

A number of the parties involved in the state court proceedings then filed suit in the federal district court asserting the unconstitutionality of the Hawai'i Supreme Court's decision.[192] In a blistering and derisive opinion, the district court held that the Hawai'i Supreme Court had indeed overstepped constitutional limits.[193] It held that by deciding the case on issues never raised or argued and by failing to consider the constitutional objections raised on request for rehearing, the court had denied those parties procedural due process.[194] The district court also determined that the Hawai'i Supreme Court, by electing to "completely restructure what was universally thought to be the well settled law of waters of Hawai'i," denied the complainants substantive due process.[195] The court stated:

> As indicated above, the decision made an unsolicited and unexpected gift to the state of all of the waters of the streams and to the complete surprise of all parties, said that the State had *always* owned the waters. There was no precedent for this determination. The court had to toss aside as dicta all the mass of prior decisions to the contrary, turn its then blind eyes toward the rule of stare decisis, tear apart the doctrine of res judicata, and discover completely new meanings in ambiguous Hawaiian words and phrases used a century before in order to change the law of water rights and gift wrap the waters for the state.[196]

The court quoted from *Hughes v. Washington*[197] as follows: "[a] State cannot be permitted to defeat the constitutional prohibition against taking property

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aff'd on reconsideration, 676 F. Supp. 1002 (1987), *reversed and remanded*, 887 F.2d 215 (1989).

[189] *See Robinson*, 441 F. Supp. at 563. The principal changes were that rights long accepted as belonging to private parties in fact belonged, and always had, to the state and that diversions of surface water out of its watershed, traditionally engaged in freely, were not and had never been lawful. *See id.*

[190] *See id.* at 564.

[191] *See McBryde*, 55 Haw. at 261, 517 P.2d at 27.

[192] *See Robinson*, 441 F. Supp. at 562.

[193] *See id.* at 580-87.

[194] *See id.* at 580.

[195] *Id.* at 583-86.

[196] *Id.* at 585 (emphasis in original).

[197] 389 U.S. 290 (1967).

without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all,"[198] and accordingly declared unconstitutional those parts of the state court decision which effected the dramatic and unanticipated changes in state law.[199] On appeal, the Ninth Circuit affirmed.[200]

The decision subsequently had a complex and tortuous history of appeals culminating in a decision that the case was not ripe for adjudication, because the State of Hawai'i had taken no steps to enforce the rights of ownership assertedly conferred on it by the *McBryde* decision.[201] Nevertheless, none of the appellate decisions challenged the fundamental constitutional analysis of the district court, and until the day, if ever, that the constitutionality of the *McBryde* decision becomes "ripe" for decision, the state's surface water law remains uncertain.[202]

The federal court decisions in *Sotomura* and *Robinson v. Ariyoshi* sounded a note of caution with respect to the Hawai'i Supreme Court's apparent willingness to make sudden and substantial changes to prior law.[203] Both of the federal decisions in these cases identified major constitutional obstacles in the path of what they seem to have considered unseemly and intemperate haste by the Hawai'i Supreme Court to implement a revolutionary political agenda through judicial activism.[204] Both federal decisions involved searches into Hawai'i's judicial history and considerations of the role and effect of custom and usage on Hawai'i law. Both cast the gravest aspersions on the historical research and analysis of the state court's majority and made clear

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[198] *Id.* at 296-97.

[199] *See Robinson*, 441 F. Supp. at 559, 584-86.

[200] 753 F.2d 1468 (9th Cir. 1985).

[201] *See* Robinson v. Ariyoshi, 887 F.2d 215, 219 (9th Cir. 1989).

[202] In *Reppun v. Board of Water Supply*, 65 Haw. 531, 656 P.2d 57 (1982), the Hawai'i Supreme Court, relying heavily on *McBryde*, overturned traditional principles which had previously governed surface water rights in an environment where surface and ground water sources were interrelated. This case was not directly associated with the federal court proceedings involving the *McBryde* and *Robinson v. Ariyoshi* cases, but the dependence of *Reppun* on *McBryde* taints it with *McBryde's* constitutional uncertainty, and the issues of those cases may yet be raised in future cases involving Hawaii's surface and ground waters.

In 1987 the State of Hawai'i enacted a State Water Code establishing a regulatory program for both surface and ground waters. *See* HAW. REV. STAT. ch. 174C. This statute, however, carefully left ambiguous the issue of actual ownership of water rights. *See* the United States District Court's discussion of the Water Code in Robinson v. Ariyoshi, 676 F. Supp. 1002, 1021-24 (D. Haw. 1987).

[203] *See* Bederman, *supra* note 1, at 1439-41.

[204] Of note is the court's astonishingly blunt observation in *Robinson v. Ariyoshi*: "The entire rationale of the [*McBryde*] majority is one of the grossest examples of unfettered judicial construction used to achieve the result desired—regardless of its effect upon the parties, or the state of the prior law on the subject." 441 F. Supp. at 568.

that casual appeals to "custom and usage" to support revolutionary changes in prior case law cannot count on avoiding cold and thorough scrutiny. Nevertheless, in a recent series of cases concerning claims of access and gathering rights, the Hawai'i Supreme Court has shown a willingness to make changes in settled law at least as dramatic as those criticized in *Robinson v. Ariyoshi* and *Sotomura*.

VII. *PASH* - A NEW LINE IN THE SAND

The *PASH* case,[205] which accords a most favored position in the law to Hawaiian custom and usage, raises constitutional questions similar to those raised in *Sotomura* and *McBryde*. In *PASH*, Nansay Hawai'i, Inc., had applied to the Hawai'i County Planning Commission ("HPC") for a Special Management Area ("SMA") use permit under the state's Coastal Zone Management Act[206] ("CZMA") for development of a resort complex on the island of Hawai'i.[207] Public Access Shoreline Hawai'i ("PASH") opposed the permit and sought a contested case hearing.[208] HPC denied the request, and thereafter issued the permit requested by Nansay, and PASH filed suit.[209] The circuit court essentially vacated the permit, and the Intermediate Court of Appeals ("ICA") upheld the circuit court, finding that HPC "disregarded the rules regarding the gathering rights of native Hawaiians and its obligation to preserve and protect those rights."[210] PASH asserted that some of its members possessed traditional native Hawaiian gathering rights at Kohanaiki, the site of the development, including food gathering and fishing for *opae* (prawns) in the anchialline ponds on the proposed development site.[211] Nansay and HPC argued that HPC had no obligation to consider or require protection of traditional and customary Hawaiian rights,[212] and HPC also argued that it had satisfied any putative obligation by requiring preservation of the anchialline ponds.[213] Nansay and HPC further argued that PASH had failed to establish a *prima facie* claim of native Hawaiian gathering rights, because the claimed gathering practices had been conducted only since the late 1920's.[214]

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[205] Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Haw. 425, 903 P.2d 1246 (1995), *cert. denied sub. nom. Nansay Hawai'i, Inc. v. Public Access Shoreline Hawai'i*, 116 S. Ct. 1559 (1996).

[206] HAW. REV. STAT. Chapter 205A (1993 Replacement).

[207] *See PASH*, 79 Hawai'i at 429, 903 P.2d at 1250.

[208] *See id.*

[209] *See id.* at 430, 903 P.2d at 1251.

[210] *Id.*

[211] *See id.*

[212] *See id.* at 435, 903 P.2d at 1256.

[213] *See id.*

[214] *See id.*

The Hawai'i Supreme Court affirmed the decision of the ICA.[215] The specific ground of its decision was that the State CZMA permitted issuance of an SMA permit only upon a finding that the proposed project will "not have any significant adverse effects," which may include "an irrevocable commitment to loss or destruction of any natural or *cultural resource, including but not limited to, historic sites* and view planes"[216] as well as effects upon "the *economic or social welfare and activities of the community*, County or state."[217] The court then suggested that HPC could impose permit conditions to effectuate these obligations and keep faith with article XII, section 7 of the state constitution, without causing an unconstitutional taking of (presumably Nansay's) private property rights, by requiring a "dedication" by Nansay to "ensure continued access to the subject property for the legitimate and reasonable practice of customary and traditional rights."[218] It returned the case to HPC with directions to "consider PASH's alleged customary rights"[219] and noted that "if such rights are established, HPC will be obligated to protect them to the extent possible."[220]

This order could have concluded the court's opinion, but instead it served merely as a starting point. The court used the *PASH* appeal as an opportunity for a far-ranging review of the various tests and constraints which Hawai'i courts had applied at various times since 1858 in adjudicating claims of traditional and customary rights. In doing so, the court threw into turmoil the historical rules and standards of state law concerning the legal status of custom, usage and tradition.

The remainder of this article examines the principal elements of the court's discourse on the establishment of traditional and customary gathering and access rights. It suggests that the court's effort to ignite, if not to accomplish, counterrevolutionary changes in the state's law of custom and real property is undermined by uncertainty, ambiguity and constitutional infirmity, and that the attempted counterrevolution may well not survive disciplined, determined challenge on behalf of the established order.

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[215] *See id.* at 452, 903 P.2d at 1273.

[216] *Id.* at 436, 903 P.2d at 1257.

[217] *Id.* (emphasis in original).

[218] *Id.* at 437, 903 P.2d at 1258.

[219] *Id.* at 452, 903 P.2d at 1273.

[220] *Id.*

A. The Precursors of PASH

PASH derives from and expands upon the court's earlier decisions in *Kalipi v. Hawaiian Trust Co.*,[221] and *Pele Defense Fund v. Paty*.[222] Understanding *PASH* requires a brief review of those earlier cases.

1. Kalipi v. Hawaiian Trust Co.

In *Kalipi*, the plaintiff sought the court's confirmation of asserted gathering rights in defendants' real property.[223] Kalipi claimed that "it [had] long been the practice of him and his family to travel the lands of the Defendants in order to gather indigenous agricultural products for use in accordance with traditional Hawaiian practices"[224] and that defendants had unlawfully denied him continued access to their lands for these purposes.[225] He asserted three legal bases for his claim: (1) HRS section 7-1, (2) "native custom and tradition" as preserved by the "Hawaiian usage" provision of HRS section 1-1, and (3) the language in grants of land to *ali'i* and *konohiki* at the time of the Mahele preserving the rights of native tenants.[226] The court rejected Kalipi's claim under HRS section 7-1 because Kalipi did not reside in the *ahupua'a* where the lands in question were located,[227] a limitation which the court found to be "dictated by the language of the statute itself."[228] The court also rejected Kalipi's claim based on "Hawaiian usage" under HRS section 1-1, stating that "as with the gathering rights of § 7-1, there is an insufficient basis to find that such rights would, or should, accrue to persons who did not actually reside within the *ahupua'a* in which such rights are claimed."[229] Finally, the court rejected Kalipi's claim based on the so-called "kuleana reservation" in the original awards of the two *ahupua'a* in question. Here, too, the court applied the residence requirement to defeat Kalipi's claim.[230]

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[221] 66 Haw. 1, 656 P.2d 745 (1982).

[222] 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied*, 507 U.S. 918 (1993).

[223] *See Kalipi*, 66 Haw. at 3, 656 P.2d at 747.

[224] *Id.*

[225] *See id.* at 4, 656 P.2d at 747.

[226] *See id.*

[227] *See id.* at 8, 656 P.2d at 750.

[228] *Id.* at 8, 656 P.2d at 749. Kalipi owned a taro patch in the *ahupua'a* of Manawai and a houselot in the *ahupua'a* of Ohia, but was not residing on either property at the time of trial. *See id.* at 3, 656 P.2d at 747.

[229] *Id.* at 12, 656 P.2d at 752. The court did not elaborate on the reasons why the *ahupua'a*-residence limitation "dictated by the language of the statute" should be applied to claims based on an entirely different statute which included no similar limiting language. *Id.*

[230] *See id.* at 13, 656 P.2d at 752. "[A]s with any gathering rights preserved by § 7-1 or § 1-1, we are convinced that traditional gathering rights do not accrue to persons, such as the

Thus the only issue material to the court's decision on Kalipi's claim was Kalipi's residence in the *ahupua'a* within which he wished to exercise those rights. En route to its rejection of all Kalipi's claims for failure of the residency requirement, however, the court, in what appears to be wholly gratuitous *dicta*, discussed in some detail what rights might be *protected* by HRS section 1-1, section 7-1 and the *kuleana* reservation. With respect to HRS section 7-1, it stated that, provided "no actual harm is done thereby,"[231]

> lawful occupants of an ahupua'a may, for the purposes of practicing native Hawaiian customs and traditions, enter undeveloped lands within the ahupua'a to gather those items enumerated in the statute.[232]

In addressing HRS section 7-1, *Kalipi* was fairly conservative. It held closely to the language of the statute, and indeed imposed restrictions beyond those expressed in the statute by limiting the exercise of gathering rights to undeveloped land[233] and establishing a "purpose" constraint ("for the purpose of practicing native Hawaiian customs and traditions").[234] It also confirmed that "those asserting the rights cannot prevent the diminution or destruction of those things they seek. The rights, therefore, do not prevent owners from developing their land".[235]

In addressing Kalipi's claims under HRS section 1-1, however, the court announced a dramatic if hypothetical break with the past. Citing Blackstone, it asserted:

> We perceive the Hawaiian usage exception to the adoption of the English common law to represent an attempt on the part of the framers of the statute to avoid results inappropriate to the isles' inhabitants by permitting the continuance of native understandings and practices which did not unreasonably interfere with the spirit of the common law. *Cf., O'Brian v. Walker*, 35 Haw. 104 (1939), *aff'd* 115 F.2d 956 (9th Cir. 1940) (Hawaiian custom and usage regarding adoption applied pursuant to statute). The statutory exception to the common law is thus akin to the English doctrine of custom.[236]

These observations, read in isolation, are consistent with Hawaiian judicial tradition since its origin. The court applied them, however, both to attack the past and to obscure the future.

Plaintiff, who do not live within the ahupua'a in which such rights are sought to be asserted." *Id.*

[231] *Id.* at 10, 656 P.2d at 751. The court offered no suggestion as to what might constitute "actual harm." *Id.*

[232] *Id.* at 7, 656 P.2d at 749.

[233] *See id.* at 8, 656 P.2d at 749, 750.

[234] *Id.*

[235] *Id.* at n.2.

[236] *Id.* at 10, 656 P.2d at 750-51.

> This, however, is not to say that we find that all the requisite elements of the doctrine of custom were necessarily incorporated in § 1-1. Rather, we believe that the retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area.
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> In this case, Plaintiff's witnesses testified at trial that there have continued in certain ahupua'a a range of practices associated with the ancient way of life which required the utilization of the undeveloped property of others and which were not found in § 7-1.[237]

As to these practices, the court concluded: "Where these practices have, without harm to anyone, been continued, we are of the opinion that the reference to Hawaiian usage in § 1-1 insures their continuance for so long as no actual harm is done thereby."[238]

Here was the break. This opinion is squarely contrary to *Oni v. Meek*.[239] The court, however, did not overrule *Oni*, but instead attempted to distinguish it away. Following a rambling and confusing misdescription of the *Oni* court's analysis of the issues before it,[240] the *Kalipi* court announced:

> We thus interpret *Oni* to stand for the proposition that § 7-1 expresses all commoners' rights statutorily insured at the time of the Mahele. However, inasmuch as the court did not expressly preclude the possibility that the doctrine of custom might be utilized as a vehicle for the retention of some such rights, we find no inconsistency in finding that the Hawaiian usage exception in § 1-1 may be used as a vehicle for the continued existence of those customary rights which continued to be practiced and which worked no actual harm upon the recognized interests of others.[241]

This result, of course, is precisely what *Oni* was intended to prevent, at least with respect to claims that "customary rights" existing under pre-Mahele feudal tenure persisted under the post-Mahele fee simple regime. Of course, section 1-1 as originally enacted could have operated to preserve Hawaiian *national* usages which had ripened into common-law custom, if the common law requirements for the establishment of such "customs" were met, as had been the case with adoption.[242] As of 1892, however, the statutory and decisional law of the kingdom, as manifested in *Oni* and in *Kahinu v. Aea*[243]

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[237] *Id.* at 751.
[238] *Id.*
[239] 2 Haw. 87 (1858).
[240] *See Kalipi*, 66 Haw. at 11, 656 P.2d at 751.
[241] *Id.*
[242] *See* O'Brian v. Walker, 35 Haw. 104 (1939), *aff'd*, 115 F.2d 956 (9th Cir. 1940).
[243] 3 Haw. 68 (1872).

and reaffirmed a few years later in *Dowsett v. Maukeala*,[244] was clear that pre-Mahele access and gathering "usages" which were not expressly continued by HRS section 7-1 were simply not among the "usages" or "customs" of the kingdom recognized by the law. Absolutely nothing in HRS section 1-1 states or implies that such usages or customs were revived by that statute; indeed, HRS section 1-1 would appear to have diminished rather than enhanced the vitality of Hawaiian custom as a source of law, because before the enactment of that law, the courts of Hawai'i had taken a rather independent view of their obligations to adhere to the English and American common law, and the statute would have operated to restrict that freedom.[245] The *Kalipi* court's awkward effort to distinguish *Oni* is intellectually unsuccessful, but it set an unfortunate example to which later Hawai'i decisions have all too closely adhered.[246]

2. *Pele Defense Fund v. Paty*

Pele Defense Fund v. Paty[247] ("*PDF*") involved a challenge to a decision of the State of Hawai'i to exchange certain public lands for private lands. Plaintiff Pele Defense Fund ("PDF") alleged on behalf of its members that the transfer violated article XII, section 7 of the state constitution by interfering with plaintiffs' exercise of "customarily and traditionally exercised subsistence, cultural and religious practices."[248] The circuit court dismissed the action, and the state supreme court affirmed in part and reversed in part,[249] concluding that "there are genuine issues of material fact with respect to PDF's claim under article XII, section 7."[250] The court reached this conclusion by extending the holding in *Kalipi* to protect claims to gathering and access rights in an *ahupua'a* other than that in which the claimants reside.[251] It noted that Kalipi's claims had not been sustained because they had been based on *ownership* of land in the *ahupua'a* where he sought to exercise his claimed rights, rather than on *residence* as required by HRS section 7-1.[252] By comparison, PDF members claimed their rights "based on the traditional

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[244] 10 Haw. 166 (1895).

[245] *See supra* note 135 and accompanying text.

[246] *See, e.g.*, Pele Defense Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied*, 507 U.S. 918 (1993); Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Haw. 425, 903 P.2d 1246 (1995), *cert. denied sub. nom.* Nansay Hawai'i, Inc. v. Public Access Shoreline Hawai'i, 116 S. Ct. 1559 (1996).

[247] 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied*, 507 U.S. 918 (1993).

[248] *Id.* at 589-90, 837 P.2d at 1256.

[249] *See id.* at 585, 837 P.2d at 1253-54.

[250] *Id.* at 621, 837 P.2d at 1272.

[251] *See id.* at 620, 837 P.2d at 1272.

[252] *See id.* at 618, 837 P.2d at 1270.

access and gathering patterns of native Hawaiians in the Puna region."[253] The court examined the legislative history of article XII, section 7 and concluded that "[i]f, as argued by PDF, the customary and traditional rights associated with tenancy in an *ahupua'a* extended beyond the boundaries of the *ahupua'a*, then article XII, section 7 protects those rights as well."[254] In so holding, the court essentially removed the residency requirement in *Kalipi* and implied that article XII, section 7 of the state constitution protected rights other than those encompassed by HRS section 7-1.[255] It did not affirm the specific rights claimed, however, but returned the case for a trial on the merits.[256]

B. Relaxing the Standards for Establishing Traditional and Customary Rights

If *Kalipi* and *PDF* could be said to have opened a path to the assertion of access and gathering rights, it could as well be said that *PASH* built superhighways, or at least threatened to do so. The court's opinion ranged at will through the various restrictions which earlier cases had placed on the establishment of such rights, and declared its readiness to abandon some or all of these restrictions in future cases. Unfortunately for the stability of titles, however, the court dealt almost exclusively in hypotheticals; it neither upheld the rights claimed by the plaintiffs before it (which would have established a precedent, if not necessarily a rule), nor delineated what rules of law would govern the adjudication of such rights in the future. The following sections address specific points addressed by the court.

1. The Kalipi limitations

The *PASH* court stated that contrary to any appearance that the decisions in *Kalipi v. Hawaiian Trust Co.*,[257] and *Pele Defense Fund v. Paty*[258] may have

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[253] *Id.* at 618, 837 P.2d at 1271. The court also noted that "[t]he practice of accessing the area as a common area for gathering and hunting by tenants of the Puna district may have commenced from the time of the Great Mahele and Kuleana Acts." *Id.* at 621, 837 P.2d at 1272. This would indicate that the practice was not part of the feudal system of "rights" in the precontact or pre-Mahele period. *See id.*

[254] *Id.* at 620, 837 P.2d at 1272. The court made no mention of the possibility that the "traditional and customary" use of the land claimed by plaintiff's members was and had been permissive. *See id.*

[255] For a thorough examination of *Pele Defense Fund v. Paty*, *see* Gina Watumull, *Pele Defense Fund v. Paty: Exacerbating the Inherent Conflict Between Native Hawaiian Tenant Access and Gathering Rights and Western Property Rights*, 16 U. HAW. L. REV. 207 (1994).

[256] *See Pele Defense Fund v. Paty*, 73 Haw. at 621, 837 P.2d at 1272.

[257] 66 Haw. 1, 656 P.2d 745 (1982).

[258] 73 Haw. 578, 837 P.2d 1247 (1992).

placed limits on the sort of rights which article XII, section 7 might protect, those cases should not be read to preclude "further inquiry concerning the extent that traditional practices have endured under the laws of this state."[259] The *PASH* court undertook no such inquiry, but did undertake to broaden extensively (if hypothetically) the so-called "*Kalipi* rights"[260] addressed and extended in *Pele Defense Fund v. Paty*.[261]

Undeterred by the express and unambiguous language of *Kalipi*, the *PASH* court announced that even though access to "fully developed" land may perhaps be "inconsistent,"[262] legitimate customary and traditional rights must be protected "to the extent feasible."[263] The State, according to the *PASH* court, does not have the right to "regulate the rights of ahupua'a tenants out of existence"[264] (presumably by permitting a landowner to do what *Kalipi* expressly allowed). The *PASH* court thus backed away from the *Kalipi* court's refusal to extend gathering rights to fully developed land,[265] although it avoided any firm position as to where any new line might be drawn.[266]

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[259] *PASH*, 79 Hawai'i at 438, 903 P.2d at 1259.

[260] The term "*Kalipi* rights" was used in *Pele Defense Fund v. Paty* to refer to "rights protected by article XII, § 7" of the state constitution. 73 Haw. at 616-17, 837 P.2d at 1270. This term is a bit misleading, however, because *Kalipi* established no specific rights; the *Kalipi* court denied Kalipi's claim, and while it suggested that other rights might exist as "Hawaiian usage" under HRS § 1-1, there was no discussion of specific rights which might be covered. *See Kalipi*, 66 Haw. at 10-12, 656 P.2d at 750-52.

[261] 73 Haw. 578, 613-21, 837 P.2d 1247, 1268-72 (1992); *see also* Watumull, *supra* note 255, at 243-61.

[262] It is not entirely clear what the court believes is "inconsistent" with what. It is likely that the court's meaning is that rights of access for gathering are inconsistent with full development of property.

[263] *PASH*, 79 Hawai'i at 450, 903 P.2d at 1271 n.43. It should be noted that much of the court's discussion of traditional and customary rights, and particularly its discussion of possible departures from *Kalipi*'s limitations, is in a portion of the opinion (*see id.* at 448-51, 903 P.2d at 1269-72) introduced by the following statement: "In light of the confusion surrounding the nature and scope of customary Hawaiian rights under HRS § 1-1, the following subsections of this opinion discuss applicable requirements for establishing such rights *in the instant case.*" *Id.* at 448, 903 P.2d at 1269. The significance of this limitation to "the instant case" is not clear because many of the court's statements in the subsections referred to are stated quite broadly and appear to be of general applicability. For purposes of this article, these statements are analyzed as though they were intended to apply generally in the future.

[264] *Id.*

[265] *See Kalipi*, 66 Haw. at 8, 656 P.2d at 749, and footnote 2 of that opinion (stating that "[t]hese rights are rights of access and collection. They do not include any inherent interest in the natural objects themselves until they are reduced to the gatherer's possession. As such *those asserting the rights cannot prevent the diminution or destruction of those things they seek. The rights therefore do not prevent owners from developing lands*[.]"). *Id.* (emphasis added).

[266] *See PASH*, 79 Hawai'i at 450-51, 903 P.2d at 1271-72, which provides:

> For the purposes of this opinion, we choose not to scrutinize the various gradations in property use that fall between the terms "undeveloped" and "fully developed."

2. The Need for Proof of "Rights"

In declining to exclude "fully developed" land from the possible reach of such claims, the court stated that "such an approach would reflect an unjustifiable lack of respect for gathering activities as an acceptable cultural usage in pre-modern Hawai'i, *see* HRS section 5-7.5 (Supp. 1992), which can also be successfully incorporated in the context of our current culture."[267] Here, the court appears to focus not on "rights" under traditional principles but on whether a "practice" *ever* existed at some undefined "pre-modern" time in the past, and whether it *could* be practiced today. Such an approach is vastly broader than an inquiry as to whether a "usage" in the legal sense existed and continues to exist, and whether it meets the common law tests for "custom," as incorporated into Hawai'i's law in 1892, which would give it the force of law today. Ultimately, however, the *PASH* court leaves the significance of this remark unexplained. The term "pre-modern" is not defined in the opinion, and the court does not state whether it means pre-Mahele, precontact, pre-1892 or something else. The court also does not explain how a "respect for gathering activities" might evolve into an affirmation of a "right."

This distinction between rights and practices is crucial. A "right," in its common legal meaning, is a legally enforceable claim of one person against another.[268] Nothing in *PASH* suggests that the court had any other meaning in mind when it used the term. "Practices" are not necessarily a matter of "right;" under long-established Hawai'i law, for example, a "practice" of using the land of another to travel to and fro does not ripen into a "right" of way by prescription unless all the requirements of a prescriptive right are

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> Nevertheless, we refuse the temptation to place undue emphasis on non-Hawaiian principles of land ownership in the context of evaluating deliberations on development permit applications. . . . Depending on the circumstances of each case, once land has reached the point of "full development," it may be inconsistent to allow or enforce the practice of traditional Hawaiian gathering rights on such property. However, legitimate customary and traditional practices must be protected to the extent feasible in accordance with article XII, section 7. . . . Although access is only *guaranteed* in connection with undeveloped land, and article XII, section 7 does not *require* the preservation of such lands, the State does not have the unfettered discretion to regulate the rights of ahupua'a tenants out of existence.

Id.

[267] *Id.* at 450, 703 P.2d at 1271.

[268] *See* RESTATEMENT OF PROPERTY § 1 (1936); *see also* Martin v. Brunzelle, 699 F. Supp. 167, 170 (N.D. Ill. 1988); Dennis v. Higgins, 498 U.S. 439, 447 (1991); PVM Redwood Co. v. United States, 686 F.2d 1327 (9th Cir. 1973).

established,[269] and a permissive use will never create a right of way, however long continued.[270] Article XII, section 7 of the state constitution refers expressly to the reaffirmation and protection of *rights* "customarily and traditionally exercised." The absence of any indication in this provision itself of what these "rights" are and how they are established necessarily implies that these "rights" must have their source and definition somewhere other than this clause of the state constitution.[271] It is worthy of note that during the deliberations of the 1978 Constitutional Convention which proposed this section for adoption, the question arose as to its scope and meaning, and the issue was left unresolved for future resolution in the courts, or in the Legislature.[272]

Of itself, article XII, section 7 of the state constitution concerning the protection of Native Hawaiian traditional and customary *rights* does not appear either to enlarge the list of rights in HRS section 7-1 or to provide an independent source of rights; indeed, it may more accurately be read to *limit* both the purposes for which existing rights may be exercised ("subsistence, cultural and religious purposes"[273]) and the persons who may exercise them

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[269] *See* Tagami v. Meyer, 41 Haw. 484 (1956).

[270] *See* Jarrett's Heirs v. Kapena, 4 Haw. 417 (1881).

[271] Somewhat surprisingly, the court offers no suggestions as to what independent sources of rights to use the land of another might be. A wide variety of options exist, some of them well-founded in traditional law, which have been used in the Hawai'i courts; in *Akau v. Olomana Corp.*, 65 Haw. 383, 652 P.2d 1130 (1982), for example, plaintiffs sought to enforce rights-of-way along once-public trails to the beach on grounds of: HRS § 7-1; ancient Hawaiian custom, tradition, practice and usage; common law custom; easement by implied dedication; easement by prescription; easement by necessity; easement by implied reservation; and easement through public trust. Some of these were established early in Hawaiian jurisprudence; *see*, for example, Rooke v. Nicholson, 1 Haw. 508 (1856)(easement by prescription); Kalaukoa v. Keawe, 9 Haw. 191 (1893)(easement by necessity); The King v. Cornwell, 3 Haw. 154 (1869)(easement by implied dedication). While not all of these may be efficacious under Hawai'i law (*see*, for example, Application of Banning, 73 Haw. 297, 832 P.2d 724 (1992)(limiting the doctrine of implied dedication in Hawai'i as compared to California) the listing alone shows that some thought has been given to old as well as new theories for the protection of traditional practices.

[272] *See*, Committee on Hawaiian Affairs Standing Committee Report No. 56, Convention Documents p. 628ff; Committee of the Whole Report No. 12, Convention Documents p. 1016; Convention Journal, 51st day, pp. 274-278. For a discussion of this subject *see* Watumull, *supra* note 255, at 243-61.

[273] The terms "cultural" and "religious" enhance the complexities of applying *PASH* to specific claims. "Culture" is a vague enough term itself; WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 582 (1981) provides the following pertinent definitions:

> 5a: the total pattern of human behavior and its products embodied in thought, speech, action, and artifacts and dependent upon man's capacity for learning and transmitting knowledge to succeeding generations through the use of tools, language, and systems of abstract thought; b: the body of customary beliefs, social forms, and material traits

("descendants of native Hawaiians who inhabited the islands prior to 1778").

Thus *PASH* adds nothing substantive to the content or effect of article XII, section 7, but it does suggest that the rights referred to in that article may extend beyond the panoply of rights which one person or entity may have, under traditional principles of state law, in the real property of another. Until those extended rights are defined, however, and are found to meet constitutional requirements, the only "rights" which could be protected by *PASH* or article XII, section 7 are, necessarily, those already established by Hawai'i's statutory or decisional law.

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constituting a distinct complex of tradition of a racial, religious, or social group; c: a complex of typical behavior or standardized social characteristics peculiar to a specific group, occupation or profession, sex, age grade, or social class.

Id.

As noted earlier in this article (*supra* notes 35-149 and accompanying text), and as a review of the works of Malo and Kamakau make abundantly clear, Hawaiian "culture" was vastly different in 1778 from what it was in 1851, and is dramatically different today from either of those times. The following observation by George S. Kanahele, a Hawaiian scholar and author, highlights the difficulty of identifying what is and is not "Hawaiian culture" today:

> These are the modern Hawaiians, a vastly different people from their ancient progenitors. Two centuries of enormous, almost cataclysmic change imposed from within and without have altered their conditions, outlooks, attitudes, and values. Although some traditional practices and beliefs have been retained, even these have been modified. In general, today's Hawaiians have little familiarity with the ancient culture.
>
> Not only are present-day Hawaiians a different people, they are also a very heterogeneous and amorphous group. While their ancestors once may have been unified politically, religiously, socially, and culturally, contemporary Hawaiians are highly differentiated in religion, education, occupation, politics, and even their claims to Hawaiian identity. Few commonalities bind them, although there is a continuous quest to find and develop stronger ties.

George S. Kanahele, *The New Hawaiians*, 29 SOCIAL PROCESS IN HAWAII 21 (1982).

It was explained above that in the transition from old to new in Hawaiian culture, the kings and senior chiefs maintained a remarkable degree of control. It was the Hawaiian monarch and his most powerful chiefs and advisors who discarded the kapu system. *See generally supra* notes 60-66 and accompanying text. Christianity became the predominant religion soon afterwards with the enthusiastic and sometimes forceful support of the king and the chiefs. *See supra* notes 67-71 and accompanying text; *see also* KAMAKAU, RULING CHIEFS, *supra* note 44, at 261-62; 2 KUYKENDALL, *supra* note 4, at 86-99. Given the active and comprehensive participation of the native Hawaiian leadership in these changes, it may be difficult for a claimant to show that as of 1892, the date before which traditional usages must have existed to have protection under *PASH*, the "culture" and "religion" defined by "Hawaiian national usage" were anything other than the essentially Western social and economic practices and the Christian religion then prevalent in the Kingdom and defined and protected by its written and common law. Certainly the pre-Christian polytheism of the kapu system, and the oppressive practices of the chiefs and konohiki described by Malo and Kamakau (*see supra* notes 4-53 and accompanying text), were no longer "Hawaiian national usage" during the latter years of the monarchy or afterward.

3. The stubborn persistence of Oni v. Meek

The *PASH* court, like the *Kalipi* court, strove heroically to distinguish *Oni v. Meek*,[274] correctly identifying it as a most daunting obstacle to the *PASH* court's conclusions. It said of *Oni*:

> Oni does not stand for the proposition that customary rights, which had not yet been formally established through judicial proceedings, were extinguished *sub silentio* by the *Mahele* or its associated legal developments. *Oni* merely rejected one particular claim based upon an apparently non-traditional practice that had not achieved customary status in the area where the right was asserted.[275]

As the discussion of *Oni* earlier in this article[276] makes clear, however, the *PASH* court is simply wrong in its characterization of that case. *Oni* stands squarely and consciously for the proposition which the *PASH* court rejects; that is, *Oni* held that *all* former feudal access and gathering rights not *specifically* listed in the 1850 statute were *extinguished*.[277] Further, contrary to the *PASH* court's statement, Oni did not reject "one particular claim based upon an apparently non-traditional practice that had not achieved customary status."[278] The court in *Oni* explicitly *declined* to base its decision on grounds that the claimed pasturage right had not achieved customary status (i.e., that it was "not shown to have obtained from time immemorial").[279] Instead, *Oni* spoke most broadly and in terms of national policy. It explicitly *confirmed* the rejection *by the king and the legislature* of the universe of *hoa'aina* rights rooted in the pre-Mahele society, except for the specific rights enumerated in what is now HRS section 7-1. The *Oni* court's use of, and emphasis on, the word "all" in stating that "it was the intention of the Legislature to declare, in this enactment, *all* the specific rights of the hoaaina (excepting fishing rights)[280] which should be held to prevail against the fee simple title of the

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[274] 2 Haw. 87 (1858).

[275] *PASH*, 79 Hawai'i at 441, 903 P.2d at 1262. A more thorough and scholarly attempt to narrow *Oni* and limit its effect appears in Forman & Knight, *supra* note 133. Ultimately, however, this effort, like that of the *PASH* Court, founders on the plain and comprehensive words of the *Oni* decision itself.

[276] *See* discussion at *supra* notes 110-34 and accompanying text.

[277] *See id.*

[278] *Id.*

[279] Oni v. Meek, 2 Haw. 87, 90 (1858).

[280] Fishing rights were addressed in *Haalelea v. Montgomery*, 2 Haw. 62 (1858), where the court discussed the 1839 statute by which the king terminated previous customary privileges and reallocated fishing rights among himself, the konohiki and the common people. The court observed: "This is the point at which the existing piscatory regulations of the Kingdom had their commencement, and *since which, ancient custom ceased to govern the subject.*" *Haalelea*, 2 Haw. at 65 (emphasis added).

konohiki"[281] could hardly make the point more emphatically. Finally, the *Oni* court did not "merely" decide anything; the court and the parties before it *knew* how important and far-reaching the decision would be, the defendant therein agreeing "that judgment should be entered against him in the Court below, reserving by consent his right to appeal, in order that the case, which involves some questions of great importance, and will determine the rights of many other persons besides the present plaintiff and defendant, might be heard and decided by this Court."[282] To this end, the *Oni* court emphasized the "traditional and customary" *context* of the old traditions in the feudal system which the Mahele had brought to an end—and under which the privileges of access and gathering were tied to reciprocal obligations of subordination, labor and the payment of taxes.[283]

Thus, *Oni v. Meek* is wholly and fundamentally inconsistent with *PASH*, yet astonishingly, the *PASH* court leaves *Oni* intact. Its attempt to "distinguish" *Oni* is unsuccessful. It neither overrules *Oni* nor explains how it now reaches a diametrically opposite conclusion concerning the effect of what is now HRS section 7-1. Possibly the *PASH* court felt that expressly overruling *Oni v. Meek* would illuminate too brightly its refusal to abide by that unequivocal and venerable precedent. Whatever the court's motivation, *Oni* remains a legal Gibraltar for traditional real property principles in Hawai'i, an enduring bastion of the traditional order and a continuing reproach to revolutionary reinterpretations of "traditional and customary" private property rights.

4. The common law of custom and usage

The *PASH* court cited approvingly from *Kalipi* to the effect that the "Hawaiian usage" exception in HRS section 1-1 to the adoption of the common law in Hawai'i did not incorporate "all the requisite elements of the doctrine of custom."[284] The court did not provide a list of the elements of the traditional law of custom which do not (or will not) apply in Hawai'i, but offered as examples: (1) that the "usage" have existed "time out of mind," because in Hawai'i, a valid usage must have existed before the adoption of the predecessor of the present HRS section 1-1 in 1892; and (2) Blackstone's comment that "a custom for every inhabitant of an ancient messuage . . . to

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[281] *Oni*, 2 Haw. at 95 (emphasis in original).

[282] *Id.* at 87.

[283] *Id.* at 90. Of interest on this point is *Kekiekie v. Dennis*, 1 Haw. 69 (1851), in which Kekiekie alleged that Dennis had trespassed on his land. Dennis claimed, among other grounds of defense, that Kekiekie, as a tenant on the land, had failed to provide the three days' labor each month required of tenants. On that point, the court ruled that Dennis had no right to demand the three days monthly labor. *See id.*

[284] *PASH*, 79 Hawai'i at 447, 903 P.2d at 1268.

take a profit a prendre in the land of an individual is bad."[285] As to the latter limitation, the *PASH* court noted that "[s]trict application of the English common law, therefore, would apparently have precluded the exercise of traditional Hawaiian gathering rights. As such, this element of the doctrine of custom could not apply in Hawai'i."[286] The *PASH* court asserted further that "[t]he *Kalipi* court properly recognized that 'all the requisite elements of the doctrine of custom were [not] necessarily incorporated in section 1-1'"[287] and that "[a]ccordingly, HRS § 1-1 represents the codification of the doctrine of custom *as it applies in our State*."[288]

The first of these limitations, which fixes the "time out of mind" date for Hawaiian custom as 1892, is perhaps reasonable, particularly in light of the long tradition of Hawaiian courts to adopt realistic compromises on such temporal requirements.[289] The second and broader statement, however, with its reference to *profits a prendre* and *Kalipi*, is more troubling. The courts of the kingdom were thoroughly familiar with the doctrine of custom as it had developed within the English and American common law; *Oni v. Meek*, of course, is a conspicuous example in which the doctrine was discussed and used consistently with Blackstone. Another example is the early case of *Coady v. Ship "Lewis,"*[290] which discussed the doctrine in its more usual context of the law merchant and demonstrated the court's full and precise understanding of its traditional common law nuances. As noted earlier in this article, early jurists of the Hawaiian kingdom did not slavishly follow English or American common law in all respects, but their departures from the common law were carefully considered[291] and were extremely few in number, more in the nature of polishing and pruning the common law than rejecting

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[285] *Id.* at 447-48, 903 P.2d at 1268-69.

[286] *Id.* at 448, 903 P.2d at 1269. The court offers no reason for this conclusion other than its inconsistency with the *result* the court desires to reach, leaving the implication that any element of custom under English and American common law which frustrates the court's recognition of "traditional" rights would likewise be found not to apply in Hawai'i. The court nowhere discusses the alternative view that if the claimed "rights" do not meet the tests of the common law, *including* the English and American common law of "custom and usage" as understood and consistently applied in Hawai'i before and long after 1892, the claimed "rights" are *not rights*, and are therefore *not protected.*

[287] *Id.* at 447, 903 P.2d at 1268.

[288] *Id.* (emphasis in original).

[289] *See supra* note 118 and accompanying text.

[290] 1 Haw. 303 (1856).

[291] *See* Estate of Hakau, 1 Haw. 471 (1856)(regarding adoption); Estate of His Majesty Kamehameha IV, 2 Haw. 715 (1864)(regarding adoption); Thurston v. Allen, 8 Haw. 392 (1892)(rejecting Rule in Shelley's Case); Kake v. Horton, 2 Haw. 209 (1860)(permitting wrongful death action); Wood v. Ladd, 1 Haw. 23 (1847)(rejecting requirement for a seal in execution of mortgage documents).

major parts of it.[292] The decisions of the kingdom courts gave no hint of a willingness to abandon or alter the *doctrine* of custom as it had been handed down from England and America.

Even as recently as 1977, the Hawai'i Supreme Court showed something less than enthusiasm for reliance on pre-Mahele custom for guidance on modern property issues. In the 1977 case of *State v. Zimring* ("Zimring II"),[293] the Hawai'i Supreme Court had considered whether the new fast land formed when lava flowed over private land into the ocean belonged to the private land owner or to the state. The trial court had applied what it could find of ancient Hawaiian custom and usage to conclude that the lava extension belonged to the private land owner. On appeal, the Hawai'i Supreme Court disagreed, finding the evidence insufficient to establish the asserted usage either before or after the *Mahele*. The court went on to say that even if a traditional pre-*Mahele* usage had been established, it "would be of little weight" because "the interests a landowner may have enjoyed under the traditional system, within which there was no private land title and all land was held in trust for the people by the King, are of little relevance in determining private rights to title under a private property regime."[294]

The *PASH* court, in at least two specific rejections of past law, implies a different course for the future. First, with respect to *Zimring II*, the *PASH* court specifically disavowed the *Zimring II* court's caution with respect to custom, as well as a possible limitation based on discontinuation of a practice, stating:

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[292] The court in *Thurston v. Allen*, 8 Haw. 392, 398-99 (1892), referred with approval to a compilation by counsel in that case showing that the court had departed from the common law in only about one percent of its 900 reported cases.

[293] 58 Haw. 106, 566 P.2d 725 (1977). The state prosecuted its first appeal in *State v. Zimring*, 52 Haw. 472, 479 P.2d 202 (1970).

[294] The *Zimring II* court discussed this point in some detail:

> Even assuming that competent evidence had established a traditional usage by which a landholder acquired the right to use lava extensions, such evidence would be of little weight in this case. Under the traditional and more communal economic system in pre-Mahele Hawaii, the ahupua'a were designed to be self-sufficient economic units. Thus, had a practice existed which allowed the landowners the use of lava extensions, such practice would have made good economic sense since the denial of access to the ocean and fishing grounds would have rendered the ahupua'a something less than self-sufficient. *The economic necessity for such a practice would not have carried over into a private property regime within the framework of a private enterprise economic system. Moreover, the interests a landholder may have enjoyed under the traditional system, within which there was no private land title and all land was held in trust for the people by the King, are of little relevance in determining private rights to title under a private property regime.*

Id. at 116-17, 566 P.2d at 732-33 (emphasis added).

> Contrary to the dictum in *Zimring II*, *supra*, the ancient usage of lands practiced by Hawaiians did, in fact, carry over into the new system of property rights established through the Land Commission. . . . [T]he right of each ahupua'a tenant to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site, although this right is potentially subject to regulation in the public interest.[295]

The second rejection of prior law—the dismissal of Blackstone's comment concerning establishment of *profits a prendre* by custom on grounds that "[s]trict application of the English common law . . . would apparently have precluded the exercise of traditional Hawaiian gathering rights"[296]—is of much greater significance. Blackstone's comment reflected an essential and fundamental element of the law of custom, which permitted the creation of *easements* by custom, but *not* such "extractive" rights as *profits*.[297]

While there were some cases to the contrary, "the easements-profits distinction continued to be recognized in English land law until this century."[298] Those few states of the United States which recognized the doctrine of custom in the eighteenth and nineteenth centuries appear, for the most part, to have preserved the easements-profits distinction and to have rejected claims of profits based on custom.[299] *PASH*, by rejecting this principle, rejects a fundamental element of both English and American common law on the subject. Nothing in Hawai'i's pre-1892 jurisprudence indicates that the courts of the kingdom had ever contemplated such a departure from the common law.

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[295] *PASH*, 79 Hawai'i at 449, 903 P.2d at 1270.

[296] *Id.* at 448, 902 P.2d at 1269.

[297] *See* Bederman, *supra* note 1 at 1395-98. Bederman states:

> A profit is something taken from the soil of another, an extractive use of the property (what was known in Latin as *alieno solo*). This is distinct from an easement upon the land, as in the right to walk across a property or to use it in some nonconsumptive fashion. The rule in England, from the time of Lord Coke's decision in *Gateward's Case* in 1607, was that a right to a profit could be secured by prescription, but not by custom. This meant that the public-at-large in a district could have the right to cross a manor land "either to the church or market, . . . for it is but an easement and no profit." If the villagers wished to enter the lord's manor for the purpose of digging sod, collecting firewood, or grazing sheep, this would be considered a profit. It would thus be considered a bad custom, inasmuch as the indefinite class of right-holders (the villagers) was insufficiently certain as to satisfy that legal element of the doctrine. Only a copyholder of the manor—a legal tenant—could claim a prescriptive right to a profit under the decision in *Gateward*.

[298] *Id.* at 1397.

[299] *See id.* at 1402-07; *see also* JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES 563 (Roland Gray ed., 1942)(stating that "[i]n America the decisions that no *profit a prendre* can be created by custom have been often and uniformly followed").

Thus, *PASH* declares, at least by implication and perhaps expressly, that as issues of traditional and customary "rights" arise, the court is prepared to redefine "custom" or "usage" to whatever extent might be necessary if the common law definition fails to take the court where the court wants to go. This declaration of independence from the traditional analysis of custom, which lacks either compelling analytical argument or some reference to supporting precedent in Hawai'i or elsewhere, foreshadows a serious constitutional question insofar as that declaration presages a sweeping and unjustified change of unpredictable scope and character in the state's law of custom as applied to real property.[300]

5. The significance of "tenancy"

Oni v. Meek,[301] *Dowsett v. Maukeala*,[302] *Kalipi v. Hawaiian Trust Co.*,[303] and (by analogy) *Haalelea v. Montgomery*[304] had all tied the rights preserved by what is now HRS section 7-1 to "tenancy" in the *ahupua'a*, meaning lawful occupancy.[305] The *PASH* court stated, however, that "it is not clear that customary rights should be limited by the term 'tenant'," [306] and stated further that "common law rights ordinarily associated with tenancy do not limit customary rights existing under the laws of this state."[307] The court did not explain these comments, and thus the decision leaves it uncertain whether "customary" rights are: (a) purely personal (and if so, whether the claimant must still show some familial, associational or other traceable link to a person or persons who engaged in the practice in question before 1892); (b) appurtenant or otherwise related to land currently owned or occupied by the claimant; (c) dependent in some way on a connection between the claimant

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[300] *See infra* notes 354-371 and accompanying text.

[301] 2 Haw. 87 (1858).

[302] 10 Haw. 168 (1895).

[303] 66 Haw. 1, 656 P.2d 745 (1982).

[304] 2 Haw. 62 (1858).

[305] *See* CANNELORA, *supra* note 90, at 41-44 (1974). The term "tenant" was discussed in the 1858 case of *Haalelea*, where the court stated:

> We understand the word "tenant", as used in this connection [referring to rights of "tenants" of an *ahupua'a* to fish in certain offshore areas] to have lost its ancient restricted meaning, and to be almost synonymous, at the present time, with the word occupant, or occupier, and that every person occupying lawfully, any part of [the *ahupua'a*] is a tenant within the meaning of the law.

2 Haw. at 71. The court in *Oni v. Meek*, 2 Haw. 87 (1858) applied this definition as well to the term "people" as used in what is now HAW. REV. STAT. ANN. § 7-1 (1995). *See also* Dowsett v. Maukeala, 10 Haw. 166 (1895).

[306] *PASH*, 79 Hawai'i at 448, 902 P.2d at 1269.

[307] *Id.* at 448, 902 P.2d at 1269.

and the land sought to be invaded; or (d) none of these.[308] Given the ambiguity of its remarks, one could envision the court sustaining a claim based solely on evidence that the practice in question was engaged in somewhere in Hawai'i before 1892, that a given parcel selected at the will of the claimant could physically support the practice, and that the claimant has a genealogical link to an ancestor who lived in precontact Hawai'i. As noted in the following section, it is not even certain that such a genealogical link to precontact Hawaiians is required.

6. Racial limitations in article XII, section 7 of the state constitution

The *PASH* court affirmed that it is the traditional and customary rights of "descendants of native Hawaiians"[309] which are protected by article XII, section 7 of the state constitution, but it asserted that these protections are not based on race, but "flow from native Hawaiians' pre-existing sovereignty."[310] The court left open the question whether descendants of subjects of the Kingdom of Hawai'i who had no ancestors among precontact occupants of the Hawaiian Islands could assert traditional and customary rights.[311]

This attempt to avoid the issue of race,[312] like the court's dilution of the

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[308] For an interesting and detailed examination of a claim of traditional and customary right, decided several months before the decision in *PASH*, see the district court opinion in *Pai 'Ohana v. U.S.*, 875 F. Supp. 680 (D. Haw. 1995), *aff'd*, 76 F.3d 280 (9th Cir. 1996). The Ninth Circuit's brief opinion, rendered shortly after the *PASH* decision was handed down, quoted (without critical analysis) some of the pronouncements of *PASH* concerning customary and traditional rights in Hawai'i, but held that *PASH* was inapplicable because *PASH*, unlike *Pai 'Ohana*, did not involve any claim for exclusive use and possession of land.

[309] *PASH*, 79 Hawai'i at 449, 902 P.2d at 1270. The court stated that such descendants would be entitled to assert claims regardless of blood quantum and declined to draw any contrary inference from remarks in *Pele Defense Fund v. Paty*, 73 Haw. 578, 615, 837 P.2d 1247, 1269 n.28 (1992).

[310] *PASH*, 79 Hawai'i at 449, 902 P.2d at 1270.

[311] *See id.*

[312] *See id.* If traditional and customary rights are somehow racially limited, their protection or enforcement by governmental entities may be restricted or prevented under the principles enunciated in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). In *Adarand*, the U.S. Supreme Court held that:

> [A]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

Id. at 227. It may well be that any court, board or governmental official taking action to enforce or protect racially defined or limited rights of Native Hawaiians would have to show, in order to shield its decision against an *Adarand* challenge, that the rights in question actually exist and have been or will be abridged or denied on grounds of race, (*see, e.g.*, Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996)), or that some other sort of "compelling interest" exists to justify such

requirements for establishing a custom, is devoid of either logical analysis or citation to authority which might support it, and is difficult to reconcile with ordinary concepts of sovereignty as that term is used in international law.[313] "Sovereignty" is a fairly well-established concept; Black's Law Dictionary assembles a lengthy list of meanings,[314] all essentially of the same import, i.e., that "sovereignty" is the *power to govern* independent of some higher

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action, and that the protective or enforcement action is "narrowly tailored" to meet that interest. *See Adarand*, 515 U.S. at 235.

The case of *Haalelea v. Montgomery*, 2 Haw. (1858), indicates that the rights of "ahupua'a tenants" pass with title to land in the *ahupua'a*, without regard to the race of the occupier of the land, because Daniel Montgomery, whose rights of piscary deriving from his status as a tenant were confirmed by the court, was an immigrant from England. *See* Montgomery v. Montgomery, 2 Haw. 553 (1862); *see also* Damon v. Tsutsui, 31 Haw. 678 (1930). In light of this, if Haw. Const. art. XII, § 7 is read (as seems intended) to require protection of such rights only if they are held by persons of a specific race, the provision may constitute an unconstitutional denial of equal protection to persons of other races holding similar rights. From a different point of view, if traditional and customary rights are in fact racially limited, their enforcement may be prohibited by *Shelley v. Kramer*, 334 U.S. 1 (1948).

It has sometimes been suggested that persons of Hawaiian ancestry are analogous to American Indians (Native Americans) and that differential treatment for persons of Hawaiian ancestry can accordingly be justified on the same basis as differential treatment for members of Indian tribes, which the Supreme Court upheld in *Morton v. Mancari*, 417 U.S. 535 (1976), as not "racial" and, therefore, not subject to strict scrutiny. With respect to preferences for persons of Hawaiian ancestry, the issue is still a matter of debate. *Compare* Hoohuli v. Ariyoshi, 631 F. Supp. 1153 (D. Haw. 1986) (suggesting that strict scrutiny might be the appropriate standard) *with* Naliielua v. Hawaii, 795 F. Supp 1009 (D. Haw. 1990), affirmed on grounds of standing in Naliielua v. State of Hawaii, 940 F.2d 1535 (9th Cir. 1991)(which applied *Morton* and concluded that a rational basis test was appropriate); *see also* Rice v. Cayetano, 941 F. Supp. 1529 (D. Haw. 1996), *aff'd* 146 F.3d 1075, 1998 WL 324980, (9th Cir., June 22, 1998), following *Naliielua*. For an exhaustive treatment of the question *see* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996) (concluding that Native Hawaiians are not comparable to Native Americans with respect to qualifying for the "special relationship" that exists between Congress and American Indian tribes, and that *Morton* does not apply to exempt preferences for persons of Hawaiian ancestry from strict scrutiny analysis).

[313] *See generally* 45 AM. JUR. 2D *International Law* § 84 (1969).

[314] BLACK'S LAW DICTIONARY 1396 (6th ed. 1990), offers the following among many similar phrases defining "sovereignty:"

> The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; the supreme will; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power, from which all specific political powers are derived; the international independence of a state, combined with the right and power of regulating the internal affairs without foreign dictation.

BLACK'S LAW DICTIONARY at 1396.

authority.[315] No obvious connection exists between any of these definitions and gathering rights, and if a subtle or obscure connection does exist, the *PASH* court provided no guide to it.

The *PASH* court does not suggest that any citizens of the state of Hawai'i who are of Hawaiian ancestry have any independent sovereignty today, apart from the sovereignty they share with all other citizens of the state and the nation as members of the body politic. Nor did persons of Hawaiian ancestry, as such, have rights under the Kingdom of Hawai'i which could be termed "pre-existing sovereignty;" the courts of the kingdom made it clear beyond misunderstanding that the "native subjects" of the kingdom had *no* inherent sovereignty. In the 1863 criminal case of *Rex v. Booth*[316] the defendants had been charged with violating a statute prohibiting the sale of intoxicating liquor to "native subjects" of the kingdom. Defendants argued that the law was unconstitutional under the 1852 Constitution as discriminatory class or special legislation. One element of their argument was that in constitutional systems the Government emanates from the people, and that the legislature acts as agent of the people and that "it is against all reason and justice to suppose . . . that the native subjects of this Kingdom ever entrusted the Legislature with the power to enact such a law as that under discussion." The court responded:

> Here is a grave mistake—a fundamental error—which is no doubt the source of such misconception. . . . The Hawaiian Government was not established by the people; the Constitution did not emanate from them; they were not consulted in their aggregate capacity or in convention, and they had no direct voice in founding either the Government or the Constitution. King Kamehameha III originally possessed, in his own person, all the attributes of sovereignty.[317]

The court then explained how and why Kamehameha III had promulgated the 1840 Constitution and its 1852 successor, under which the King's absolute power was shared with the Nobles and the House of Representatives. It then continued:

> Not a particle of power was derived from the people. Originally the attribute of the King alone, it is now the attribute of the King and of those whom, in granting the Constitution, he has voluntarily associated with himself in its exercise. No law can be enacted in the name, or by the authority of the people. The only share in the sovereignty possessed by the people, is the power to elect the members of

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[315] Because sovereignty is defined in terms of actual power, it is hard to imagine how present-day access and gathering rights could "flow" from "pre-existing sovereignty" if that term means "sovereignty which no longer exists" as seems to be the case here.

[316] 2 Haw. 616 (1863).

[317] *Id.* at 630.

> the House of Representatives; and the members of that House are not mere delegates.[318]

Consistent with this philosophy, Kamehameha V and Queen Lili'uokalani held the view that among the prerogatives of the monarch was the unfettered right to amend or revoke the sharing of sovereignty reflected in the constitution, as might be appropriate in the discharge of the monarch's duties.[319]

Thus, the *PASH* court's appeal to "native Hawaiians' pre-existing sovereignty" to evade the issue of racial preference is both historically inaccurate and legally irrelevant. "Native Hawaiians" as a group or class do not and did not have "pre-existing sovereignty." This leaves the restriction in article XII, section 7 subject to challenge as a racial limitation[320] which must satisfy a test of "strict scrutiny"[321] unless the analogy to American Indians applies.[322] The *PASH* court does not address whether the test of strict scrutiny can be met, and the few courts which have considered the matter of the Indian analogy have come to inconsistent conclusions.[323]

7. Application of the "Aloha Spirit" Statute

In what might be described as the Zen of *PASH*, the court referred without extensive comment to HRS section 5-7.5 in support of its statement that placing "undue emphasis on non-Hawaiian principles of land ownership in the context of evaluating deliberations on development permit applications"[324] would "reflect an unjustifiable lack of respect for gathering activities"[325] in the past and present. In an accompanying footnote, the court stated:

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[318] *Id.* at 630-31.

[319] Concerning Kamehameha V, *see* 2 KUYKENDALL, *supra* note 4, at 132. Queen Lili'uokalani expressed her own opinion in LILI'UOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 21 (Mutual Publishing 1990)(1898): "Let it be repeated: the promulgation of a new constitution, adapted to the needs of the times and the demands of the people, has been an indisputable prerogative of the Hawaiian monarchy." *Id.*

[320] An interesting point of speculation is the constitutionality of such a classification not as a racial distinction, but as a "title of nobility" which is prohibited to the Federal government under U.S. CONST. art. I, § 9, cl. 8 and to state governments under U.S. CONST. art. I, § 10, cl. 1. *See* Richard Delgado, *Inequality "From the Top": Applying an Ancient Prohibition to An Emerging Problem of Distributive Justice*, 32 U.C.L.A. L. REV. 100 (1984); Zobel v. Williams, 457 U.S. 55 (1982)(Brennan, J., concurring).

[321] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Shelley v. Kramer, 334 U.S. 1 (1948).

[322] *See* discussion *supra* at note 312.

[323] *See id.*

[324] *PASH*, 79 Hawai'i at 450, 903 P.2d at 1271.

[325] *Id.*

> In accordance with HRS § 5-7.5(b), we are authorized to "give consideration to the 'Aloha Spirit'." The Aloha Spirit "was the working philosophy of native Hawaiians[;] . . . 'Aloha' is the essence of relationships in which each person is important to every other person for collective existence." HRS § 5-7.5(a).[326]

The court's invocation of HRS section 5-7.5 as a legitimate "consideration" in judicial decisions concerning real property rights portends no good for stability of titles in Hawai'i. That statute authorizes courts of the state, as well as the executive and legislative branches of state government, to "contemplate and reside with the life force and give consideration to the 'Aloha Spirit'" in exercising their responsibilities. The statute provides a number of definitions of "aloha," noting that "'Aloha' means to hear what is not said, to see what cannot be seen and to know the unknowable."[327] The application of this statute in future cases concerning real property rights will undoubtedly be watched with gleeful anticipation by legal scholars both in Hawai'i and in other common law jurisdictions,[328] but must surely be a source of anxiety to developers, other property owners in Hawai'i and investors.

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[326] *Id.* at 450, 903 P.2d at 1271 n.44.

[327] HAW. REV. STAT. § 5-7.5. The statute reads in full:

> "Aloha Spirit" (a) "Aloha Spirit" is the coordination of mind and heart within each person. It brings each person to the self. Each person must think and emote good feelings to others. In the contemplation and presence of the life force, "aloha", the following unuhi laula loa may be used:
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> "Akahai", meaning kindness to be expressed with tenderness; "Lokahi", meaning unity, to be expressed with harmony; "Oluolu", meaning agreeable, to be expressed with pleasantness;"Haahaa", meaning humility, to be expressed with modesty; "Ahonui", meaning patience, to be expressed with perseverance.
>
> These are traits of character that express the charm, warmth and sincerity of Hawaii's people. It was the working philosophy of native Hawaiians and was presented as a gift to the people of Hawaii. "Aloha" is more than a word of greeting or farewell or a salutation. "Aloha" means mutual regard and affection and extends warmth in caring with no obligation in return. "Aloha" is the essence of relationships in which each person is important to every other person for collective existence. "Aloha" means to hear what is not said, to see what cannot be seen and to know the unknowable.
>
> (b) In exercising their power on behalf of the people and in fulfillment of their responsibilities, obligations and service to the people, the legislature, governor, lieutenant governor, executive officers of each department, the chief justice, associate justices, and judges of the appellate, circuit and district courts may contemplate and reside with the life force and give consideration to the "Aloha Spirit."

[328] Scholars may speculate, for example, whether developing instructions for service of process on a public official "residing with the life force" might involve difficulties similar to those discussed in *U.S. ex rel. Mayo v. Satan and his Staff*, 54 F.R.D. 282 (W.D. Pa. 1971).

8. Redefinition of fee simple title

Of all the departures from prior law suggested in *PASH*, this is perhaps the most far-reaching. Following a somewhat rambling and disjointed review of the development of Hawai'i property law through the time of the Great Mahele,[329] the *PASH* court announced that "[o]ur examination of the relevant legal developments in Hawaiian history leads us to the conclusion that the western concept of exclusivity [as an element of private property rights in land] is not universally applicable in Hawai'i"[330] and that "the issuance of a Hawaiian land patent[331] confirmed a limited property interest as compared with typical land patents governed by western concepts of property."[332] By these statements the court appears to imply (but does not state explicitly) that the fee simple rights created during the Great Mahele never included the right to prohibit access for such gathering activities as might have been previously exercised.[333]

This fundamental element of the *PASH* court's decision—that land grants from the Kingdom conveyed something less than full fee simple absolute title[334]—is not related by strict logic to the court's preceding discussion of

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[329] *See PASH*, 79 Hawai'i at 442-47, 903 P.2d at 1263-68.

[330] *Id.* at 447, 903 P.2d at 1268.

[331] Concerning this term *see supra* note 99. Strictly speaking, for patents issued upon Land Commission Awards, it was not the land patent which "confirmed" the landowner's property interest; it was the Land Commission Award which confirmed the applicant's title, and the patent simply released the government's right to commutation. *See* CHINEN, *supra* note , at 13-14. Land patents were also issued, however, to convey government lands to private purchasers, and these *did* transfer title. CHINEN, ORIGINAL LAND TITLES IN HAWAI'I 33-46 (1961). It may be inferred from the context of the *PASH* court's reference to "land patents" that it was using the term not in its technical sense but as a general term for documents of original title; but given the potential significance and controversial nature of the court's pronouncements in this part of its decision, technical precision would have been desirable.

[332] *PASH*, 79 Hawai'i at 447, 903 P.2d at 1268.

[333] It is not clear how such a "limited interest," even if that were all that was granted at the Great Mahele, would be relevant in the cases of claimants whose practices commenced after that event. The administrative record in *PASH* shows only that the claimed gathering rights were exercised as long ago as the 1920's, long after the Great Mahele of 1848 and long after the "cutoff date" of 1892 for establishing "Hawaiian usage." *PASH*, 79 Hawai'i at 447, 903 P.2d at 1268 n.39. The *PASH* court did not explain either how this claimed practice could avoid the problem of post-1892 establishment or how the right to engage in the practice could have been reserved out of the patent to a *konohiki* at the time of the Great Mahele.

[334] The court is apparently speaking of limitations of title other than the express exception of the rights of native tenants included generally in all conveyances to the *ali'i* and *konohiki*. That express exception ("koe nae ke kuleana o na kanaka," translated as "reserving however the people's kuleana therein") was addressed in *Territory v. Liliuokalani*, 14 Haw. 88 (1902), and was held to refer only to the reservation, out of a grant of a larger parcel of land, of "the house lots and taro patches or gardens of natives lying within the boundaries of the tract granted." *Id.*

history. That discussion of history dealt with the king's reservation of sovereign prerogatives at the time of the Great Mahele[335] and the importance of custom in Hawaiian jurisprudence,[336] neither of which, independently or in combination, supports the court's conclusion concerning the meaning of fee simple title in Hawai'i. The court's conclusion is impossible to reconcile with the long-established principle of Hawai'i law that a Land Commission Award is "conclusive as to title against all the world"[337] except for reserved rights of

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at 95; *see also supra* note 109.

[335] *See PASH*, 79 Hawai'i at 445, 903 P.2d at 1266. The reservations in question derive from the PRINCIPLES ADOPTED BY THE BOARD OF COMMISSIONERS TO QUIET LAND TITLES, IN THEIR ADJUDICATION OF CLAIMS PRESENTED TO THEM, Laws 1848, p. 81, *reprinted in* REVISED LAWS OF HAWAII 1925, Vol. II, p. 2124, 2128. These reservations include such land-related prerogatives as the right of eminent domain, taxation of real property, construction of roads and bridges and forfeiture of lands as punishment for treason.

The *PASH* court quoted extensively from *Reppun v. Board of Water Supply*, 65 Haw. 531, 656 P.2d 57 (1982), a case concerning water rights, in which the court held that the monarch's reservation, as a sovereign prerogative, of the power to "encourage and even to enforce the usufruct of lands for the common good" constituted a reservation "to the sovereign [of] the right to regulate and allocate water resources in accord with the needs of the people of the Kingdom." *Id.* at 543-44, 656 P.2d at 66. In quoting from *Reppun*, the *PASH* court replaced the phrase "water resources" with "[undeveloped land]," apparently intending to extend the holding in *Reppun* to land by means of the bracketed replacement. *Reppun*, however, is based squarely on the constitutionally doubtful case of *McBryde Sugar v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973), *aff'd on rehearing*, 55 Haw. 260, 517 P.2d 26 (1973), *appeal dismissed and certs. denied*, 417 U.S. 962 and 417 U.S. 976 (1974), and itself announces radical departures from prior law which are themselves questionable from a constitutional standpoint. *See* Robinson v. Ariyoshi, 676 F. Supp. 1002, 1015 (D. Haw. 1987), *vacated and remanded with direction to dismiss on grounds of ripeness*, 887 F.2d 315 (9th Cir. 1989), and discussion *supra* note 202. The reservation concerning the "usufruct of lands for the common good," moreover, was given an entirely different interpretation in *Territory v. Liliuokalani*, 14 Haw. 88 (1902), as follows:

> "To encourage and even enforce the usufruct of the land for the common good," was undoubtedly intended to cover the right of private persons and corporations to condemn land for quasi public purposes, and also the inalienable right, not only to conduct commerce over navigable waters, but to provide wharves and landing places for its accommodation.

Id. at 98 (Fitch, J., concurring). *Reppun* thus affords, at best, an uncertain foundation for the *PASH* court's position.

The *PASH* court's conclusion is also difficult to reconcile with the statute of August 6, 1850 (Laws 1850, p. 202, *reprinted in* REVISED LAWS OF HAWAII 1925, Vol. II, p. 2141-42) discussed in *Oni v. Meek*, 2 Haw. 87 (1858), which followed the enactment of the PRINCIPLES by three years. Even assuming that the reservation in question did, in some undefined fashion, perpetuate pre-Mahele customs, the statute of August 6, 1850, as interpreted in *Oni*, ended all but the gathering rights specifically listed therein.

[336] *See PASH*, 79 Hawai'i at 446, 902 P.2d at 1267.

[337] Jones v. Meek, 2 Haw. 9, 11 (1857); *see also* Keelikolani v. Robinson, 2 Haw. 522, 546 (1862)(stating that "[t]he titles awarded by the Board [of Commissioners to Quiet Land Titles] were free of all burdens except that affecting certain classes of them, which were subject to the

native tenants,[338] existing rights of way,[339] statutory fishing rights,[340] and the government's commutation[341] and reserved mineral rights.[342] The court's conclusion is also impossible to reconcile with either *Oni v. Meek*[343] or with *Kahinu v. Aea*.[344] *Kahinu* particularly is pertinent, because the court rejected an argument that an earlier practice of natives to remove house frames when moving from one parcel of land to another persisted as an implied right in real property transactions involving natives. The court in *Kahinu* observed that such an interpretation of fee simple title would be in derogation of rights of a landowner *under traditional English and American common law*, and refused to accept it.[345]

It goes almost without stating that the *PASH* court's rejection of the "exclusivity" ordinarily inherent in fee simple title contravenes both traditional and modern law developed on the subject by the U.S. Supreme Court.[346] It also appears to conflict directly with the state's own land registration statute,[347] which assures a title which is "conclusive upon and against all persons, including the State"[348] and which is also proof against adverse possession and prescription[349] to those who follow its procedures. The land registration statute provides seven specified classes of encumbrances

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payment of a commutation to the government, to render them allodial"); CANNELORA, *supra* note 90, at 24; CHINEN, *supra* note 96, at 13 (stating that "[e]xcept for the government's right to commutation, a Land Commission Award gave complete title to the lands confirmed").

[338] *See* Kekiekie v. Dennis, 1 Haw. 69 (1851). The rights reserved were defined in *Territory v. Liliuokalani* to be the "reservations of the house lots and taro patches or gardens of natives lying within the boundaries of the tract granted." 14 Haw. 88, 95 (1902).

[339] *See* Jones v. Meek, 2 Haw. 9 (1857).

[340] *See* Bishop v. Mahiko, 35 Haw. 608 (1940)(stating that "[n]o judicial or administrative procedure existed prior to annexation for officially establishing the boundaries of private fisheries. . . . The commissioners to quiet titles were without jurisdiction to award fisheries, except as the same, in the exercise of their jurisdiction to settle titles to 'lands,' might incidentally come in question"); *see also* CHINEN, *supra* note 96, at 13 n.10.

[341] *See* CHINEN, *supra* note 96, at 13-14.

[342] *See* Application of Robinson, 49 Haw. 429, 421 P.2d 570 (1966).

[343] 2 Haw. 87 (1958)

[344] 6 Haw. 68 (1872), discussed *supra* at note 141 and accompanying text.

[345] *See id.* at 69.

[346] *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994)(stating that "[a]s we have noted, this right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property'"); *see also* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)(stating that "[i]n this case we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannnot take without compensation").

[347] *See* HAW. REV. STAT. § 501 (1993).

[348] *Id.* § 501-71.

[349] *See id.* § 501-87.

which are not affected by the land registration process,[350] none of which would include a claim of gathering or access rights. Hawaii Revised Statutes section 501-81, however, provides that "[r]egistered land, and ownership therein, shall in all respects be subject to the same burdens and incidents which attach by law to unregistered land," including such burdens as "rights incident to the relation of husband and wife" and "levy on execution," and specifically provides that "[n]othing in this chapter shall in any way be construed to . . . change or affect in any way any other rights or liabilities created by law and applicable to unregistered land."[351] *PASH* does not state whether "traditional and customary rights" are "created by law" in this sense, but the court in *Damon v. Tsutsui*[352] held that fishing rights established as an incident of "tenancy" in an *ahupua'a* by the statute of 1839 derived from the statute[353] rather than from the conveyance creating the tenancy, so at least in the case of an *ahupua'a* tenant claiming rights under HRS section 7-1, a similar argument might be made to overcome a defense based on the land registration statute. Claims of rights not specifically created by statute, however, would appear to be foreclosed by the land registration law for lands with registered title.

C. PASH and the U.S. Constitution

Is the *PASH* case subject to constitutional challenge? Setting aside the issue of ripeness for the moment, the most likely challenge would be based on the same grounds raised in *Sotomura v. County of Hawai'i*[354] and *Robinson v. Ariyoshi*:[355] that the decision is so radical a departure from prior state law as to constitute a taking of property without just compensation. Such a challenge would logically focus on the effect of that decision in affording to persons with no interest of record in, or visible connection with, a parcel of land owned by another an opportunity to claim rights, vastly broader than had been generally believed to exist, to physically invade and make use of some or all of that parcel and take things from it, at times and places and for purposes only vaguely hinted at in *PASH*, at some time or times in the unlimited or indefinite future. A challenge might also be raised to the apparently racial limitation on who may hold and exercise these rights.

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[350] *See id.* § 501-82.

[351] *Id.* § 501-81.

[352] 31 Haw. 678 (1930).

[353] *See id.* at 688.

[354] 460 F. Supp. 473 (D. Haw. 1978).

[355] 441 F. Supp. 559 (D. Haw. 1977), *aff'd in part, vacated in part and remanded*, 753 F.2d 1468 (1985), *vacated and remanded*, 477 U.S. 902 (1986) and 796 F.2d 339 (1986), *aff'd on reconsideration*, 676 F. Supp. 1002 (1987), *reversed and remanded*, 887 F.2d 215 (1989).

Contrary to the *PASH* court's characterization, the issue is not one of "Hawaiian" principles of law or property versus "Western" ones. As discussed earlier in this article,[356] "Hawaiian" property law, at least from the time of the *Mahele* and perhaps well before, was symbiotically intertwined with "Western" concepts. The *PASH* court's artificial opposition of "Hawaiian" to "western," as if both had persisted with equal vitality and in actual conflict from the past to the modern day, is unfortunate, because it injects a racial or ethnic character into a debate where such considerations can only impede rational solutions.

What *PASH* did was to propose to abandon, without substantial logical or authoritative support, over a century of prior law, both under the Kingdom and afterward, which defined and applied the concept of fee simple title in careful parallel to English and American common law; which established HRS section 7-1's narrow list of gathering rights as the sole catalog of "traditional" gathering rights surviving the creation of fee simple estates during the Great Mahele; and which restricted those rights to *ahupua'a* tenants (*not* "native Hawaiians" or any other racially-defined group).

In fact, "customary and traditional Hawaiian rights" could, consistent with *PASH*, turn out to be none of these things. In specific cases, they may not be "customary," because they could possibly be upheld even though they fail to meet the common law tests for custom. They may likewise not be "traditional," either because in a modern incarnation they would be severed from their pre-*Mahele* feudal context or because they have not been widely practiced (or practiced at all) for generations. They may not be limited to persons of Hawaiian ancestry, either because they were not so in the past or because the U.S Constitution forbids it. Finally, they may not be "rights," at least in the sense that they have a basis in state law under such independent and well established concepts as prescriptive use or implied dedication.

Thus, what *PASH* proposes is revolutionary, and it is *new*. The favored legal status which the court appears ready to accord to gathering and access claims has never before been known. It certainly did not exist before 1839 when the concept of "rights" in the modern sense was unknown and native tenants and other commoners were subject to the often arbitrary rule and unrestrained exactions of the king and *ali'i*. It did not exist between 1839 and the Mahele, when the "rights" of tenants existed only within a feudal polity which imposed on those tenants corresponding obligations to the king and landlords of subordination, obedience, labor, and the payment of taxes. Nor did it exist after the Mahele when *Oni v. Meek*[357] was settled law and gathering rights were limited to those listed in HRS section 7-1, and to

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[356] See *supra* notes 90-149 and accompanying text.

[357] 2 Haw. 87 (1858).

"tenants." It can hardly be said to have existed even after the decision in *Kalipi*,[358] which in spite of its *dicta* did little to change the law handed down from the kingdom. Thus, the *PASH* decision is not a reaffirmation or revitalization of a prior rule of law which had fallen into desuetude. If the "traditional and customary rights" which the *PASH* court proposes to protect are anything other than the rights enumerated in HRS section 7-1, augmented by rights proved in specific cases under such doctrines as prescriptive use, easement by necessity, implied dedication, custom (as historically understood) and similar well established legal theories, then what the *PASH* decision promises is a brand new legal regime of radical import.

While such a dramatic change in the law might logically be subject to challenge under cases such as *Sotomura* and *Robinson v. Ariyoshi*, some courts have expressed reservations concerning such cases, the suggestion being that these cases limit too strictly the necessary freedom of a court to depart from res judicata and stare decisis when circumstances so require.[359] It has been proposed instead that only an "arbitrary" refusal to apply prior law would permit constitutional challenge.[360] *PASH*, however, may well be subject to challenge even under such a more demanding standard because of: (1) the absence of logical analysis requiring or supporting the proposed expansion of access and gathering rights; (2) the absence of (or at least the absence of citations to) supporting legal authority from Hawai'i or other jurisdictions for such a change; (3) the court's abandonment of a typical and fundamental element of the "bundle of rights" which in other jurisdictions constitute fee simple title; and (4) the court's contorted evasion of the conflict with traditional Hawai'i law beginning with *Oni v. Meek*.

As if the foregoing were not exposure enough, *PASH*, if otherwise ripe for appeal, would appear to be subject to constitutional challenge on an entirely different ground. In *PASH*, the court suggested that HPC might properly impose conditions on its SMA permit to protect the plaintiffs' claimed gathering rights.[361] In general, permit conditions which diminish the value of a landowner's property will survive constitutional challenge as "takings" if they substantially further governmental purposes that would justify denial of the permit.[362] The U.S. Supreme Court, however, has identified:

> [A]t least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a

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[358] 66 Haw. 1, 656 P.2d 745 (1982).

[359] *See, e.g.*, Gutierrez v. Bowen, 702 F. Supp. 1050 (S.D.N.Y. 1989).

[360] *See id.* at 1060.

[361] *See PASH*, 79 Hawai'i at 436, 903 P.2d at 1257 (citing Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)).

[362] *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

> physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. . . . The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of the land.[363]

It should be noted that a "permanent" invasion can be found "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."[364] Whether a specific claimed right of access would, if upheld, constitute such a "permanent and continuous right to pass" would of course depend on the rights claimed, but even a right to enter infrequently might qualify if the right could be exercised in the unrestricted discretion of the claimant. Gathering rights, of course, by definition, involve not just access, but the right to permanently deprive the landowner of the objects gathered.

But a challenge to the changes in law raised in *PASH* may have to be raised not with respect to that case itself, but to subsequent actions of courts and administrative agencies applying the *PASH dicta*. The likelihood of a successful challenge to the *PASH* case itself on any of the grounds discussed above is diminished by the U.S. Supreme Court's requirement for ripeness. Until there is some specific permit condition imposed or some denial of a permit based on *PASH*, or until some specific claimant's individual demand for access is adjudicated, there will likely be reluctance on the part of the U.S. Supreme Court to become involved.[365] Although the *PASH* court affirmed the possible existence of other rights and (at least on a hypothetical basis) removed previously settled limits on the assertion of claims to such rights, no specific claim of "other" gathering or access rights was actually adjudicated. It may thus fairly be stated that so far, there are *no* "*PASH* rights." For all of its bold language, *PASH* neither created nor confirmed a single specific Native Hawaiian traditional and customary "right" except perhaps the rights protected since 1850 by HRS section 7-1.[366]

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[363] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

[364] *Nollan*, 483 U.S. at 832.

[365] *See* Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

[366] Most of *PASH* is quite unashamedly *dictum*. An interesting question is whether it rises to the quality of *dictum* which an inferior court should, under Hawai'i law, consider binding. The Hawai'i Supreme Court, in *Robinson v. Ariyoshi*, 65 Haw. 641, 655, 658 P.2d 287, 298 (1982), stated that the appropriate course for a lower court "would be to consider a statement of a superior court binding on inferior tribunals, even though technically dictum, where it 'was passed upon by the court with as great care and deliberation as if it had been necessary to decide it, was closely connected with the question upon which the case was decided, and the opinion was expressed with a view to settling a question that would in all probability have to be decided

Thus, *PASH* itself is more appropriately viewed as a revolutionary manifesto, rather than a revolutionary overthrow of an institution of established real property law. This does not mean that it can be taken lightly. Manifestos can have far-reaching consequences, as such disparate documents as the Declaration of Independence and the Communist Manifesto well demonstrate. Manifestos, however, are not generally appealable to the U.S. Supreme Court. In the absence of a ripe claim, those who find *PASH* troubling must fall back on such alternatives as far-sighted, responsible and comprehensive education of the legislature and the people, perhaps with a view toward legislative reaffirmation of the traditional order.

Should a claim ripe for adjudication arise, however, both *Hughes* and *Lucas* appear to offer appropriate avenues of challenge on grounds of an unconstitutional taking. The state's response to such a claim will almost certainly be that the landowner has been deprived of nothing, because the landowner's title was always subject to the asserted right of access. The court in *Lucas* indicated that such a limitation on title "cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[367] The issue of "background law" will be central, because unless the asserted access right is in fact within the "background law" of a state and is not a "radical departure" from that law, a taking might be found. As stated in *Hughes v. Washington*, "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all."[368] *PASH*, of course, establishes no such "background law," but at most expresses an openness to consider whether such "background law" might exist. An interesting aspect of any federal court review will be the reconciliation, if such is possible, between *PASH*'s statement that "the western concept of exclusivity is not universally applicable

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before the litigation was ended.'"

The manifold ambiguities of the *PASH* case, the pervasive reservation of specific issues for future cases to decide, and the threats of sweeping, unsupported rejections of fundamental, long-settled precedent may justify a lower court or tribunal in concluding that the standard of "great care and deliberation" is not met. Lower courts and tribunals may also conclude that the issues actually decided in *PASH* were not "closely connected" with the court's discourses on the potential scope of gathering and access rights, because the claims by the *PASH* plaintiffs were rather specific (*see PASH*, 79 Hawai'i at 430, 903 P.2d at 1251 n.6) and the actual decision of the court on the application of the CZMA was quite narrow; *see also id.* at 436, 903 P.2d at 1257.

[367] 505 U.S. at 1029.

[368] 389 U.S. 290, 296-97 (1967)(Stewart, J., concurring)(cited in Stevens v. City of Cannon Beach, 510 U.S. 1207, 1212 (1994)(Scalia, J., dissenting from denial of petition for writ of *certiorari*)).

in Hawai'i"[369] and the U.S. Supreme Court's "repeated" holdings that at least as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[370] Unfortunately, however, until the issue is resolved, the *PASH* decision, in the words of Justice Scalia in a similar case, "casts a shifting shadow upon federal constitutional rights the length of the State."[371]

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[369] 79 Hawai'i at 447, 903 P.2d at 1268.

[370] Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987)(citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982), quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

[371] Stevens v. City of Cannon Beach, 510 U.S. 1207, 1214 (1994)(Scalia, J., dissenting from denial of petition for writ of *certiorari*). The *PASH* decision, of course, is not without its supporters. *See, e.g.*, Forman & Knight, supra note 133.

Cyberprivacy on the Corporate Intranet: Does the Law Allow Private-Sector Employers to Read Their Employees' E-mail?

"[C]omputer technology has advanced much faster than the legal code, and laws . . . are proving inadequate to deal with . . . electronic mail and computer communications across telephone lines."[1]

"Laws and institutions must go hand in hand with the progress of the human mind. . . . [A]s new discoveries are made . . . institutions must advance also, and keep pace with the times."[2]

I. INTRODUCTION

Though controversial, employer monitoring of employees in the private sector workplace is far from new.[3] Throughout modern history, employers have monitored their workers' performance by observing production lines, counting sales orders, or simply looking over the employee's shoulder.[4] Over

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[1] Lewis, *Can Computer Invaders be Stopped but Civil Liberties be Upheld?*, CHI. L. DAILY BULL., Oct. 1990, at 2.

[2] 2 JEFFERSONIAN CYCLOPEDIA: A COMPREHENSIVE COLLECTION OF THE VIEWS OF THOMAS JEFFERSON 726 (J. Foley ed. 1967).

[3] *See* David F. Linowes & Ray C. Spencer, *Privacy: the Workplace Issue of the '90s*, 23 J. MARSHALL L. REV. 591, 597 (1990)(commenting that private-sector employers have historically monitored their employees); Lois R. Witt, Comment, *Terminally Nosy: Are Employers Free to Access Our Electronic Mail?*, 96 DICK. L. REV. 545, 545 (1992) (noting that employers have monitored employee conversations for several decades); Donald R. McCartney, Comment, *Electronic Surveillance and the Resulting Loss of Privacy in the Workplace*, 62 UMKC L. REV. 859, 859 (1994) (asserting that employer monitoring of employees has increased in recent years); Holly Metz, *They've Got Their Eyes on You*, STUDENT LAW., Feb. 1994, at 22, 24 (noting that observation and recording of employee performance began during industrialization).

[4] *See* Laurie Thomas Lee, *Watch Your E-Mail! Employee E-Mail Monitoring and Privacy Law in the Age of the "Electronic Sweatshop,"* 28 J. MARSHALL L. REV. 139, 143 (1994). Jarrod J. White, Commentary, *E-mail@Work.Com: Employer Monitoring of Employee E-mail*, 48 ALA. L. REV. 1079, 1079 (1997), chronicles the development of employers' monitoring practices as follows:

> At the dawn of this century, monitoring took the unsophisticated form of a supervisor walking the assembly line and visually inspecting employee work. Workplace technology advanced, and the increasing availability of individual telephone extensions added a new dimension to workplace privacy issues. The tension between the employer's right to monitor and the employee's expectation of privacy spawned case law, followed by statutory action, and then even more case law interpreting the statutory regulations. Despite its arduous development, the net result of this process was a somewhat straightforward understanding by employers and employees of their legal rights concerning privacy in the workplace. However, emerging technology at the sunset of the

time, employees have become accustomed to working under the watchful eyes of their supervisors.[5]

Until recently, employer monitoring was limited primarily to supervisors physically observing employees as they worked.[6] This is no longer the case. Recent advancements in technology have made increasingly invasive forms of monitoring available to employers,[7] causing one commentator to liken the modern workplace to an "electronic sweatshop."[8] One of the most frequently used forms of electronic surveillance is e-mail monitoring.[9]

Employer monitoring of employees' e-mail is beginning to raise eyebrows.[10] A recent survey of American businesses suggests that over twenty million employees may be subject to some type of electronic monitoring through their

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twentieth century, particularly the pervasive use of electronic mail (E-mail) by private sector companies, has unleashed a new uncertainty concerning privacy rights in the workplace.

Id.

[5] *See* Metz, *supra* note 3, at 24.

[6] *See id.*; White, *supra* note 4, at 1079 (describing the historical development of employers' monitoring practices).

[7] *See* Michael F. Rosenblum, *The Expanding Scope of Workplace Security and Employee Privacy Issues*, 3 DEPAUL BUS. L.J. 77, 96 (1990/91); John Araneo, Note, *Pandora's (E-Mail) Box: E-Mail Monitoring in the Workplace*, 14 HOFSTRA LAB. L.J. 339, 342-43 (1996); George B. Trubow, *Constitution vs. Cyberspace: Has the First Amendment Met its Match?*, 5 BUS. L. TODAY 41, 41-42 (1996); Paul E. Hash & Christina M. Ibrahim, *E-Mail, Electronic Monitoring, and Employee Privacy*, 37 S. TEX. L. REV. 893, 893 (1996) (noting that employers have used new forms of technology to monitor employees).

[8] Lee, *supra* note 4, at 143. Electronic surveillance in the workplace is beginning to take its toll on employees' psychological and physical well being. *See* UNIVERSITY OF WISCONSIN-MADISON, DEPARTMENT OF INDUSTRIAL ENGINEERING & THE COMMUNICATIONS WORKERS OF AMERICA, ELECTRONIC PERFORMANCE MONITORING AND JOB STRESS IN TELECOMMUNICATIONS JOBS 7 (1990) (finding that electronic monitoring is positively related to employees' reported levels of physical and psychological strain).

[9] *See* Lee, *supra* note 4, at 139. One commentator has characterized the extent to which employers have monitored employees' e-mail as "hav[ing] reached the threshold of a state that even George Orwell did not imagine." Paul F. Gerhart, *Employee Privacy Rights in the United States*, 17 COMP. LAB. L.J. 175, 176 (1995). *See also* Hash & Ibrahim, *supra* note 7, at 893-94; Trubow, *supra* note 7, at 41-42; Araneo, *supra* note 7, at 341 (describing employers' widespread use of e-mail monitoring).

[10] *See* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, ELECTRONIC SURVEILLANCE AND CIVIL LIBERTIES 31 (1985). According to the Office of Technology Assessment, approximately fifty percent of the American public believes that computers threaten privacy rights and supports increased legal protection of privacy rights. *See id.* A 1990 poll indicates that 79 percent of the subjects polled were concerned about the use of technology to intrude upon individual privacy. *See* Jennifer J. Griffin, Comment, *The Monitoring of Electronic Mail in the Private Sector Workplace: an Electronic Assault on Employee Privacy Rights*, 4 SOFTWARE L.J. 493, 499 n.33 (1991).

computers.[11] The study surveyed 301 employers in a broad spectrum of industries regarding the extent to which employers monitor employees' computers, e-mail, and voice-mail systems.[12] The survey found that 41.5 percent of the employers accessed employee e-mail systems, 73.8 percent monitored employees' electronic work files, and 27.7 percent accessed employee network messages.[13]

Employers' monitoring practices stand in sharp contrast to employees' beliefs that their e-mail messages are private.[14] This contrast is particularly troubling when one considers that 66.2 percent of the survey's respondents who monitor their employees stated that they do not inform their employees that they may be monitored.[15]

Employers argue that this monitoring is justified by legitimate business concerns.[16] Businesses, they claim, must monitor employees' e-mail in order to evaluate employees' performance,[17] improve workplace productivity,[18] and

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[11] *See* Charles Pillar, *Bosses With X-Ray Eyes*, MACWORLD, July 1993, at 118, 123 (chart).

[12] *See id.* at 123.

[13] *See id.* at 123 (chart).

[14] *See* Caroline M. Cooney & Lisa Arbetter, *Who's Watching the Workplace? The Electronic Monitoring Debate Spreads to Capitol Hill*, SECURITY MGMT., Nov. 1991, at 26, 29 (citing an August 1991 reader survey); Hash & Ibraham, *supra* note 7, at 894; Griffin, *supra* note 10, at 493 (arguing that most employees consider their e-mail to be private).

[15] *See* Pillar, *supra* note 11, at 118, 123 (chart).

[16] *See* OFFICE OF TECHNOLOGY ASSESSMENT, THE ELECTRONIC SUPERVISOR: NEW TECHNOLOGY, NEW TENSIONS, 5 (1987)(listing the reasons employers monitor their employees).

[17] *See id.*

[18] *See id. But see* Larry O. Natt Gantt, II, *An Affront to Human Dignity: Electronic Mail Monitoring in the Private Sector Workplace*, 8 HARV. J.L. & TECH. 345, 420 (1995) (noting that there is extensive evidence suggesting that electronic monitoring reduces workers' efficiency). Gantt comments that:

> [D]espite employers' argument that E-mail monitoring increases their ability to ensure that employees work efficiently and productively, the Communications Workers of America has testified before Congress that West Virginia and Wisconsin have experienced no decline in service quality or productivity since the states enacted laws banning workplace telephone monitoring. In fact, West Virginia's C & P Telephone ranked number one of all Bell Telephone Companies in six out of twelve customer service categories. Similarly, officials at Federal Express report that productivity has attained an all-time high since it stopped monitoring individual employees and began surveying work performance of departments as a whole. These reports from individual employers support the findings of the Office of Technology Assessment, which found that the elimination of secret monitoring of telephone operators resulted in an improved service quality, fewer customer complaints and employee grievances, a drop in absenteeism, and a reduction in management costs. Other industrialized nations have also recognized that surreptitious monitoring impedes productivity and damages employee morale. Japan, Germany, and Sweden impose tight restrictions on employee monitoring, and their service quality and productivity have remained among the best in the world.

protect confidential and privileged information such as trade secrets.[19]

Employees argue that their e-mail messages are private and should be afforded legal protection.[20] Many commentators agree, arguing that new monitoring technologies intrude upon employees' workplace privacy rights.[21] Unfortunately for employees whose e-mail has been monitored, technology's uncanny ability to outpace the law's development has left them uncertain as to the extent of their privacy rights in the modern workplace.[22]

This article examines the extent to which private-sector employees' e-mail privacy is protected under federal statutory law and the common law. Part II provides a brief overview of the technological characteristics of e-mail and describes how employers are using these characteristics to monitor employee e-mail. Part III examines federal statutory protection, analyzing the Electronic

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> The employer who constantly invades its employees' personal privacy "tear[s] apart the fabric of trust and cooperation that binds companies and their employees." Any resulting lack of trust may, in turn, increase monitoring and operating costs. Studies have demonstrated that monitored employees experience tension and anxiety, which may produce a decline in employee productivity and workplace satisfaction as well as an increase in occupational health problems. Furthermore, this perception of mistrust and unfairness resulting from employer monitoring practices may motivate employees to seek union representation. In the end, E-mail monitoring may thus exacerbate the problems it was designed to correct.

Id. at 420-21 (citations omitted).

[19] *See id.*

[20] *See, e.g.*, Julie A. Flanagan, *Restricting Electronic Monitoring in the Private Workplace*, 43 DUKE L.J. 1256, 1262 (1994) (discussing labor unions' objections to electronic monitoring in the workplace); Frank J. Cavico, *Invasion of Privacy in the Private Employment Sector: Tortious and Ethical Aspects*, 30 HOUS. L. REV. 1263, 1266 (1993) (noting that the widespread use of electronic monitoring by employers generates a "deep-seated disquietude" among employees); Cooney, *supra* note 14, at 26, 29 (citing a reader survey suggesting that most employees believe their e-mail messages should be private); McCartney, *supra* note 3, at 859 (noting that it seems "widely accepted that individuals desire . . . a certain amount of privacy").

[21] For a brief sampling of articles opposing employer monitoring as invasive to employees' privacy, *see* Metz, *supra* note 3, at 22, 28; Cooney, *supra* note 14, at 26, 29; Flanagan, *supra* note 20, at 1262-65; Thomas R. Greenberg, Comment, *E-mail and Voice Mail: Employee Privacy and the Federal Wiretap Statute*, 44 AM. U. L. REV. 219, 249 (1994); Witt, *supra* note 3, at 567-68, 571. Concern over workplace monitoring is so great that at the First Conference on Computers, Freedom & Privacy, Professor Laurence Tribe proposed a twenty-seventh Amendment to protect privacy and other rights threatened by recent advances in computer technology. *See* Henry Weinstein, *Amendment on Computer Privacy Urged*, L.A. TIMES, Mar. 27, 1991, at A3.

[22] *See* Araneo, *supra* note 7, at 339 (arguing that current law does not adequately address the "technologically advanced nature of e-mail"); Witt, *supra* note 3, at 546 (noting that recent advances in technology raise new legal questions regarding employees' right to privacy); McCartney, *supra* note 3, at 859 (noting that drawing a line between employers' business interests and employees' privacy interests "remains a hard question to answer because neither the courts nor Congress have defined the limits of an individual's privacy in any forum . . .").

Communications Privacy Act of 1986 ("ECPA") and how it may be applied to e-mail.[23] Part IV examines common law remedies, discussing how the common law tort for invasion of privacy may be applied to e-mail. Part V concludes that neither source of law offers adequate privacy protection to employees' e-mail and warns employees that they should not consider personal e-mail sent over an employer's intranet to be private.

II. E-MAIL: A TECHNICAL OVERVIEW

E-mail is a form of communication that integrates computer and telecommunications technology,[24] allowing individuals to electronically transmit correspondence between computer terminals. Because it provides a more effective and efficient method of communication than by telephone, fax, or letter writing,[25] e-mail is widely used among businesses and individuals alike.[26]

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[23] Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-2522, 2701-2711.

[24] The Senate report on the bill that became the ECPA describes e-mail as follows:

> Electronic mail is a form of communication by which private correspondence is transmitted over public and private telephone lines. In its most common form, messages are typed into a computer terminal, and then transmitted over telephone lines to a recipient computer operated by an electronic mail company. If the intended addressee subscribes to the service, the message is stored by the company's computer "mail box" until the subscriber calls the company to retrieve its mail, which is then routed over the telephone system to the recipient's computer. If the addressee is not a subscriber to the service, the electronic mail company can put the message onto paper and then deposit it in the normal postal system.

Electronic mail systems may be available for public use or may be proprietary, such as systems operated by private companies for internal correspondence.

1986 U.S.C.C.A.N. 3555, 3562. The Electronic Mail Association provides a more nebulous definition of e-mail, stating that:

> Electronic mail is the generic name for non-interactive communication of text, data, image or voice messages between a sender and designated recipients by systems utilizing telecommunications links.

STEPHEN A. CASWELL, E-MAIL 1, 2 (1988). For a less technical definition of e-mail, *see* LYNN BREMNER ET AL., INTRANET BIBLE 12 (1997).

[25] *See* PHILLIP ROBINSON, DELIVERING ELECTRONIC MAIL 22 (1992); CASWELL, *supra* note 24, at 2 (describing the benefits e-mail offers).

[26] *See* Araneo, *supra* note 7, at 340-41 (describing e-mail as the "preferred choice of communication mediums in corporate America"). As of 1996, ninety percent of companies with 100 employees or more used e-mail. *See id.* at 341. Overall, close to 60 million Americans use e-mail to conduct business on a daily basis. *See id. See also* Hash & Ibrahim, *supra* note 7, at 894 (noting that e-mail is the "fastest growing form of electronic communication in the workplace").

A knowledge of the different types of e-mail systems and how they work is crucial to understanding the legal issues involved.[27] E-mail systems fall into two broad categories, internet systems and intranet systems.[28] An internet e-mail system, such as America Online, utilizes public phone lines and provides e-mail services to its subscribers.[29] An intranet e-mail system is a privately owned, self-contained e-mail system.[30] Intranet e-mail systems provide direct connections between their users and do not use public telephone lines.[31] This article addresses only intranet systems.[32]

The process of sending e-mail on an intranet system is relatively simple. First, an individual composes the text of the message on his computer terminal.[33] The individual then addresses the message and transmits it to the mailserver, a computer that routes messages to their recipients.[34] The mailserver then transmits the message to its intended recipient's mailbox using the address provided by the sender.[35] Depending on the configuration of the e-mail system being used, either the recipient's computer terminal or a

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[27] *See* Griffin, *supra* note 10, at 497.

[28] *See* BREMNER ET AL., *supra* note 24, at 1, 31; CASWELL, *supra* note 24, at 81-82; Witt, *supra* note 3, at 547 (discussing the differences between the internet and intranets).

[29] *See* BREMNER ET AL., *supra* note 24, at 1-29 (discussing, in detail, the internet in general and how e-mail is sent over the internet). For a more concise explanation of internet e-mail, *see* Witt, *supra* note 3, at 547.

[30] *See* BREMNER ET AL., *supra* note 24, at 32-33. For an up-to-date, interactive discussion of intranets, *see The Intranet - Revolution or Evolution?* (visited Jun. 10, 1997) <http://137.142.42.95/Slides/Intranet.html>; *FAQ - Intranet* (visited Jun. 10, 1997) <http://www.onsite.net/faq/intranet.htm>; *Intranet Demo* (visited Jun. 10, 1997) <http://www.design.nl/intra/pages/start.htm>; *Virtual Intranet* (visited Jun. 10, 1997) <http://www.cplabs.com/dascom/sitepres/sld010.htm> (websites discussing intranets and related topics).

[31] For a detailed description of how intranets function, *see* BREMNER ET AL., *supra* note 24, at 31-70. *See also* Witt, *supra* note 3, at 547 (providing a simpler explanation of intranet e-mail).

[32] There are many legal questions surrounding internet e-mail systems as well. *See* Araneo, *supra* note 7, at 343-46 (describing the legal issues surrounding internet e-mail systems). These legal issues are beyond the scope of this article which concerns only intranet e-mail systems.

[33] *See* ED TITTEL & MARGARET ROBBINS, E-MAIL ESSENTIALS 13 (1994).

[34] *See id.*

[35] *See id.* The message is translated into electronic code and broken into separate parts called "packets." *See id.* The packets are not usually transmitted directly from the sender to the recipient. *See id.* Rather, the packets pass through intermediate "nodes" on their way to their destination. *See id.* Packets may be backed-up at each intermediate node and are backed-up at their point of origin as "sent mail" and their destination as "mail received." *See id.* Packets do not necessarily follow the same path as they are transmitted to the recipient; in fact, quite often, each one of the message's packets pursues a different route. *See id.* The entire transmission process is extremely quick, taking only seconds for most messages. *See id.*

directory within the mailserver serves as the recipient's "mailbox" for incoming messages.[36]

The same computer technology that makes e-mail efficient and easy to use also makes it susceptible to interception by unauthorized third parties.[37] E-mail systems generally require users to enter both their username[38] and password[39] to access e-mail files in their mailbox;[40] however, this does not provide as much security as one might expect.[41] E-mail messages are stored as unencrypted text files on either the recipient's computer or the mailserver.[42] This essentially reveals the substance of the message to one's supervisors[43] and to the computer technicians who have access to the mailserver's files.[44]

E-mail can be intercepted by unauthorized parties at five separate stages.[45] First, an unauthorized party can view the message on the sender's computer screen[46] or access the e-mail files on the sender's terminal.[47] Second, the

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[36] *See id.*

[37] *See* Hash & Ibrahim, *supra* note 7, at 894-95 (describing e-mail technology as a "double-edged sword" that presents employers with a "compelling new opportunity" to monitor employees). *See also* Elsa F. Kramer, *Litigation Takes on One of the Challenges of Cyberspace*, RES GESTAE, Jan. 1996, at 24 (likening the privacy afforded by e-mail messages to that of postcards).

[38] *See* Garfinkel, *Use E-Mail for Efficiency*, 35 PRAC. LAW. 41, 42 (Jan. 1989). A username is the name an individual uses to log into his computer system. *See* ROBINSON, *supra* note 25, at 20. It is usually the user's real name, or an abbreviation thereof. *See id.* The username also serves as an address through which others may send e-mail to an individual. *See* Garfinkel, *supra* at 42.

[39] *See* CASWELL, *supra* note 24, at 83-84. A password is a sequence of letters and numbers used to prevent unauthorized users from gaining access to one's e-mail account. *See id.*

[40] *See id.*

[41] A password's effectiveness depends on how difficult the password is for an unauthorized user to guess. *See* Richard Behar, *Who's Reading Your E-Mail?*, FORTUNE, Feb. 3, 1997, at 56, 70. Although e-mail users are generally urged to create passwords that are difficult to guess, such as a random string of letters and numbers, users often prefer easier to remember passwords based on such things as their children's names or favorite sports teams. *See id.* Such passwords are much easier for unauthorized users to guess and provide less security. *See id.* Moreover, e-mail systems generally keep back-up copies of all messages that pass through its mailserver. *See* Richards, *Privacy at the Office: Is there a Right to Snoop? Lawsuit May Set Limits on Firms' 'Eavesdropping'*, WASH. POST, Sept. 9, 1990, at H6, col. 4. These backed-up messages can be accessed and read by systems technicians and supervisors who have access to the mailserver's files. *See id. See also* CASWELL, *supra* note 24, at 92-93 (noting that stored messages have little protection against unauthorized access).

[42] *See* CASWELL, *supra* note 24, at 90-93 (describing how e-mail systems store messages).

[43] *See* Richards, *supra* note 41, at H6, col. 4.

[44] *See id.*

[45] *See* OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 10, at 31, 45.

[46] *See id.*

[47] *See id.*

message can be intercepted as it is being transmitted.[48] Third, an unauthorized party can access the recipient's stored e-mail files and view the message.[49] Fourth, a printed copy of the message could be intercepted.[50] Finally, an unauthorized party could access the mailserver's e-mail files and view the message.[51]

The remainder of this article will discuss the remedies available to private-sector employees whose e-mail has been monitored by their employers.[52] Specifically, it will consider federal statutory protection of e-mail privacy under the Electronic Communications Privacy Act and common-law protection under the tort for invasion of privacy.

III. FEDERAL PROTECTION OF E-MAIL PRIVACY UNDER THE ELECTRONIC COMMUNICATIONS PRIVACY ACT

Although there are federal statutes regulating computer crimes[53] and

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[48] *See id.* Messages can be intercepted during transmission in three ways. *See id.* at 49. The unauthorized party can "[tap] into the wire over which the message is being sent, [break] into the fiberoptic cable, or [intercept] satellite or microwave signals." *Id.* In addition to the methods of interception listed by the Office of Technology Assessment, it is possible that portions of the message could be intercepted at the various nodes it passes through as it is routed to its recipient. *See supra* notes 33-36 and accompanying text. The possibility of a significant percentage of the message being intercepted, however, is minimal as the message is broken into "packets," each of which is transmitted to the recipient along a different route. *See id.* Moreover, the intermediate nodes do not make back-up copies of the "packets," making it highly unlikely that a message's security would be compromised in this manner. *See id.*

[49] *See* OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 10, at 31, 45. This would involve accessing the directory containing stored e-mail messages on the recipient's computer. *See id.* It is also possible for an unauthorized individual to access the file containing back-up copies of sent messages on the sender's computer. *See id.*

[50] *See id.*

[51] *See id.*

[52] Although there are many reasons why employers may wish to monitor their employees, *see* Lee, *supra* note 4, at 143-46 (discussing employers' reasons for monitoring, with employers generally arguing that e-mail monitoring is necessary to prevent theft, monitor employee performance, and evaluate employees), this article will focus only on employees' privacy interests.

[53] *See* Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030 (1994) (prohibiting unauthorized access to computer systems to get classified information). In 1993, Senator Paul Simon introduced the Privacy for Consumers and Workers Act. S. 984, 103d Cong., 1st Sess. (1993). The proposed Act required employers who intended to monitor their employees to provide the employees with notice detailing the form of surveillance used, personal data to be collected, time when the monitoring will occur, use of the data obtained through monitoring, and a description of the monitoring to be used. S. 984, 103d Cong., 1st Sess. § 4(b)(1993). A detailed analysis of this act can be found in McCartney, *supra* note 3, at 882-90. The Act was not passed into law and has not been reintroduced.

informational privacy,[54] these statutes do not explicitly address the right of private-sector employers to monitor employees' e-mail.[55] The only federal statute that appears to address the unauthorized access or interception of e-mail is the Electronic Communications Privacy Act of 1986,[56] which amended Title III of the Omnibus Crime Control and Safe Streets Act ("Title III"),[57] commonly known as the Federal Wiretap Act.

Congress enacted the ECPA to update Title III's language to include newly developed technologies[58] and increased the scope of its coverage to include the interception of transmitted electronic communication and the unauthorized access to stored electronic communication.[59] Although the ECPA does not directly mention e-mail, the Act's legislative history makes it clear that e-mail is included within the ECPA's definition of electronic communication.[60]

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[54] *See generally* Privacy Statutes on File, 21 NAT'L L. J. 2520 (1989) (briefly describing the privacy laws Congress has enacted over the past two decades). Congress has enacted numerous statutes addressing privacy concerns arising from newly developed information and communication technologies. *See id.*

[55] *See* Griffin, *supra* note 10, at 513-14 (arguing that the only federal statute to expressly regulate the interception of e-mail is the Electronic Communications Privacy Act).

[56] Electronic Communications Privacy Act of 1986, Pub. L. No. 94-508, 100 Stat. 1848 (1986) (codified at 18 U.S.C. §§ 2510-2522, 2701-2711 (1994)).

[57] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, §§ 801-804, 82 Stat. 197, 211-25 (1968) (codified as amended at 18 U.S.C. §§ 2510-2522 (1994) and 47 U.S.C. § 605 (1994)).

[58] *See* S. REP. NO. 99-541, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3556. Congress believed that the ECPA was necessary because Title III only prohibited the aural interception of voice communications and did not cover data communications. *See id.* Congress noted that:

> A letter sent by first class mail is afforded a high level of protection against unauthorized opening by a combination of constitutional provisions, case law, and U.S. Postal Service statutes and regulations. . . .
>
> But there are no comparable Federal statutory standards to protect the privacy and security of communications transmitted by . . . new forms of telecommunications and computer technology. This is so, even though American citizens and American businesses are using these new forms of technology in lieu of, or side-by-side with, first class mail and common carrier telephone services.
>
> This gap results in legal uncertainty. . . . It probably encourages unauthorized users to obtain access to communications to which they are not a party. . . .
>
> [T]he law must advance with the technology to ensure the continued vitality of the fourth amendment. . . . Congress must act to protect the privacy of our citizens. If we do not, we will promote the gradual erosion of this precious right.

Id. at 5, 1986 U.S.C.C.A.N. at 3559.

[59] *See id.* at 1-3, 1986 U.S.C.C.A.N. at 3555-57. *See also* 18 U.S.C. §§ 2510(1),(4),(12), (17) (1994).

[60] *See* S. REP. NO. 99-541, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3562 (listing e-mail as one "of the new telecommunications and computer technologies referred to in the Electronic Communications Privacy Act"). *See also* Steve Jackson Games, Inc. v. United States

Title I of the ECPA prohibits the intentional, unauthorized interception of any "wire, electronic, or oral communication" through the use of any electronic, mechanical, or other device.[61] Title II of the ECPA prohibits the unauthorized access of stored electronic communications.[62] E-mail messages exist in both of these forms, depending on whether they are being sent between parties, or stored for back-up purposes.[63] Thus, e-mail messages are protected by different sections of the ECPA depending on their form.[64] A message that is being transmitted between parties is protected under Title I, whereas a message that is being stored in either party's computer system for later retrieval is protected under Title II.

While these provisions, by themselves, would appear to prohibit employer monitoring of employee e-mail, the ECPA contains three key exceptions[65] which allow employers to monitor employee telephone communications.[66] To date, no court has addressed whether these exceptions apply to e-mail,[67] but many scholars believe that these exceptions would be interpreted to allow

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Secret Serv., 36 F.3d 457, 461-64 (5th Cir. 1994) (holding that the United States Government's seizure of a computer containing private e-mail messages violated Title II of the ECPA).

[61] 18 U.S.C. § 2511(1)(a),(1)(b) (1994).

[62] *See* 18 U.S.C. § 2701 (1994). The ECPA defines "stored electronic communications" as:

> [A]ny temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and . . . any storage of such communication by an electronic communication service for purposes of backup protection of such communication[.]

18 U.S.C. § 2510(17).

[63] *See generally supra* notes 33-36 and accompanying text.

[64] *See* United States v. Moriarty, 962 F. Supp. 217, 220 (D. Mass. 1997); Bohach v. City of Reno, 932 F. Supp. 1232, 1236 (D. Nev. 1996); *Steve Jackson Games*, 36 F.3d at 461-64 (holding that electronic communications, such as e-mail messages, are protected under either Title I or Title II of the ECPA, depending on whether the e-mail is being transmitted or stored).

[65] *See* 18 U.S.C. §§ 2510(5), 2511(2)(a)(i),(2)(d) (1994). The exceptions are commonly referred to, respectively, as the Business-Extension Exception, the Service-Provider Exception, and the Consent Exception.

[66] *See* Gantt, *supra* note 18, at 355-70 (detailing the development of each exception and its application to telephone monitoring in the private sector); Hash & Ibrahim, *supra* note 7, at 900-01 (discussing the service-provider and consent exceptions); Araneo, *supra* note 7, at 349-50 (discussing the ECPA's key exceptions).

[67] *See* Gantt, *supra* note 18, at 355. One federal case has held that the Secret Service and the U.S. Government violated Title II of the ECPA by seizing a computer used to operate a bulletin board system containing private e-mail messages. *See Steve Jackson Games*, 36 F.3d at 461-64. The relevance of the court's opinion to employer monitoring of employee e-mail in the private sector is limited to its holding that the ECPA's Title I "interception" provisions do not apply to stored communications, which are covered under Title II. *See id.* This narrow holding provides little meaningful insight into the application of the ECPA exceptions to private sector employer monitoring of employee e-mail. *See* Gantt, *supra* note 18, at 355.

employers to monitor employee e-mail to some degree.[68] This section examines these three exceptions, the "business-extension exception,"[69] the "service-provider exception,"[70] and the "consent exception"[71] to determine whether the ECPA will grant stronger protection to e-mail than telephone communications. In order to determine whether these exceptions will permit private sector employers to monitor employees' e-mail, it is helpful to analyze how the courts have applied these exceptions to telephone conversations and the policy behind the courts' interpretation of these exceptions.[72]

A. The Business-Extension Exception

The first relevant exception to the ECPA is commonly known as the "business-extension," "business use," or "ordinary course of business" exception.[73] In order to constitute a violation of the ECPA, a communication

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[68] *See generally* Gantt, *supra* note 18; Greenberg, *supra* note 21; Lee, *supra* note 4; Griffin, *supra* note 10 (arguing that the ECPA exceptions would likely allow employers to monitor employee e-mail to the same extent that they allow employer monitoring of employee telephone conversations).

[69] *See* 18 U.S.C. § 2510(5). *See* discussion of the business-extension exception *infra* Part III.A.

[70] *See* 18 U.S.C. § 2511(2)(a)(i). *See* discussion of the service-provider exception *infra* Part III.B.

[71] *See* 18 U.S.C. § 2511(2)(d). *See* discussion of the consent exception *infra* Part III.C.

[72] *See* Griffin, *supra* note 10, at 506-08, 517 (arguing that, given the similarities between telephones and e-mail as well as the similar expectation of privacy associated with the two mediums of communication, courts are likely to look to telephone monitoring cases in determining how to address e-mail monitoring). Many commentators have found telephone monitoring cases helpful in analyzing how the ECPA may treat e-mail. *See, e.g.*, Lee, *supra* note 4; Witt, *supra* note 3; McCartney, *supra* note 3; Gantt, *supra* note 18; Araneo, *supra* note 7 (looking to judicial application of the ECPA's exceptions toward telephone monitoring to predict application of the ECPA's exceptions to e-mail).

[73] The business-extension exception is found in 18 U.S.C. § 2510(5) which states, in relevant part:

> (5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than-
>
> (a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties[.]

Id. See also Martha W. Barnett & Scott D. Makar, *In the Ordinary Course of Business: the Legal Limits of Workplace Wiretapping*, 10 HASTINGS COMM. & ENT. L.J. 715, 717 (1988) (noting the different names by which the exception has been known).

must be intercepted by an "electronic, mechanical, or other device."[74] The business-extension exception excludes from the definition of "electronic device" the following:

> [A]ny telephone or telegraph instrument, equipment or facility, or component thereof, i) furnished to the subscriber or user . . . in the ordinary course of [its] business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business . . . .[75]

The courts have employed two separate approaches to determining whether employer telephone monitoring is covered by this exception.[76] Early cases addressing the exception applied a "content" based approach which focused on whether the communication at issue was business or personal in nature.[77] The most recent cases addressing the exception have abandoned this approach in favor of a "context" based approach which focuses on the employer's perspective and examines the circumstances surrounding the employer's monitoring.[78]

1. The content approach

The content approach allowed employers to intercept business communications but prohibited the interception of communications that were personal in

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[74] 18 U.S.C. § 2511(1)states in relevant part:

(1) Except as otherwise specifically provided in this chapter any person who-

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;. . . shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

Id. The ECPA defines the term "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4) (1994).

[75] 18 U.S.C. § 2510(5)(a) (1994).

[76] *See* Gantt, *supra* note 18, at 365 (describing the separate approaches courts have taken in applying the business-extension exception). Although the network cables that connect computer terminals on an intranet are not technically telephone lines, *see* BREMNER ET AL., *supra* note 24, at 98-101 (describing the technical components of networks and intranets), many commentators feel that the business-extension exception would be applied to intranet e-mail systems. *See* Gantt, *supra* note 18, at 364-74 (applying the business-extension approach to e-mail); Griffin, *supra* note 10, at 514-16 (arguing that the business-extension exception would be applied toward e-mail); Witt, *supra* note 3, at 550-53 (commenting that the business-extension exception applies to e-mail).

[77] *See* discussion of the context approach *infra* notes 105, 135 and accompanying text.

[78] *See* discussion of the content approach *infra* notes 79-104 and accompanying text.

nature.[79] This approach was first applied in *Watkins v. L.M. Berry & Co.*[80]

Watkins involved an employer monitoring an employee's personal telephone call.[81] The employee was a telephone salesperson, and the company had a policy of monitoring solicitation calls as part of its training program.[82] Employees were allowed to make personal telephone calls and were told by their supervisors that personal calls would only be monitored to the extent necessary to determine that the calls were personal.[83]

In concluding that the employer's monitoring violated Title I of the ECPA, the court held that an employer wishing to monitor telephone communications under the business-extension exception must demonstrate that the interception was conducted "in the ordinary course of business."[84] According to the court, monitoring was conducted in the ordinary course of business when the intercepted conversation was a "business call."[85] The court distinguished personal calls from business-related calls, stating that the monitoring of personal calls was never in the ordinary course of business except to the extent

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[79] *See, e.g.*, Watkins v. L.M. Berry & Co., 704 F.2d 577 (11th Cir. 1983); Briggs v. American Air Filter Co., Inc., 630 F.2d 414 (5th Cir. 1980); Epps v. St. Mary's Hosp. of Athens, Inc., 802 F.2d 412 (11th Cir. 1986) (applying a content based analysis of the business-extension exception). *See also* Barnett & Makar, *supra* note 73, at 730 (describing the content approach).

[80] 704 F.2d 577 (11th Cir. 1983).

[81] *See id.* at 579. The employee called a friend during her lunch hour. *See id.* They discussed an employment interview with Lipton Company the plaintiff had recently attended. *See id.* The employee stated that the interview had gone well and told her friend that she was very interested in the Lipton job. *See id.* Unbeknownst to the employee, her supervisor was monitoring the call and heard the discussion of the interview. *See id.* After hearing the conversation, the employee's supervisor told a managing supervisor about it. *See id.* Later that afternoon, the employee was called into the managing supervisor's office and told that the company did not want her to leave. *See id.* Upon hearing that her supervisor had intercepted her call, the employee became upset, and an argument ensued. *See id.* The employee was fired the next day; however, after complaining to the company's management, she was reinstated with apologies from her supervisor. *See id.* A week later, the employee left the company to work for Lipton. *See id.*

[82] *See id.*

[83] *See id.*

[84] *See id.* at 582.

[85] *Id.* The court provided little insight as to when a call would be considered a business conversation, stating only that the conversation in question was not a business conversation because it was "neither in pursuit nor to the legal detriment of [the employer's] business." *Id.* Briggs v. American Air Filter Co., Inc., 630 F.2d 414, 416 (5th Cir. 1980) held that an employee's call was a business call when it was "related to and intended to be in furtherance of [the employer's] business." Epps v. St. Mary's Hosp. of Athens, Inc., 802 F.2d 412, 417 (11th Cir. 1986) provided further insight into the definition of "business call," finding that a call was a business call when it "occurred during office hours, between co-employees, over a specialized extension which connected the principal office to the substation, and concerned scurrilous remarks about supervisory employees in their capacities as supervisors."

necessary "to determine whether a call is personal or not."[86] Thus, under *Watkins*, an employer was initially permitted to monitor all calls to determine whether they were personal or business-related.[87] Once the nature of the call was determined, continued monitoring was only permitted when the conversation being monitored was business-related.[88]

Briggs v. American Air Filter Co., Inc.[89] and *Epps v. St. Mary's Hospital of Athens, Inc.*[90] shed more light on whether an employer's monitoring would be in the ordinary course of business. In *Briggs*,[91] an employer, suspecting his employee was discussing confidential information over the telephone with a competitor, used an extension phone to monitor the employee's telephone call to the competitor.[92] In holding that the employer's monitoring was in the ordinary course of business, the court emphasized several factors: 1) the employer's "particular suspicions about confidential information being disclosed to a business competitor;"[93] 2) the employer's act of "warn[ing] the employee not to disclose such information;"[94] 3) the employer's "reason to believe that the employee [was] continuing to disclose the information;"[95] and 4) the employer's "know[ledge] that a particular phone call" the employee was making was "with an agent of the competitor."[96] The court mentioned that it might have decided the case differently if the employer had monitored a

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[86] *Watkins*, 704 F.2d at 583.

[87] *See id.*

[88] *See id.* at 582-83. In reaching this conclusion, the court stated that the employer's policy on monitoring did not affect the scope of the business-extension exception as it applied to the company. *See id.* at 584 n.7. It was merely a "coincidence" that the scope of the company's monitoring policy coincided with the scope of the business-extension exception determined by the court. *See id.*

[89] 630 F.2d 414 (5th Cir. 1980).

[90] 802 F.2d 412 (11th Cir. 1986).

[91] *Briggs* involved an employee who was close friends with individuals who worked for two of his employer's competitors. *See Briggs*, 630 F.2d at 415-16. The employer was unhappy about these relationships and attempted to dissuade his employee from spending time with these individuals. *See id.* at 416. The employer and his competitors often bid against each other for jobs, and the competitors often submitted the lowest bid. *See id.* The employer suspected that his employee was discussing his bid with his friends, enabling their employers to underbid him. *See id.* At one point, the employer admonished his employee not to discuss company business with his friends. *See id.* Shortly thereafter, the employer was informed that his employee was talking to one of his friends on the company phone. *See id.* The employer picked up his extension of the phone and recorded the conversation. *See id.*

[92] *See id.* at 415-16.

[93] *Id.* at 420.

[94] *Id.*

[95] *Id.*

[96] *Id.*

personal portion of the call or if the employer engaged in a general practice of surreptitious monitoring.[97]

Epps expanded on *Briggs*, providing further clarification on whether an employer's monitoring was in the ordinary course of business. *Epps* involved the monitoring of a conversation between two employees who were making disparaging remarks about their supervisors.[98] The court held that the conversation was not personal because it occurred between employees during work hours over a company-owned system and involved remarks about fellow employees in their capacity as supervisors.[99] The court concluded that "the potential contamination of a working environment is a matter in which an employer has a legal interest."[100]

These cases suggest that employer monitoring would be in the ordinary course of business when the conversation being monitored is related, in some manner, to the operation of the employer's business.[101] Under *Briggs*, employers may monitor employees' conversations when they have a "legitimate suspicion" that business information is being discussed.[102] *Epps* allows employers to monitor employees' conversations that might negatively affect the working environment.[103] Together, these cases allow employers to monitor any conversation they can reasonably relate to their business interests.[104]

2. *The context approach*

Recent cases addressing the business-extension exception have applied the context approach.[105] This approach focuses on whether the employer has a

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[97] *See Briggs*, 640 F.2d at 420 & nn.8-9.

[98] *See Epps*, 802 F.2d at 413-14. The employees worked at the Emergency Medical Services (EMS) office at a hospital. *See id.* at 413. The EMS office had several remote sites which communicated with the main office through a private telephone system. *See id.* Conversations made over the system could be monitored from the main office. *See id.* The employees' conversation was recorded by a co-worker who overheard one of the employees refer to his supervisor as "the hospital's nigger." *Id.*

[99] *See id.* at 417.

[100] *See id.*

[101] *See* Gantt, *supra* note 18, at 367-69 (discussing courts' application of the content approach).

[102] *See Briggs*, 630 F.2d at 420. The court defined "legitimate suspicion" as a "particular suspicion" that the call being monitored concerned the employer's business. *Id.*

[103] *See Epps*, 802 F.2d at 417.

[104] *See* Gantt, *supra* note 18, at 367-69 (discussing courts' application of the content approach in telephone monitoring cases).

[105] *See generally* Deal v. Spears, 980 F.2d 1153 (8th Cir. 1992); Sanders v. Robert Bosch Corp., 38 F.3d 736 (4th Cir. 1994); James v. Newspaper Agency Corp., 591 F.2d 579, 582 (10th Cir. 1979); United States v. Harpel, 493 F.2d 346, 351 (10th Cir. 1974)(applying the context approach to the business-extension exception).

legitimate business interest justifying the interception[106] and whether employees are notified that their employer may intercept their communications.[107] The context approach differs from the content approach in that it looks at the means used to monitor a conversation rather than the content of the conversation monitored to determine whether the employer has a legitimate business interest in monitoring the conversation.

The context approach has its roots in *James v. Newspaper Agency Corp.*[108] In *James*, an employer installed a monitoring device on telephones used by employees who dealt with the public.[109] The employer hoped this would enable the employees' supervisors to provide useful training and instruction as well as protect employees from abusive calls.[110] The employer notified its employees of its plan, and none objected.[111] The court held that the employer's actions came "squarely" within the provisions of the business-extension exception because the monitoring was fully disclosed and based on a legitimate business purpose.[112]

James was decided during the same period as *Briggs*, *Watkins*, and *Epps*, but its analysis of the business-extension exception was significantly different.[113] All four cases required an employer to have a legitimate business interest in monitoring its employees.[114] *James*, however, looked to the employer's reason for monitoring its employees and the means used to determine whether a legitimate business interest existed.[115] This was markedly different from *Briggs*, *Watkins*, and *Epps*, which looked to the contents of the conversation that was monitored to determine whether a legitimate business interest existed.[116]

The two most recent cases addressing the business-extension exception have adopted the *James* analysis, paying particular attention to the means an employer uses to monitor. In the first of these cases, *Deal v. Spears*,[117] an

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[106] *See James*, 591 F.2d at 582.

[107] *See Harpel*, 493 F.2d at 351.

[108] 591 F.2d 579 (10th Cir. 1979).

[109] *See id.* at 581.

[110] *See id.*

[111] *See id.*

[112] *Id.* at 581-82.

[113] *Compare* discussion of the *James* analysis, *supra* notes 108-12 and accompanying text *with* discussion of the *Briggs*, *Watkins*, and *Epps* decisions, *supra* notes 79-104 and accompanying text.

[114] *See* discussion of *Briggs*, *Watkins*, *Epps*, and *James*, *supra* notes 79-112 and accompanying text.

[115] *See James*, 591 F.2d at 581-82. *See also* discussion of *James*, *supra* notes 108-12 and accompanying text.

[116] *See* discussion of *Briggs*, *Watkins*, and *Epps*, *supra* notes 74-104 and accompanying text.

[117] 980 F.2d 1153 (8th Cir. 1992).

employer installed a recording device on his extension of the company phone in order to prevent suspected employee theft.[118] Building on *James*, the court divided the business-extension exception into two prongs.[119] The first prong required the monitoring equipment to be provided by the phone company or connected to the phone line by the subscriber.[120] The second prong required the monitoring to be conducted in the ordinary course of business.[121]

Applying the first prong of the test, the court held that the recording device used to monitor the calls, not the extension phone it was connected to, was the critical intercepting device.[122] Because this device was purchased at Radio Shack, not supplied by the phone company, the court held that the device was not covered by the business-extension exception.[123] Addressing the second prong of the test, the court held that while the employer's interest in catching an employee thief justified some monitoring, the employer's recording of twenty-two hours of telephone calls, most of them personal, and listening to

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[118] *See id.* at 1155. The employer operated a "Package Store" and lived in a mobile home adjacent to the store. *See id.* The store's telephone had an extension in the mobile home. *See id.* The store had recently been burglarized, and the employer suspected the burglary was an inside job. *See id.* Hoping to catch the thief, the employer purchased a recording device from Radio Shack and attached it to the extension in the mobile home. *See id.* When turned on, the machine would automatically record all conversations made or received on either extension of the phone. *See id.* The employer left the machine attached to the mobile home's phone extension for approximately a month, during which it recorded close to twenty-two hours of phone conversations. *See id.* Many of the calls recorded were personal conversations between the store's employee and her friends. *See id.* After disconnecting the machine, the employer listened to the recorded conversations in their entirety. *See id.* While the employer did not learn anything about the theft, he did learn that the employee had sold a keg of beer to a friend at cost in violation of store policy. *See id.* at 1156. When the employee reported for work the next day, the employer played the implicating portion of the recording to her and told her she was fired. *See id.* The court held that the employer's actions violated Title I of the ECPA and awarded the employee over $10,000 in punitive damages. *See id.*

[119] *See id.* at 1157. The court stated that:

> [T]here are two essential elements that must be proved before [the business-extension exception] becomes a viable defense: the intercepting equipment must be furnished to the user by the phone company or connected to the phone line, and it must be used in the ordinary course of business.

Id.

[120] *See id.*

[121] *See id.*

[122] *See id.* at 1157-58. The court stated that "[i]t seems far more plausible . . . that the recording device, and not the extension phone, is the instrument used to intercept the call." *See id.* at 1158. In so holding, the court expressed its disapproval of *Epps*, which held that a dispatch console to which a recorder was attached, not the recorder itself, was the instrument used to monitor a conversation. *See id.* at 1157.

[123] *See Deal*, 980 F.2d at 1158.

them without regard to its business interest in the calls was "well beyond the boundaries of the ordinary course of business."[124]

Deal marked a significant departure from previous cases addressing the business-extension exception because it focused on the equipment used to monitor.[125] *Sanders v. Robert Bosch Corp.*[126] expanded the *Deal* analysis, holding that only certain kinds of equipment may be used to monitor.[127]

In *Sanders*, the employer, a security company, installed recording devices on several company phones in an attempt to prevent bomb threats.[128] The court adopted *Deal*'s two-pronged test and held that the employer's monitoring was not protected under the business-extension exception.[129] Applying the test's first prong, the court held that despite the fact that the recording device had been purchased and installed by the phone company, it was not a "telephone instrument" that "further[ed] the [employer's] communication system."[130] Because of this, the employer's monitoring was not protected under the business-extension exception.[131] Applying the test's second prong, the court held that the employer's surreptitious recording of all conversations made over certain phone lines was not in the ordinary course of business despite the employer's fear of bomb threats.[132] Noting that the evidence of bomb threats was scant, the court concluded that the employer's rationale for monitoring did not justify its failure to inform employees that their calls were being monitored.[133]

Deal and *Sanders* suggest that employers may use an extension phone to listen to their employees' business-related conversations, but not to record

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[124] *Id.*

[125] *Compare* discussion of *Deal* analysis, *supra* notes 117-24 and accompanying text *with* discussion of *Watkins*, *Briggs*, *Epps*, and *James*, *supra* notes 79-112 and accompanying text.

[126] 38 F.3d 736 (4th Cir. 1994).

[127] *See id.* at 740.

[128] *See id.* at 737-38. The security company was employed by a manufacturer to provide security at its plant. *See id.* at 738. The company had received several bomb threats during the previous year. *See id.* In an attempt to identify the voice of any future persons making bomb threats, the security company contacted the local phone company and had recording devices installed on several of the plant's telephone lines. *See id.* The devices monitored the phone lines twenty-four hours a day, seven days a week. *See id.* All conversations made over the monitored lines were recorded at the plant's security office and later replayed by company supervisors. *See id.* The plaintiff was an employee of the security company whose personal conversations over the company phone lines had been recorded, and listened to by several of his supervisors. *See id.* The court held that the supervisors' actions violated Title I of the ECPA. *See id.*

[129] *See id.* at 740.

[130] *Id.*

[131] *See id.*

[132] *See Sanders*, 38 F.3d at 741-42.

[133] *See id.*

these conversations.[134] This stands in sharp contrast to *Briggs*, *Watkins*, and *Epps*, which allow employers to record employees' business-related telephone conversations.[135] The courts' shift from a "content-based" approach to a "context-based" approach may suggest a change in the policy consideration underlying courts' interpretation of the business-extension exception.

3. Policy considerations behind the judicial application of the business-extension exception

Judicial application of the business-extension exception is driven by policy considerations. Close examination of the exception's legislative history and the cases interpreting the exception as it relates to telephone monitoring may shed light on these policy considerations and provide insight into how the exception would be applied to emerging forms of communication like e-mail.[136]

It is important to place the exception and the cases interpreting it in their historical context.[137] At the time the business-extension exception was codified, it was common practice for telemarketing companies to use extension phones to monitor their employees' telephone conversations with the public for training purposes.[138] In order to monitor an employee's conversation, a supervisor would have to pick up the extension phone while the conversation was occurring.[139] Although the legislative history does not expressly state why Congress added the business-extension exception to the ECPA,[140] it may have done so to allow telemarketing companies to continue this practice.

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[134] *See* discussion of *Deal* and *Sanders*, *supra* notes 117-33 and accompanying text. *See Deal*, 980 F.2d at 1157 ("[The court is] not as easily convinced as is at least one of our sister circuits that an extension telephone is exempt equipment under [the business-extension exception] when a recording device is attached to the extension to record calls for later listening.").

[135] *See* discussion of *Watkins*, *Briggs*, and *Epps*, *supra* notes 79-104 and accompanying text.

[136] *See, e.g.*, Lee, *supra* note 4; Griffin, *supra* note 10; Witt, *supra* note 3; McCartney, *supra* note 3; Gantt, *supra* note 18; Araneo, *supra* note 7 (looking to judicial application of the exception toward telephone monitoring to predict application of the exception to e-mail).

[137] *See* Susan Ellen Bindler, Note, *Peek and Spy: A Proposal For Federal Regulation of Electronic Monitoring in the Workplace*, 70 WASH. U. L.Q., 853, 853-54 (1992) (describing the historical context of employer monitoring).

[138] *See id.*

[139] *See id.*

[140] *See* S. REP. NO. 99-541, 11-17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3565-71. *See also* Briggs v. American Air Filters Co., Inc., 630 F.2d 414, 418 (1980) (commenting that the legislative history "sheds almost no light on what Congress intended by the extension telephone exception").

This conclusion seems plausible in light of where the business-extension exception appears in the statute. The ECPA prohibits the use of an "electronic or mechanical" device to intercept an oral or electronic communication.[141] The business-extension exception is not found in the list of exceptions to this rule,[142] but rather in the definition of "electronic or mechanical device."[143] This may suggest that Congress included the exception to allow telemarketing companies to continue their practice of monitoring for training purposes.

Changes made to the text of the business-extension exception may also suggest that Congress did not intend to allow employers to use devices connected to extension phones to record employees' telephone conversations. The ECPA's business-extension exception mirrors Title III's business-extension exception.[144] An early draft of the Title III exception excluded all telephone equipment provided to the employer by a telephone company from the definition of "mechanical or electronic" device.[145] The American Civil Liberties Union voiced concern that the exception, as written, would allow extension phones to be used as monitoring devices.[146] When the bill was passed, the business-extension exception contained the additional requirement that the equipment must be used in the ordinary course of business.[147] The ordinary course of a telemarketing company's business involved merely listening to employees' telephone conversations, not recording them.[148] Thus, Congress may not have intended the exception to allow employers to record employees' telephone conversations.[149]

The development of the case law interpreting the business-extension exception suggests that courts agree with this interpretation of the legislative history.[150] Early cases interpreting the exception, such as *Watkins*, *Epps*, and

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[141] *See* 18 U.S.C. § 2511(1)(b) (1994).

[142] *See* 18 U.S.C. § 2511(2) (1994).

[143] *See* 18 U.S.C. § 2510(5)(a) (1994).

[144] *Compare* Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510(5) (1982 & Supp. IV 1986) *with* The Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510(5) (1994).

[145] *See* H.R. 5470, 90th Cong., 1st Sess., § 2515(d)(1) (1967), *reprinted in* Hearings on the Anti-Crime Program Before the Subcomm. No. 5 of House Comm. on the Judiciary, 90th Cong., 1st Sess. 892, 894 (1967).

[146] *See* H.R. 5470, 90th Cong., 1st Sess., § 2515(d)(1) (1967), *reprinted in* Hearings on the Anti-Crime Program Before the Subcomm. No. 5 of House Comm. on the Judiciary, 90th Cong., 1st Sess. 892, 989 (1967).

[147] *See* Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510(5) (1982 & Supp. IV 1986).

[148] *See* Bindler, *supra* note 137, at 413 (describing employers' telephone monitoring practices).

[149] *See supra* notes 136-48 and accompanying text.

[150] *See* discussion of cases interpreting the business-extension exception, *supra* notes 73-135 and accompanying text.

Briggs, involved employers who merely listened in on employees' phone calls,[151] or simultaneously recorded and listened in on employees' phone calls.[152] The decisions in these cases focused only on whether the telephone conversations in question were business related, ignoring the equipment used to monitor the conversations.[153] The two most recent cases addressing the exception, *Deal* and *Sanders*, have involved employers that attached recording devices to extension phones, recorded all conversations that occurred while the device was attached, and listened to the recorded conversations after they had taken place rather than as they were occurring.[154] The decisions in these cases focused on the nature of the monitoring equipment, holding that the exception did not allow the use of recording devices.[155] This suggests that courts now interpret the business-extension exception as only allowing employers to listen in on employees' telephone conversations, rather than record them.[156] As the following section will discuss, this narrow interpretation of the exception may prevent employers from monitoring computerized forms of communication, such as e-mail.

4. *Application to e-mail*

The *Sanders* holding that recording devices do not qualify as "telephone or telegraph" equipment[157] suggests that the business-extension exception will not protect employers who monitor their employees' e-mail.[158] To understand why *Sanders* is likely to have this effect on e-mail monitoring, it is necessary to examine how e-mail is transmitted and how it could be intercepted through an extension phone.

As discussed previously, e-mail is transmitted over an intranet's network cables as electronic signals.[159] An employer could monitor its employees' e-mail through an extension of the network cable the e-mail is transmitted over.[160] To do so, the employer would need to attach a recording device capable of capturing the electronic signals and translating them back into their

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[151] *See Briggs*, 630 F.2d at 414; *Watkins*, 704 F.2d at 577. *See also* discussion of *Briggs* and *Watkins*, *supra* notes 79-97 and accompanying text.

[152] *See Epps*, 802 F.2d at 412. *See also* discussion of *Epps*, *supra* notes 98-104 and accompanying text.

[153] *See* discussion of *Watkins*, *Briggs*, and *Epps*, *supra* notes 73-104 and accompanying text.

[154] *See* discussion of *Deal* and *Sanders*, *supra* notes 117-35 and accompanying text.

[155] *See* discussion of *Deal* and *Sanders*, *supra* notes 117-35 and accompanying text.

[156] *See* discussion of *Deal* and *Sanders*, *supra* notes 117-35 and accompanying text.

[157] *See Sanders*, 38 F.3d at 740.

[158] *See* discussion *infra* notes 159-172.

[159] *See* discussion of intranet e-mail, *supra* notes 30-51 and accompanying text.

[160] *See supra* notes 45-51 and accompanying text.

original textual form.[161] Without such a recording device, the intercepted e-mail would be unintelligible.[162]

The business-extension exception states that the interception of an electronic communication with "telephone or telegraph" equipment attached to an extension line does not violate the ECPA.[163] *Sanders* held that this equipment must be a component of the communication system.[164] Thus, employers may only monitor employees' e-mail if the device used to intercept the e-mail qualifies as "telephone or telegraph" equipment and is considered to be a component of the employer's communication system.[165]

Sanders specifically held that "recording devices" are not telephone or telegraph equipment that "further the [employer's] communication system."[166] Thus, if the recording devices employers use to intercept e-mail are similar to the recording device used in *Sanders*, the employer's monitoring is likely to violate the ECPA.[167]

The monitoring device employed in *Sanders* recorded any conversation made over the telephone lines it was connected to and indexed the time and date of each conversation.[168] A computer connected to an intranet's network cable would be capable of recording all e-mail messages transmitted over the cable.[169] It would also be capable of indexing the messages in a more sophisticated manner than the *Sanders* device. Not only would it be capable of recording the time and date each message was sent, it would also be capable of determining from which particular computer terminal the message was sent,

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[161] E-mail is translated into electronic code before it is transmitted. *See* TITTLE & ROBBINS, *supra* note 33, at 13-14. This code is broken into separate parts called "packets," each of which may take a separate path from the sender to the recipient. *See id.* In order to monitor the entire message, one would need to capture all of the message's packets. *See id.* Once the packets are captured, it would be necessary to translate them from electronic code back into text before reading them. *See id.* This translation would require the computer doing the monitoring to record the message. *See id.*

[162] *See id.*

[163] 18 U.S.C. § 2510(5)(a) (1994).

[164] *See Sanders*, 38 F.3d at 740.

[165] *See id. See also* discussion *supra* notes 126-35 and accompanying text.

[166] *Sanders*, 38 F.3d at 740.

[167] *See* discussion *supra* notes 120-35 and accompanying text. *See also* comparison of monitoring device used in *Sanders* to the type of monitoring device one would use to monitor e-mail, *infra* notes 168-72 and accompanying text.

[168] *See Sanders*, 38 F.3d at 738. The recording device, known as a "voice logger" was an eight-channel reel-to-reel tape recorder. *See id.* Seven of the eight channels were connected to the plant's telephone lines. *See id.* The eighth channel continuously indexed the time and date to allow easy access to particular conversations. *See id.*

[169] *See* discussion of e-mail interception, *supra* notes 45-51 and accompanying text.

by whom it was sent, and to whom it was sent.[170] Given these similarities, it is likely that a computer, like the device used in *Sanders*, would not qualify as a "telephone instrument" that "further[s] the employer's communication system."[171] Thus, it does not appear that employers who monitor their employees' e-mail will be protected under the ECPA's business-extension exception.[172]

This conclusion appears to be supported by the legislative history behind the business-extension exception.[173] Congress appears to have added the exception to allow telecommunications companies to monitor their employees' telephone conversations for training purposes.[174] Monitoring employees' e-mail does not appear to fit within the narrow purpose of the business-extension exception.

Thus, the business-extension exception appears to protect employees' e-mail from employer monitoring. Recent cases interpreting the exception have held that it does not protect employers who use recording devices to monitor their employees' telephone conversations.[175] If this standard is applied to e-mail monitoring, it is likely that the equipment used to intercept and record e-mail messages will be treated similarly.[176] Therefore, it is reasonable to conclude that the business-extension exception would not allow employers to monitor their employees' e-mail.

B. The Service-Provider Exception

The second exception to the ECPA is commonly known as the "service-provider" exception.[177] Both Title I and Title II contain a service-provider exception;[178] however, the two versions of the exception contain different statutory language.[179] At least one commentator addressing this exception has

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[170] *See* TITTLE & ROBBINS, *supra* note 33, at 13-14 (discussing the process by which e-mail is sent).

[171] *See Sanders*, 38 F.3d at 740.

[172] *See supra* notes 157-71 and accompanying text.

[173] *See* discussion of legislative history, *supra* notes 136-56 and accompanying text.

[174] *See* discussion of legislative history, *supra* notes 136-56 and accompanying text. *See also James*, 591 F.2d at 581-82 (holding that an employer that monitored its employees' telephone conversations with customers for training purposes fell "squarely within" the provisions of the business-extension exception).

[175] *See* discussion of *Deal* and *Sanders*, *supra* notes 117-35 and accompanying text.

[176] *See* discussion *supra* notes 157-74 and accompanying text.

[177] *See, e.g.*, Araneo, *supra* note 7, at 349.

[178] *See* 18 U.S.C. § 2511(2)(a)(i), 2701(c)(1) (1994).

[179] The Title I service-provider exception states, in pertinent part, that:

> [i]t shall not be unlawful under this chapter for . . . an officer, employee or agent of a provider of . . . [an] electronic communication service, whose facilities are used in the

argued that the two versions of the service-provider exception would be interpreted equally, given the ECPA's intent to protect electronic communications equally.[180] A recent case, *Bohach v. City of Reno*,[181] may have made this commentator's speculation moot, however, by holding that Title II's service-provider exception grants service-providers broader authority to monitor than the Title I exception.[182]

If courts follow *Bohach*, its holding may have huge implications for forms of communication like e-mail that exist in both transmitted and stored form.[183] This is particularly true in the context of private-sector intranet systems where one's employer is always the service-provider and will have access to employees' e-mail in both its transmitted and stored forms.[184] Restrictions placed on monitoring transmitted e-mail by the Title I exception will mean little to employees if their employers may simply employ their broader monitoring powers under the Title II exception to access the backed-up copies of employees' e-mail.[185]

In light of *Bohach* it is necessary to examine the two versions of the service-provider exception separately. This section will first examine Title I's service-provider exception and the restrictions it places on monitoring transmitted messages. This section will then examine the restrictions the Title II service-provider exception places on accessing stored communications. In doing so, this section will examine whether *Bohach* correctly interprets the Congressional intent behind the ECPA.

> transmission of . . . electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service . . . .

18 U.S.C. § 2511(2)(a)(i) (1994). Title II's service provider exception provides that an unauthorized accession of a stored electronic communication does not violate Title II when the accession is done "by the person or entity providing a wire or electronic communication service[.]" 18 U.S.C. § 2701(c)(1) (1994).

[180] *See* Gantt, *supra* note 18, at 362-63 (arguing that the ECPA's intention is to protect electronic communications regardless of the medium through which they are sent). *But see* Greenberg, *supra* note 21, at 247-49 (arguing that Title II allows service providers much greater access to stored electronic communications).

[181] 932 F. Supp. 1232 (D. Nev. 1996).

[182] *See id.* at 1236. The court held that Title II "allows service providers to do as they wish when it comes to accessing communications in electronic storage." *Id.*

[183] *See* discussion *supra* notes 181-82 and accompanying text.

[184] Because an intranet is owned by the employer, the employer will have access to any e-mail transmitted over the intranet's network cables or stored in the mailserver's back-up files. *See* discussion of intranet e-mail systems, *supra* notes 30-51 and accompanying text.

[185] *See* Greenberg, *supra* note 21, at 248-52 (arguing that granting transmitted communications stronger protection than stored communications is irrational).

1. The Title I service-provider exception

The Title I service provider exception applies to electronic communications while they are being transmitted.[186] The exception allows:

> an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service . . . .[187]

Thus, Title I's service-provider exception can be seen as a two-pronged exception allowing companies that provide electronic communications services to monitor electronic communications under limited circumstances. Monitoring is permitted when it is incident to the rendition of the company's services or when the company reasonably believes that the monitoring is necessary to protect its rights or property.[188]

Few cases have interpreted the Title I service-provider exception;[189] however, the courts have interpreted its predecessor, the Title III common carrier exception, narrowly.[190] This is demonstrated by *United States v. Clegg*.[191]

In *Clegg*, a telephone company attached a monitoring device to the business and residential phone lines of an individual the company suspected was using a "blue box"[192] to obtain free telephone calls.[193] The monitoring device

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[186] *See Bohach*, 932 F. Supp. at 1235-36. *See also* United States v. Moriarty, 962 F. Supp. 217, 220-21 (D. Mass. 1997).

[187] 18 U.S.C. § 2511(2)(a)(i) (1994).

[188] *See id.*

[189] The cases addressing the Title I service-provider exception merely state that Title I applies to transmitted electronic communications, not stored electronic communications which are covered under Title II. *See Moriarty*, 962 F. Supp. at 220-21; *Bohach*, 932 F. Supp. at 1235-36; *Steve Jackson Games*, 36 F.3d at 461-62 (holding that stored electronic communications are covered under Title II).

[190] *See, e.g.*, United States v. Clegg, 509 F.2d 605 (5th Cir. 1975); Simmons v. Southwestern Bell Tel. Co., 452 F. Supp. 392 (W.D. Okla. 1978), *aff'd*, 611 F.2d 342 (10th Cir. 1979).

[191] 509 F.2d 605 (5th Cir. 1975).

[192] The *Clegg* court described a blue box as "an electronic device . . . [used] to circumvent the toll call billing system of the phone company." *Id.* at 608.

[193] *See id.* A security supervisor for Southwestern Bell had received information that Clegg might be using a blue box to obtain free phone calls. *See id.* The security supervisor and an agent from the FBI met with the informant and decided to attach a TTS 176 device to Clegg's business and home telephone lines. *See id.* The TTS 176 monitors the line to which it is attached and produces a record of the time and date of all outgoing phone calls. *See id.* On the day following the device's installation, the TTS 176 detected that illegal long distance phone calls were being made from Clegg's business phone. *See id.* Later, the device noticed that

recorded only the time and date of the telephone calls.[194] The court held that the telephone company's actions were protected by the common carrier exception.[195] The court did stress, however, that the monitoring device had been used to prevent long distance abuse and that it had not monitored the content of the telephone calls.[196] *Clegg* suggests that the service-provider exception will strictly limit the extent to which a service-provider may monitor phone calls to protect its property rights.

Simmons v. Southwestern Bell Telephone Co.,[197] demonstrates that the courts will also limit the extent to which service-providers may use the rendition of their services as a justification for monitoring. *Simmons* involved a telephone company that monitored phone lines reserved exclusively for customer service.[198] In holding that the company's monitoring was protected by the common carrier exception, the court reasoned that the company's interest in maintaining open lines for customer service calls was incidental to the rendition of its services.[199] The court stressed, however, that the exemption would not have permitted the company to monitor calls made on telephones available for personal use.[200]

Clegg and *Simmons* demonstrate the narrow interpretation courts have applied to the common carrier exception.[201] If this narrow interpretation is applied toward the Title I service-provider exception, service providers would be allowed to monitor electronic communications only when monitoring is incident to the rendition of the service-provider's services or necessary to protect the service-provider's rights or property.[202] This narrow interpretation

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illegal phone calls were also being made from Clegg's home phone. *See id.* The TTS 176 was used to monitor Clegg's phone lines for approximately four months during which it detected over two hundred blue box calls being made. *See id.*

[194] *See id.* at 610.

[195] *See id.* at 614.

[196] *See id.* at 612.

[197] 452 F. Supp. 392 (W.D. Okla. 1978), *aff'd*, 611 F.2d 342 (10th Cir. 1979).

[198] *See id.* at 393-94. Simmons had been employed as a "deskman" or "testboardman" at Southwestern Bell's Oklahoma City testing center. *See id.* Simmons worked with several other employees at a "testdesk," a large, complex panel where customers' reports of trouble were received. *See id.* Southwestern Bell had a written policy prohibiting employees from making personal calls from the testboard. *See id.* There were other telephones not subject to monitoring available for personal calls. *See id.* The deskmen, including Simmons, knew that the testboard lines were monitored, and Simmons had been repeatedly warned to curb his excessive use of the testboard for personal phone calls. *See id.*

[199] *See id.* at 396.

[200] *See id.* The court noted that, "[h]ad the plaintiff been monitored on [a phone reserved for personal calls], the court would wholeheartedly agree that the defendant had overstepped its limited privilege." *Id.*

[201] *See* discussion of *Simmons* and *Clegg*, *supra* notes 189-200 and accompanying text.

[202] *See* discussion of *Simmons* and *Clegg*, *supra* notes 189-200 and accompanying text.

may suggest that the courts do not believe that Congress intended to grant broad monitoring rights to service providers.

2. *Policy considerations behind judicial application of the Title I service-provider exception*

Like the business-extension exception, judicial application of Title I's service-provider exception is driven by policy considerations. Foremost of these considerations is the ECPA's attempt to balance employers' business interests with employees' privacy rights.[203] While the ECPA safeguards employers' business interests such as property protection and the ability to properly render their services to customers,[204] the ECPA also protects employees' privacy rights, requiring that monitoring be done in the least intrusive manner possible.[205] As the *Clegg* analysis demonstrates, technology plays a crucial role in this balancing act.

The telephone company involved in *Clegg* suspected that the defendant was using a "blue box" to obtain free telephone calls.[206] In order to confirm this suspicion, and prevent further theft, the telephone company needed to prove that the calls were being made from the defendant's telephone without being charged to his account.[207] The telephone company employed a monitoring device that recorded only the time and date of all telephone calls made from the defendant's house, and the court held this action to be permissible because the monitoring device did not record the content of the telephone calls.[208] Once the telephone company established that illegal telephone calls were being made from the defendant's telephone it recorded portions of the telephone calls made from the defendant's telephone to prove that the defendant, rather than some third party, had made the telephone calls.[209] The court found this permissible because the company recorded only the salutations.[210] The *Clegg* holding suggests that courts will require employers

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[203] The ECPA's legislative history demonstrates this balancing of interests. *See* 1986 U.S.C.C.A.N. 3555, 3559. Congress states that it enacted the ECPA to provide clear guidelines for businesses and ensure that individuals' privacy is protected. *See id.*

[204] *See* 18 U.S.C. § 2511(2)(a)(i), (2)(d) (1994).

[205] *See* 18 U.S.C. § 2518(5) (1994) (requiring law enforcement officials executing wiretaps to minimize intrusion to the extent possible). *Watkins v. L.M. Berry & Co.*, 704 F.2d 577 (11th Cir. 1983), appears to have extended this requirement to private sector employers. *See id.* at 584.

[206] *Clegg*, 509 F.2d at 608. *See also* discussion of *Clegg*, *supra* notes 191-98 and accompanying text.

[207] *See Clegg*, 509 F.2d at 608.

[208] *See id.* at 610.

[209] *See id.* at 612.

[210] *See id.*

to limit the intrusion of their monitoring to the extent made reasonably possible by existing technology.

3. Application to e-mail

In order to determine how the courts will apply the service-provider exception to e-mail, it is important to consider the role technology has played in balancing employers' business interests and employees' privacy rights, in the context of telephone monitoring, and assess how the balancing of these interests will be altered by the computer technology employed to deliver e-mail.[211] As discussed previously, courts have required that monitoring be conducted in the least intrusive manner possible[212] and have looked to existing technology to determine whether a particular act of monitoring is permissible.[213] If technology makes it possible to meet an employer's business interests while protecting employees' privacy interests, the courts should require employers to utilize this technology when monitoring employees' electronic communications.[214] This section examines how the difference in technology employed by telephone communication and e-mail should strictly limit an employer's ability to monitor its employees' e-mail.

The service-provider exception allows an electronic communications service-provider to monitor electronic communications in only two situations: 1) when the monitoring is incident to the rendition of the company's services, and 2) in order to protect the company's rights or property.[215] Within the context of an intranet e-mail system, the rendition of service primarily involves properly routing e-mail messages between parties.[216] Employers' property protection concerns primarily involve the need to prevent employees from divulging important company documents to their competitors via e-mail.[217]

In order to determine the extent to which courts will allow an employer to monitor under either prong of the Title I service-provider exception, it is necessary to determine the extent to which intrusions to employees' privacy can be reasonably limited while ensuring that the aforementioned objectives

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[211] *See* discussion *supra* notes 203-10 and accompanying text.

[212] *See Watkins*, 704 F.2d at 584.

[213] *See Clegg*, 509 F.2d at 608.

[214] *See* discussion of *Clegg* analysis, *supra* notes 199-202 and accompanying text.

[215] *See* discussion *supra* notes 166-88 and accompanying text.

[216] *See generally* Terry Morehead Dworkin, *Protecting Private Employees From Enhanced Monitoring: Legislative Approaches*, 28 AM. BUS. L.J. 59 (1990).

[217] *See* OFFICE OF TECHNOLOGY ASSESSMENT, THE ELECTRONIC SUPERVISOR: NEW TECHNOLOGY, NEW TENSIONS, 5 (1987). *See also* discussion *supra* notes 16-19 and accompanying text.

are met.[218] An e-mail message is composed of two elements: 1) the message text, and 2) the label or address, which is separate from the message text.[219] As all the routing information is contained in the message's address, proper routing of the message does not require monitoring the message's text.[220] This makes e-mail monitoring similar to the monitoring performed in *Clegg* where it was possible to accommodate the service-provider's business needs by monitoring only a portion of the communication.[221] In light of this similarity, courts applying this prong of Title I's service-provider exception to the private-sector workplace should require employers to limit their monitoring to the message's address.

In order to determine the extent to which the courts will allow employers to monitor employees' e-mail under the second prong of the service-provider exception, it is necessary to examine the extent to which current intranet security devices allow employers to protect their property interests without intruding on their employees' privacy.[222] As discussed previously, an intranet system is a closed system connected to the outside world, or internet, through a single portal.[223] Arguably, an employer that wished to prevent employees from leaking company documents to competitors via e-mail could simply monitor the text of each e-mail message that is sent through this portal. This would be time consuming and would only discover an employee's actions after the fact. Current computer technology offers a better alternative.[224] By attaching a security device to the intranet's connection to the internet, it is possible to prevent employees from e-mailing company documents to competitors without monitoring the individual text of each message sent.[225]

The most frequently used security device is known as a "firewall."[226]

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[218] *See* discussion *supra* notes 211-17 and accompanying text.

[219] *See* discussion *supra* notes 33-35 and accompanying text.

[220] *See* discussion *supra* notes 33-35 and accompanying text.

[221] *See* discussion of *Clegg*, *supra* notes 191-96, 206-10 and accompanying text.

[222] *See* discussion *supra* notes 203-10 and accompanying text.

[223] *See* discussion of intranet e-mail systems, *supra* notes 30-32 and accompanying text. *See also* BREMNER ET AL., *supra* note 24, at 32.

[224] *See* BREMNER ET AL., *supra* note 24, at 392-417 (discussing intranet security issues and the different forms of intranet security companies typically employ).

[225] *See id.* at 395-97.

[226] *See id.* at 392-417. A firewall is a hardware or software package that prevents unauthorized "packets" from entering or leaving an intranet. *See id.* at 392-93. There are many different types of firewalls, each of which can be configured in a number of ways to customize one's security needs. *See id.* at 392-417 (discussing the various firewall configurations intranets employ). A thorough explanation of firewalls and how they work is beyond the scope of this article; however, those interested in gaining a complete understanding of firewalls and intranet security should visit several of the many websites discussing firewalls. *See* "Categories of Firewalls" (visited June 10, 1997) <http://gows.gintic.ntu.ac.sg: 8000/~ronnie/security/firewall.html#categories> (discussing circuit-level firewalls); "TIS Internet Firewall Toolkit"

Firewalls are security programs that prevent unauthorized transmissions from entering or leaving a company's intranet.[227] Firewalls can be used to mark confidential documents on an employer's computer network and prevent those files from passing through the intranet's connection to the internet.[228] This would prevent sensitive documents from leaving the employer's intranet via e-mail.[229]

If firewalls can effectively protect against e-mail based security leaks,[230] the reasoning in *Clegg* suggests that the courts would require employers to utilize firewalls rather than monitor the text of employee e-mail messages.[231] Numerous "hackers" however have demonstrated that even the most sophisticated security systems can be breached.[232] Recently developed forms

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(visited June 10, 1997) <http://www.tis.com/docs/products/fwtk/ index/html>; "The SOCKS Proxy Server" (visited June 10, 1997) <http://204.156.110/linux/ howto/Firewall-HOWTO-8.html> (websites discussing two popular proxy servers).

[227] *See* BREMNER ET AL., *supra* note 24, at 394-95. A firewall generally consists of a "bastion host" and a "router." *See id.* Bremner, Iasi, & Servati describe a bastion host as follows:

> [A] bastion host is a computer specially fortified against network attacks. Network designers place bastion host computers on a network as a first line of network defense. A bastion host is the "choke point" of all communications that lead in and out of your intranet. By centralizing access through one computer, you can easily manage network security . . . .

Id. at 394. A router is a special device which filters out data packets based on criteria that the intranet's system manager specifies. *See id.* at 395. The router functions like a security guard, allowing certain packets to pass between the intranet and the internet and blocking others. *See id.* One form of firewall, called a network level firewall, uses the router to examine where each packet originated from and then decides whether to block the packet or allow the packet to pass from the intranet to the internet or vice versa. *See id.* at 400. A very basic network level firewall, called a "blacklist," blocks all packets originating from or sent to a competitor. *See id.* For more information on routers and their uses, *see id.* at 401.

[228] *See id.* This would involve placing all of the company's sensitive files in a certain directory on the intranet's hard drive and programming the router to block all packets emanating from this directory. *See id.* (describing the different criteria routers may be programmed to examine).

[229] *See id.* at 400-01.

[230] Bremner and her colleagues argue that firewalls can effectively protect an intranet. *See id.* at 395 ("Regardless of your internal security concerns, you will find that firewalls provide as much protection as you need.").

[231] *See* discussion of *Clegg* analysis, *supra* notes 191-96 and accompanying text.

[232] *See* Behar, *supra* note 41 (describing the security risk hackers present to corporate networks). The article describes how a WheelGroup, a network security consulting firm, penetrated an unnamed Fortune 500 company's network. *See id.* at 58-61. The FBI recently surveyed over 400 companies and institutions, finding that approximately 40 percent had detected a recent "break-in." *See id.* at 58. Close to 30 percent of these break-ins took place at companies that employed firewalls. *See id.* at 59. These numbers represent only a fraction of the break-ins that occur. *See id.* According to the FBI, as many as 95 percent of all break-ins

of network security appear to offer near airtight protection,[233] but nothing short of completely isolating an intranet from the internet can offer total security.[234] Because network security devices appear to offer more than adequate protection against employee misuse,[235] courts addressing this prong of Title I's service-provider exception are likely to follow the reasoning in *Clegg* and *Watkins* and limit employer monitoring of employees' e-mail to the limited extent necessary to supplement the protection offered by a network security device.[236]

Thus, an employer's right to monitor employee e-mail under Title I's service-provider exception appears to be more limited than its right to monitor employee telephone calls. Whereas an employer wishing to monitor employee telephone calls under this exception could justify its monitoring as being incident to the rendition of its services or necessary to protect its property

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go undetected. *See id.* Of the break-ins that are detected, as little as 15 percent are actually reported. *See id.* According to one expert on computer security, "[t]he only secure computer is one that is turned off, locked in a safe, and buried 20 feet down in a secret location - and I'm not completely confident on that one either." *See id.* at 58 (quoting Bruce Schneier, author of the book E-MAIL SECURITY). Even the FBI cannot prevent Hackers from breaking into corporate networks. *See id.* at 59. Dennis Hughes, the FBI's senior expert on computer crimes, recently declared that "[t]he hackers are driving us nuts. Everyone is getting hacked into. It's out of control." *Id.* It is important to remember, however, that very few private-sector employees possess the skills necessary to penetrate a firewall's defenses. *See* BREMNER ET AL., *supra* note 24, at 395 (noting that most serious attacks to a company's intranet are likely to originate outside the intranet).

[233] *See* Behar, *supra* note 41, at 70. One such security system, considered to be the state of the art, is Pilot Network Services. *See id.* Pilot operates as a buffer between a company's network and the internet. *See id.* Rather than connecting directly to the internet, a company's network connects to one of Pilot's service centers. *See id.* Pilot then provides the company with supervised internet access. *See id.* This is accomplished through the use of a five-layered firewall whose data pathways are routinely altered. *See id.* The system is continuously monitored by Pilot's employees. *See id.* Trident Data Systems, a well known security consultant for the Pentagon, conducted an independent review of Pilot's systems and found them to be "by far the most secure network [they had] encountered." *Id.* Another innovative security system, NetRanger, is aimed at thwarting break-ins within corporate networks. *See id.* NetRanger allows a company to monitor and alter network traffic in real time, much like a flight tower guiding airplanes. *See id.* The system can also be programmed to work automatically, sounding an alarm and halting suspicious network activity when it is detected. *See id.* After having NetRanger tested by the National Security Association, the Pentagon purchased thirty-two of the devices to protect its networks. *See id.* Unlike firewalls, these security systems do not come cheap. *See id.* Pilot's services cost close to $5,000 per month while the NetRanger system costs $25,000. *See id.*

[234] *See* BREMNER ET AL., *supra* note 24, at 397 (noting that the best way to prevent unauthorized access to a company's intranet is to completely isolate it from the internet).

[235] *See* discussion *supra* notes 224-34 and accompanying text.

[236] *See* discussion *supra* notes 206-10, 224-34 and accompanying text.

rights,[237] an employer wishing to monitor employee e-mail would be allowed to do so only when network security devices are inadequate to protect its property rights.[238]

4. *The Title II service-provider exception*

Like Title I, Title II of the ECPA contains a service-provider exception.[239] The Title II exception is couched in broader language,[240] providing that the ECPA's prohibition of unauthorized access to stored electronic communications "does not apply with respect to conduct authorized . . . by the person or entity providing a wire or electronic communication service[.]"[241]

The only case to address this exception, *Bohach v. City of Reno*,[242] held that Title II allows service providers much broader monitoring rights than its Title I counterpart.[243] In *Bohach*, the Reno Police Department accessed stored messages sent between police officers over the department's alphanumeric pager system[244] and used the messages in an internal affairs investigation.[245]

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[237] *See Simmons*, 452 F. Supp. at 396.

[238] *See* discussion *supra* notes 230-36 and accompanying text.

[239] 18 U.S.C. § 2701(a) provides:

> (a) OFFENSE. - Except as otherwise provided in subsection (c) of this section whoever -
>
> (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or
>
> (2) intentionally exceeds an authorization to access that facility;
>
> and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

Id. 18 U.S.C. § 2701(c) limits liability under Title II as follows:

> (c) EXCEPTIONS. - Subsection (a) of this subsection does not apply with respect to conduct authorized -
>
> (1) by the person or entity providing a wire or electronic communications service . . .

Id.

[240] *Compare* 18 U.S.C. § 2701(c) (1994) *with* 18 U.S.C. § 2511(2)(a)(i) (1994). The Title II exception does not contain the express limitation that the service-provider's monitoring be a necessary incident to the rendition of service or necessary for the protection of property. *See id.*

[241] 18 U.S.C. § 2701(c) (1994).

[242] 932 F. Supp. 1232 (D. Nev. 1996).

[243] *See id.* at 1236.

[244] The pager system, "Alphapage," is a software program installed on the police department's Local Area Network ("LAN") computer system. *See id.* at 1233. The software allows the transmission of short alphanumeric messages to visual display pagers. *See id.* Alphapage was installed to allow the broadcast of "mini news releases" and other "timely information" to the media via the display pagers and thus free up the police department's telephone lines. *See id.* at 1234. An order issued at the time of the system's installation warned all users that "[e]very Alphapage message is logged on the network," and prohibited the sending of certain types of messages. *See id.* To use the system, one logs on to any Reno Police

Faced with this investigation, the police officers filed suit, claiming that the storage of the messages by the Department's LAN and the retrieval of the messages from the LAN's server were violations of the ECPA.[246] The officers sought to halt the investigation and bar disclosure of the messages' contents.[247]

The court noted that the ECPA classified the messages in question as stored electronic communications protected under Title II rather than transmitted communications protected under Title I.[248] Stating that Title II "allows service providers to do as they wish when it comes to accessing communications in electronic storage," the court held that the police department's actions did not violate Title II of the ECPA.[249]

The *Bohach* court expressly stated that the restrictions placed on the Title I service-provider exception do not apply to the Title II service-provider exception.[250] Thus, if *Bohach* correctly interprets Title II's service-provider exception, the ECPA places no restrictions on service providers who wish to access stored electronic communications.[251]

5. *Bohach contradicts the ECPA's purpose and intent*

A strong argument can be made that the *Bohach* court did not correctly

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Department computer terminal and selects the message's recipient from a list of persons holding display pagers. *See id.* One then types the text of the message and hits the "send" key. *See id.* The message is then sent to the LAN's "Inforad Message Directory," where it is stored in the message server's directory. *See id.* The computer then dials the paging company and sends the message to the company by modem. *See id.* The paging company then sends the message to the recipient's display pager via radio broadcast. *See id.*

[245] *Id.* at 1233.

[246] *See id.*

[247] *See id.*

[248] *See id.* at 1236. The court stated that:

> The computer's storage of an electronic communication, whether that storage was "temporary" and "intermediate" and "incidental to" its impending "electronic transmission," or more permanent storage for backup purposes, was "electronic storage." An "electronic communication," by definition, cannot be "intercepted" when it is in "electronic storage," because only "communications" can be "intercepted," and . . . the "electronic storage" of an "electronic communication" is by definition, not part of the communication. The treatment of messages in "electronic storage" is governed by [18 U.S.C.] §§ 2701-11, not by the restrictions on "interception" set out at [18 U.S.C.] §§ 2501-22.

Id.

[249] *Id.*

[250] *See id.*

[251] *See id. See also* Greenberg, *supra* note 21, at 238, 247-48 (noting that Title II appears to grant service providers broader monitoring rights than Title I).

interpret the Title II service-provider exception.[252] Although Title II's vague statutory language does not appear to place restrictions on service-providers who wish to access stored electronic communications,[253] the ECPA's purpose and intent as well as the Act's legislative history strongly suggest that Congress intended the same restrictions to apply to the service-provider exception under both Title I and Title II.[254]

The strongest argument against the *Bohach* court's interpretation of the Title II service-provider exception lies in the irrational result its implementation would lead to.[255] Strict application of the *Bohach* holding would create a situation where the configuration of an electronic communication system determined the level of protection electronic communications would receive under the ECPA.[256] This is illustrated by the following example.[257]

> Employer A runs a large corporation and operates its own intranet e-mail system. Employer B operates an identical e-mail system, except that, rather than using its own computer equipment, B employs a third party service provider. The two systems are identical in both their technical capacity and their usage. Both employers routinely monitor e-mail sent over their systems. Under *Bohach*, employer A, whose monitoring is covered under Title II, would have no restrictions placed on its monitoring whereas employer B, whose monitoring is covered by Title I, would have strict limitations placed on its ability to monitor employees' e-mail.[258]

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[252] *See* BENKLER ET AL., RULES OF THE ROAD FOR THE INFORMATION SUPERHIGHWAY: ELECTRONIC COMMUNICATIONS AND THE LAW § 20.3(3) (1996) (arguing that Title II's service-provider exception is should be interpreted to include the same limitations on monitoring present in Title I's service-provider exception); Greenberg, *supra* note 21, at 251-52 (arguing that the service-provider exception should be amended to explicitly provide the same protection for stored and transmitted communications).

[253] *See* 18 U.S.C. § 2701(c) (1994). *See also* Greenberg, *supra* note 21, at 238 (noting that the Title II service-provider exception's language appears to give blanket protection to service providers who access stored communications); White, *supra* note 4, at 1088-89 (commenting that Title II's provisions regarding stored communications appear to protect service providers who access stored communications).

[254] *See* BENKLER ET AL., *supra* note 252, at § 20.3(3).

[255] *See id.*

[256] *See id.* (commenting that a strict reading of the Title II service-provider exception would create a situation where the configuration of an e-mail system would be "key to the rights and responsibilities" of employers and employees).

[257] *See id.* This example is based on a hypothetical situation posed in the treatise's discussion of Title II. *See id.*

[258] *Id.* Employer B would be covered under Title I rather than Title II because it does not own the network over which the e-mail is sent and would therefore be unable to access the stored e-mail messages. *See id.* at § 20.3(5)(a). Employer B would be forced to intercept the messages as they were being transmitted from the employee's computer terminal to the service-provider's network cables. *See id.*

In effect, the *Bohach* holding establishes a different standard of protection for electronic communications that are transmitted over private intranet systems and systems run by a third party or common carrier.[259] Congress expressly stated that the ECPA was enacted to prevent such a situation.[260] Moreover, *Bohach*, when read strictly, would hold that an electronic communication sent over a privately owned system is protected from monitoring during the few seconds in which it is being transmitted and completely unprotected from monitoring as soon as it reaches its recipient.[261] Had Congress intended such a bizarre result, it would arguably have expressly stated so.

Finally, a strong argument can be made that when an employer that owns its electronic communication system accesses employees' stored communications for monitoring purposes, it is not acting as a service-provider and is not

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[259] *See* discussion *supra* notes 242-51 and accompanying text.

[260] *See* 1986 U.S.C.C.A.N. 3555, 3556. Congress enacted the ECPA because, as the Act's sponsor, Senator Leahy stated, the existing law was "hopelessly out of date." *Id.* The legislative history expands on Senator Leahy's statement, saying of the existing law:

> Since the divesture of AT&T and deregulation, many different companies, not just common carriers, offer a wide variety of telephone and other communications services. It does not make sense that a phone call transmitted via common carrier is protected by the current federal wiretap statute, while the same phone call transmitted via a private telephone network such as those used by many U.S. corporations today, would not be covered by the statute.

Id. In light of this statement, Philip Walker, Vice-Chair of the Electronic Mail Association, has argued that, "electronic mail users deserve privacy regardless of what type of entity runs their system." Frank C. Morris, Jr., *E-Mail Communications: the Next Employment Law Nightmare*, HR ADVISOR, Jul.-Aug. 1995, at 15 (citing S. Rep. No. 99-541, at 8 (1986)).

[261] *See Bohach*, 932 F. Supp. at 1236. *Bohach* held that electronic communications are protected under Title I while they are transmitted. *See id.* E-mail messages are transmitted in a matter of seconds. *See* discussion of e-mail, *supra* notes 33-36 and accompanying text. Once the e-mail is transmitted to its recipient, it is stored on the intranet's mailserver as sent mail. Stored e-mail is protected by Title II which, according to *Bohach*, does not incorporate Title I's limitations to monitoring. *See Bohach*, 932 F. Supp. at 1236. Thus, while e-mail is being transmitted, service providers may only monitor it to ensure the proper rendition of service or protect their property, but once the e-mail is stored on the intranet's mailserver, service providers may "do as they wish when it comes to accessing [the e-mail]." *Compare* 18 U.S.C. § 2511(2)(a)(i) (1994) *with Bohach*, 932 F. Supp. at 1236. It may, in fact, be argued that *Bohach*, when read literally, holds that service providers who wish to monitor employee e-mail are simultaneously restricted by Title I's limitations and granted unlimited monitoring rights under Title II. *See* Kenneth R. Shear, *What You Don't Know Can Hurt You: E-Mail Privacy Claims Under The Federal Electronic Communications Provacy Act*, 43 LA. B.J. 464, 465 (commenting that it is difficult to draw the line between when e-mail is intercepted while in transmission or retrieved from storage). E-mail's schizophrenic nature stems from the ECPA's definition of "electronic storage" as including storage of the communication that is incident to its transmission. *See* 18 U.S.C. § 2510(17)(a) (1994) (defining "electronic storage"). Because e-mail is backed-up at each intermediate node it passes through during transmission, it is simultaneously in storage and in transmission. *See* Shear, *supra* at 465 n.12.

protected under Title II's service-provider exception.[262] Because the ECPA does not define what a "provider of electronic communications service" is,[263] it is difficult to determine whether the Act would consider an employer to be a service provider when the employer's accession of stored communications was not incident to the rendition of the electronic communication service. The ECPA's definition of "stored electronic communications" appears to answer this question in the negative.[264] Electronic storage is defined in terms of properly routing messages between users and back-up protection.[265] This may suggest that Congress intended Title II to authorize access to stored communications only to the extent necessary to facilitate electronic communications services.[266]

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[262] *See* BENKLER ET AL., *supra* note 252, at § 20.3(3) (arguing that an employer that operates its own intranet is not acting as a service provider when it is monitoring employees' e-mail).

[263] *See* 18 U.S.C. § 2510 (1994) (defining terms used in the ECPA).

[264] *See* 18 U.S.C. § 2510(17) (1994) (defining "electronic storage" as intermediate storage of an electronic communication that is incident to its transmission and storage of the communication for back-up purposes). Focusing on this, Benkler and others argue that the Title II service-provider exception's authorization to access stored electronic communications contemplated only access that is necessary to facilitate the electronic communication system. BENKLER ET AL., *supra* note 252, at § 20.3(3). An employer, they argue, is a service provider only when it accesses stored electronic communications in order to facilitate the delivery of electronic communications. *See id.*

[265] *See* 18 U.S.C. § 2510(17) (1994).

[266] *See* BENKLER ET AL., *supra* note 252, at § 20.3(3) ("In the case of e-mail monitoring, . . . an employer is a [service] provider when it allows access [to stored e-mail] for purposes of facilitating communication, but cannot authorize its own monitoring activities when their purpose is entirely alien to the provision of communication services."). Benkler and others present the following hypothetical and argument:

> Employer M maintains a purely private e-mail system on its computer. Every message sent creates not one, but two backup copies. The first backup copy is maintained in one directory, is never processed, and is destroyed after thirty days. The second copy is maintained in another directory, which the employer periodically scans to review content, and is maintained for three years. Presumably, the first copy could be considered to be a maintenance backup copy in electronic storage, and access to it would therefore [be] subject only to Title II, but not to Title I. It is unlikely, however, that the second copy is similarly electronic storage, within the meaning of Title II, as opposed to a collection of intercepted messages.
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> The definition [of electronic storage] focuses on the function of the storage, rather than on the history of its creation. Electronic storage is either the temporary intermediate storage incidental to transmission, which exists only until the message is delivered, or backup storage, which is defined by its function [of] backup protection of the communication. The second copy created in the hypothetical is neither a part of the transmission nor a backup for purposes of the communication. Its purpose is to allow the employer to monitor employee e-mail. It seems at least plausible that the second copy would be considered to be an interception, not the creation of electronic storage.

The paucity of legislative history addressing Title II makes it difficult to discern what limits, if any, Congress intended to place on service providers' access to stored communications.[267] One thing is clear, however, the *Bohach* court's reading of Title II's service-provider exception stands as the only holding to address the issue and may eliminate e-mail privacy on company-owned intranets.[268]

6. *Application to e-mail*

If courts apply *Bohach* to e-mail monitoring,[269] e-mail transmitted over a company-owned intranet would most likely be subject to unrestricted monitoring as soon as it is stored on the intranet's server.[270] Employers wishing to monitor their employees' e-mail could avoid Title I's restrictions on monitoring simply by waiting a few seconds for the message to be backed-up on the intranet's mailserver.[271]

> Now, as a technical matter, there is no need to create two copies in two different directories. The employer could simply use the copy in backup storage to . . . print out messages for review by human supervisors. The question a court will have to decide is whether, once an employer follows a pattern of using stored communications for monitoring purposes, the storage itself is not tainted as interception ab initio. Since the definition of storage is functional, not technical, and turns on a determination that the communication was stored in aid of the [transmission of the] communication or for communication backup purposes, a determination that the primary purpose was not communication backup, but monitoring, may require that a court consider the monitoring practice to be an interception under Title I.

Id. at § 20.3(2)(a).

[267] *See* 1986 U.S.C.C.A.N. 3555, 3589-90 (discussing Title II and its exceptions). The legislative history does not address the issue of employers using stored communications for monitoring purposes. *See id.* This lack of Congressional guidance leaves Title II subject to interpretation in "unpredictable ways." Shear, *supra* note 261, at 465.

[268] *See* Greenberg, *supra* note 21, at 238 (commenting that the Title II service-provider exception appears to provide blanket protection to employers who monitor stored communications on their system); White, *supra* note 4, at 1088-89 (noting that employers who operate their own communications system may argue that Title II's prohibition of access to stored communications does not apply to them).

[269] Although *Bohach* involved an alphnumeric pager system rather than an e-mail system, the two systems appear to be analogous in their manner of operation. Compare the description of how "Alphapage" operates, *See Bohach*, 932 F. Supp. at 1234, with the description of how e-mail is sent over an intranet, *supra* notes 33-36 and accompanying text.

[270] *See Bohach*, 932 F. Supp. at 1236. Once an electronic communication, such as e-mail has been stored on the communication system's server, access is covered by Title II. *See id.* Title II allows service providers to do "as they wish" with stored communications. *Id.*

[271] *See id. See also* Greenberg, *supra* note 21, at 247-48 (noting that if Title II is interpreted to grant service providers unrestricted authority to access stored communications, the limitations placed on monitoring by Title I will vanish as soon as the message is stored on the communication system's server).

If courts decline to follow *Bohach*, it is likely that they will apply Title I's restrictions on monitoring to Title II.[272] Under this interpretation of Title II, e-mail stored on a company-owned intranet would receive much greater protection against monitoring than *Bohach* would provide.[273] The Title II service-provider exception would only allow employers to access stored e-mail messages when the employer is acting as a service provider.[274] This would be narrowly defined to include access necessary to properly route messages between users and provide back-up protection for messages.[275] Employers would not be allowed to use business interests as a pretext to access employees' stored e-mail messages.[276] It is difficult to predict how courts addressing the issue of employer e-mail monitoring will interpret Title II.[277] Arguably,

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[272] *See* BENKLER ET AL., *supra* note 261, at § 20.3(3) (arguing that a strict reading of the Title II service-provider exception would contradict the ECPA's purpose of protecting electronic communications regardless of the medium they are transmitted over and asserting that courts should apply the Title I service-provider exception's limitations to the Title II exception); Greenberg, *supra* note 21, at 252 ("Whether a message is 'intercepted,' 'accessed,' or 'acquired' should be irrelevant to an employer's liability, and employee communications should be protected regardless of whether the message is transmitted or remains in storage.").

[273] *See* BENKLER ET AL., *supra* note 261, at § 20.3(3) (analyzing how Title II's service-provider exception would apply to e-mail if Title I's limitations on monitoring are imputed to Title II).

[274] *See id.* (commenting that an employer would only be considered a service provider when its actions were necessary to facilitate the transmission and storage of electronic communications).

[275] *See* 18 U.S.C. § 2510(17) (1994) (defining "electronic storage"). *See also* BENKLER ET AL., *supra* note 261, at § 20.3(2)(a) (noting that the ECPA defines electronic storage to the temporary storage of messages incidental to their transmission and the storage of messages for backup purposes).

[276] *See* BENKLER ET AL., *supra* note 261, at § 20.3(2)(a) (commenting that an employer could not "authorize its own monitoring activities when their purpose is entirely alien to the provision of communications services").

[277] See Shear, *supra* note 261, at 465 (noting that the ECPA's complex nature and lack of legislative history make it easy for courts interpreting the statute to arrive at "counterintuitive results"). The *Briggs* court addressed the ECPA's complexity as follows:

> We might wish we had planted a powerful electronic bug in a Congressional antechamber to garner every clue concerning [the wiretap statute], for we are once again faced with the troublesome task of an interstitial interpretation of an amorphous Congressional enactment. Even a clear beam of statutory language can be obscured by the mirror of Congressional intent. Here, we must divine the will of Congress when all recorded signs point to less than full reflection. But, alas, we lack any sophisticated sensor of Congressional whispers, and are remitted to our more primitive tools. With them, we can only hope to measure Congress' general clime. So we engage our wind vane and barometer and seek to measure the direction of the Congressional vapors and the pressures fomenting them. Our search for lightning bolts of comprehension traverses a fog of inclusions and exclusions which obscure both the parties' burdens and the ultimate goal [of the ECPA].

Briggs v. American Air Filter Co., Inc., 630 F.2d 414, 415 (5th Cir. 1980).

courts should decline to follow *Bohach* because it clearly contradicts the ECPA's purpose and intent.[278] Unfortunately for private-sector employees, there are no guarantees that future courts addressing this issue will do so.[279] In light of this, private-sector employees should not consider e-mail sent over their employer's intranet to be private, even if their employer has never stated that it will monitor e-mail.

C. The Consent Exception

The final key exception to the ECPA is commonly known as the consent exception. Regarding transmitted communications, Title I states that:

> It shall not be unlawful under this chapter . . . to intercept a wire, oral, or electronic communication . . . where one of the parties to the communication has given prior consent to such interception . . . .[280]

Title II allows access to stored communication when consent has been given "by a user of [the electronic communication] service with respect to a communication of or intended for that user[.]"[281] Cases addressing the consent exception under Title I have held that consent may be express or implied.[282] No cases to date have addressed the exception under Title II, but it is likely that the same standard would apply given the ECPA's stated intent to protect communications without regard to the medium of transmission.[283]

The seminal case defining the limits of the consent exception is *Watkins v. L. M. Berry & Co.*,[284] which held that implied consent will be closely limited to the confines of an employer's monitoring policy.[285] In *Watkins*, the

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[278] *See* Shear, *supra* note 261, at 465 (arguing that the ECPA's intent to protect privacy strongly suggests that service providers' access to stored communications should be limited to the narrow purpose of facilitating electronic communication services); Greenberg, *supra* note 21, at 252 (arguing that, in light of the ECPA's emphasis on privacy, employees' communications should be treated equally regardless of whether they are transmitted or stored).

[279] *See* Shear, *supra* note 261, at 465 (noting that the ECPA is "worded ambiguously and awkwardly and may be interpreted in unpredictable ways").

[280] 18 U.S.C. § 25112)(d) (1994).

[281] 18 U.S.C. § 2701(c)(1)-(2) (1994).

[282] Griggs-Ryan v. Smith, 904 F.2d 112, 116 (1st Cir. 1990); Watkins v. L.M. Berry & Co., 704 F.2d 577, 581 (11th Cir. 1983); United States v. Willoughby, 860 F.2d 15, 19 (2d Cir. 1988); United States v. Amen, 831 F.2d 373, 378 (2d Cir. 1987); Campiti v. Walonis, 611 F.2d 387, 393 (1st Cir. 1979).

[283] *See* 1986 U.S.C.C.A.N. 3555, 3559 (commenting that recent changes in technology had created a situation in which similar messages transmitted over different mediums would receive different legal treatment, necessitating the changes in the law proposed by the ECPA).

[284] 704 F.2d 577 (11th Cir. 1983).

[285] *See id.* at 583-84. The court held that "[t]he limit of the [consent] exception for Berry Co.'s business was the policy that Berry Co. in fact instituted." *Id.*

employer's monitoring policy stated that it would monitor employees' business calls, but would only monitor personal calls to the extent necessary to determine that they were personal.[286] The court held that this policy allowed the employer to imply employees' consent with respect to business calls, but not the contents of personal calls.[287] Reasoning that consent cannot "routinely be implied from [the] circumstances,"[288] and that "knowledge of the capability of monitoring alone cannot be considered implied consent,"[289] the court held that consent can only be implied when: 1) an employee knows or should know about a policy of constantly monitoring calls; or 2) when an employee makes a call over a line reserved explicitly for business purposes.[290]

Deal v. Spears,[291] further defined the limits of the consent exception. In *Deal*, an employer informed his employee that he might be forced to monitor telephone conversations to reduce the number of personal calls being made.[292] The court held that this was insufficient to create implied consent, stating that consent could not be "cavalierly implied."[293] The court emphasized that the employer only informed his employee that he might monitor phone conversations, not that he actually was engaged in monitoring.[294]

Watkins and *Deal* demonstrate that courts interpret the consent exception narrowly. To fall within the exception's protection, an employer must either: 1) obtain express consent;[295] or 2) have a documented policy regarding the monitoring of employee communications or use of company equipment that will allow the court to find implied consent.[296] Courts will not find implied consent easily. Rather, courts will carefully examine the facts of each case, paying close attention to the terms of the employer's policy on monitoring or use of office equipment.[297] A policy on monitoring or a policy prohibiting the

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[286] *See id.* at 579.

[287] *See id.* at 583-84.

[288] *Id.* at 581.

[289] *Id.*

[290] *See id.* at 582.

[291] 980 F.2d 1153 (8th Cir. 1992).

[292] *See id.* at 1155-56.

[293] *Id.* at 1157 (citing *Watkins*, 704 F.2d at 581).

[294] *See id.*

[295] Simmons v. Southwestern Bell Tel. Co., 452 F. Supp. 392, 396 (W.D. Okla. 1978), *aff'd*, 611 F.2d 342 (10th Cir. 1979).

[296] *See Watkins*, 704 F.2d at 579.

[297] *See Griggs-Ryan*, 904 F.2d at 116-17. The court held that implied consent "inheres where a person's behavior manifests an acquiescence or a comparable voluntary diminution of his or her otherwise protected rights." *Id.* at 116. The court further held that "implied consent is 'consent in fact' which is inferred from surrounding circumstances indicating that the [party] knowingly agreed to the surveillance." *Id.* at 116-17. The court held that "[t]he circumstances relevant to an implication of consent will vary from case to case, but the compendium will

use of office equipment for personal purposes will not always allow an employer to imply employees' consent to monitoring.[298] The courts will carefully examine the terms of the employer's policy and will not allow an employer's monitoring to exceed the scope of its monitoring policy.[299]

A key distinction between the consent exception and the business-extension and service-provider exceptions is the requirement of notice. The business-extension and service-provider exceptions apply regardless of whether employers have given their employees notice that they may be monitored.[300] In contrast to these exceptions, the consent exception applies only when employees know or should know that monitoring will occur.[301] Essentially, the consent exception does not seek to prevent monitoring, but rather requires that employees be put on notice that monitoring may occur.[302] In determining how the consent exception will be applied to e-mail, it is helpful to keep this distinction in mind.

1. Application to e-mail

Several commentators have suggested that the consent exception allows employers to determine the extent of their right to monitor employees' e-mail.[303] An employer may obtain its employees' express consent to monitor

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ordinarily include language or acts which tend to prove (or disprove) that a party knows of, or assents to, encroachments on the routine expectation that conversations are private." *Id.* at 117.

[298] *See Deal*, 980 F.2d at 1157 (implied consent not found when employer only told employee that he might begin monitoring, not that he would).

[299] *See Watkins*, 704 F.2d at 583-84 (limit of employees' implied consent to monitoring defined by employer's policy); *Deal*, 980 F.2d at 1157 (implied consent not found when employer had no written policy on monitoring and only suggested to employee that he might begin monitoring); *Griggs-Ryan*, 904 F.2d at 117 (implied consent found when plaintiff was repeatedly informed that all incoming calls would be monitored).

[300] *See* 18 U.S.C. §§ 2510(5)(a), 2511(2)(a)(i), 2701(c)(1)-(2) (1994). Neither the business-extension nor the Title I or II service-provider exceptions contain language that would require an employer to notify his employees that monitoring may occur. *See id.* *See* Briggs v. American Air Filter Co. Inc., 630 F.2d 414, 416-19 (5th Cir. 1980)(employer monitoring held permissible despite lack of notice to employee).

[301] *See Griggs-Ryan*, 904 F.2d at 117. The consent exception requires that the party being monitored "knowingly agreed to the surveillance." *Id.*

[302] *See* Gantt, *supra* note 18, at 357-58 (noting that the consent exception grants employers unrestricted authority to monitor as long as the employer implements a comprehensive monitoring policy clearly defining the level of monitoring that will occur).

[303] *See* Lee, *supra* note 4, at 154 (noting that the legality of e-mail monitoring under the consent exception "may depend on the specificity and clarity of the company's monitoring policy"); Gantt, *supra* note 18, at 358 (arguing that an employer who institutes a policy on monitoring is "only limited in that the scope of its intrusion must match the legitimate business interest justifying the invasion, and employers can expand the permissible scope simply by offering legitimate interests justifying broad monitoring policies").

e-mail sent over the employer's intranet by requiring employees to sign a written consent agreement as a condition of employment.[304] This agreement may allow the employer to monitor all e-mail sent over its intranet, or it may authorize monitoring to a lesser extent by clearly defining when and to what extent e-mail will be monitored.[305] If the employer chooses to do the latter, the courts will not allow the employer's monitoring to exceed the scope of the agreement.[306]

If an employer does not obtain express consent to monitor its employees' e-mail, it may still argue that its employees impliedly consented to monitoring by using the employer's office equipment.[307] To make this argument, the employer could point to the existence of a policy on monitoring e-mail or a policy prohibiting use of office equipment for personal business.[308] If the employer has a policy on monitoring e-mail, the courts will likely allow the employer to monitor its employees' e-mail but will strictly limit the employer's monitoring to the scope of the policy.[309] If the employer has a policy prohibiting employees from using office equipment to conduct personal business, the courts will likely allow employers to monitor employees' e-mail only to the extent necessary to determine that the e-mail is personal in

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[304] *See* Griffin, *supra* note 10, at 517 (commenting that the consent exception allows employers to escape liability for monitoring by obtaining express written consent to the monitoring from employees).

[305] *See* Araneo, *supra* note 7, at 357-58 (comparing the monitoring policies adopted by various companies). These policies range from all-inclusive policies that grant the employer complete access to employees' e-mail, to "hands off" policies which strictly limit the employers' rights to monitor employees' e-mail. *See id.* One commentator notes that the Electronic Mail Association has a toolkit available to assist employers in developing e-mail policies. *See* James J. Cappel, *Closing the E-mail Privacy Gap*, 44 J. SYS. MGMT. 6, 9-10 (1993).

[306] *See Watkins*, 704 F.2d at 583-84 (limiting employees' implied consent to monitoring as defined by employer's policy); *Deal*, 980 F.2d at 1157 (implied consent not found when employer had no written policy on monitoring and only suggested to employee that he might begin monitoring).

[307] *See* Araneo, *supra* note 7, at 351 (noting that employees who use an employer's e-mail system when the employer has a clear policy stating that e-mail will be monitored may have given implied consent to be monitored); White, *supra* note 4, at 1085 (commenting that employees who are aware of their employer's monitoring policy and continue to use the employer's e-mail system are likely to have given implied consent to monitoring).

[308] *See* Gantt, *supra* note 18, at 404-05 (noting that e-mail policies give employers a strong defense against employees' e-mail privacy claims). Gantt notes that monitoring policies may grant the employer unrestricted rights to monitor or may prohibit the use of the employer's e-mail system for personal messages. *See id.*

[309] *See Watkins*, 704 F.2d at 583-84 (holding that the limit to an employer's right to monitor is defined by the scope of the employer's monitoring policy). *See also* Griffin, *supra* note 10, at 518 (noting that the scope of an employer's right to monitor employees' e-mail would be limited to the original conditions set forth in the employer's monitoring policy).

nature.[310] As with the service-provider exception, the message to private-sector employees is clear: do not expect e-mail sent over an employer's intranet to be private.

D. The ECPA Does Not Provide Adequate Protection for Employees' E-mail and Should Be Reformed

The preceding discussion demonstrates that the ECPA does not adequately protect private-sector employees' e-mail privacy. Neither the ECPA nor the law interpreting the consent exception clearly establish when implied consent may be found.[311] Moreover, the Title II service-provider exception appears to grant employers unlimited access to stored e-mail, allowing employers to avoid the minimal limitations placed on monitoring by the consent exception.[312]

Much of the uncertainty surrounding the extent of employees' e-mail privacy stems from the ECPA's failure to specifically address e-mail monitoring.[313] Congress should rectify this situation by amending the ECPA to specifically address the limits on e-mail monitoring in the private-sector workplace.[314]

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[310] *See* Griffin, *supra* note 10, at 518 n.177 (noting that courts may require employers to cease monitoring employees' e-mail once it has been determined that the e-mail is personal in nature). *See also Watkins*, 704 F.2d at 582; United States v. Axselle, 604 F.2d 1330, 1334 (10th Cir. 1979) (holding that employers who monitor employees' telephone conversations must cease monitoring once it is determined that the call is personal in nature).

[311] *See* 18 U.S.C. § 2511(d) (1994). The ECPA does not define a standard by which implied consent may be found. *See id. See also* Araneo, *supra* note 7, at 351 (commenting on the "capricious nature" of the law interpreting the consent exception); White, *supra* note 4, at 1085 (noting that a policy stating only that e-mail may be monitored or that the employer reserves the right to monitor e-mail may not be sufficient to establish implied consent).

[312] *See* discussion of the Title II service-provider exception, *supra* notes 239-51 and accompanying text.

[313] Although the ECPA's legislative history makes it clear that e-mail is a form of "electronic communication" protected by the Act, *see* 1986 U.S.C.C.A.N. 3555, 3562, the ECPA itself does not mention e-mail. *See* 18 U.S.C. § 2510(12) (defining "electronic communication" in broad terms). One commentator has criticized the ECPA for its failure to address modern forms of communication such as e-mail, saying:

> [T]he essence of the ECPA's remedial efforts is comprised of cosmetic alterations of a statute originally drafted for phone lines, not the sophisticated, technological mediums of the future. Rather than trying to adapt or reclothe the weathered original, it is imperative that new legislation be drafted from scratch to adequately and squarely confront the unique dilemmas of the modern era.

Araneo, *supra* note 7, at 354.

[314] *See* Greenberg, *supra* note 21, at 251 ("As was the case in 1986, [the wiretap statute] is again ripe for amending."); Griffin, *supra* note 10, at 527 (arguing that "[t]he absence of legal

To accomplish this, Congress should specifically address how the service-provider exception will apply to company-owned intranets where the employer is also the service-provider.[315] Congress should limit employer monitoring under this exception to situations where the employer is acting in its capacity as a service provider.[316] The service-provider exception should also be amended to allow monitoring only when it is necessary to facilitate the electronic communications service.[317]

Such an amendment to the ECPA would require employers who wish to monitor their employees' e-mail to do so under the consent exception where they would be required to give their employees notice that monitoring will occur.[318] This would ensure that employees are made aware of the fact that they may be monitored and that they will be informed as to the extent to which the monitoring will occur.[319] Congress should amend the consent exception to establish clear guidelines regarding employer monitoring policies.[320] Specifically, Congress should require that monitoring policies address the following:[321]

1) acceptable reasons for monitoring e-mail and the specific business purpose behind monitoring;
2) forms of monitoring that will be used;
3) how the information obtained from monitoring will be used;
4) who may conduct the monitoring; and

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protection and the employers' increased use of electronic monitoring devices demonstrate the need for federal legislative action").

[315] *See generally* Greenberg, *supra* note 21; BENKLER ET AL., *supra* note 252 (arguing that the service-provider exception should be limited in scope to apply only when the monitoring conducted is necessary for the rendition of electronic communication services).

[316] *See* BENKLER ET AL., *supra* note 252, at § 20.3(3) (arguing that an employer should only be considered a service-provider when the employer's actions are necessary to facilitate electronic communications service); Greenberg, *supra* note 21, at 251-52 (arguing that the service-provider exception should be curtailed or eliminated).

[317] *See* BENKLER ET AL., *supra* note 252, at § 20.3(2)(a),(3) (arguing that an employer should only be considered a service-provider when the employer's actions are necessary to facilitate electronic communications service).

[318] *See* discussion of the consent exception and its requirement of notice, *supra* notes 280-302 and accompanying text.

[319] *See* discussion of the consent exception and its requirement of notice, *supra* notes 280-302 and accompanying text.

[320] *See* Griffin, *supra* note 10, at 527 (arguing that the ECPA should be amended to include notification requirements and should require that monitoring be done in the least intrusive manner possible).

[321] At least two commentators have proposed model monitoring policies. *See* Araneo, *supra* note 7, at 362-64; Gantt, *supra* note 18, at 404-08 (establishing proposed guidelines for employer monitoring policies).

5) acceptable use of the employer's intranet by employees, such as whether employees may send personal e-mail over the employer's intranet.

Employees should be provided with a copy of this policy at the time they are hired, and the employer should periodically review the policy with employees.[322]

IV. PROTECTION OF E-MAIL PRIVACY UNDER THE COMMON LAW

The ECPA is not the only source of protection for workplace privacy rights. Given the limited protection offered by the ECPA, employees who have had their e-mail monitored may also wish to pursue common-law remedies such as the tort for invasion of privacy.[323]

A. Invasion of Privacy

Invasion of privacy encompasses four distinct torts, each of which protects a "substantial zone of freedom"[324] within which an individual has the right "to be let alone."[325] Of these four, the tort commonly called unreasonable intrusion upon the seclusion of another appears to be the most applicable to e-mail monitoring.[326]

Unreasonable intrusion upon seclusion consists of the intentional intrusion "upon the solitude or . . . private affairs or concerns [of another] . . . if the intrusion would be highly offensive to a reasonable person."[327] In order to demonstrate an actionable invasion of privacy under this theory, an individual must demonstrate that: 1) an actionable intrusion occurred; 2) the intrusion was highly offensive; and 3) the individual had a reasonable expectation of privacy in the area the intrusion occurred.[328] To determine whether employer monitoring of employee e-mail constitutes an unreasonable intrusion upon the employee's seclusion, one must examine each of these elements in turn.

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[322] *See* Araneo, *supra* note 7, at 362-64 (providing a model monitoring policy and arguing that employers should review their policies with employees on a regular basis).

[323] *See* Gantt, *supra* note 18, at 373-74 (noting that tort law may represent employees' greatest source of protection from employer monitoring).

[324] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 849, 851 (5th ed. 1984).

[325] *Id.*

[326] *See* Lee, *supra* note 4, at 161 (discussing the applicability of common law tort remedies to e-mail monitoring).

[327] RESTATEMENT (SECOND) OF TORTS § 625B (1977).

[328] *See* KEETON ET AL., *supra* note 324, § 117, at 855-56.

1. Meeting the "intrusion" requirement

The element of intrusion appears to be easily met. In determining whether an actionable intrusion into private information, such as one's e-mail, has occurred, courts look primarily to the means used to access the information.[329] When the means used are "abnormal in character," the intrusion is generally actionable.[330] According to one treatise on the law of torts, wiretapping and the use of electronic monitoring devices constitute "abnormal means" that satisfy the element of intrusion.[331]

2. Meeting the "highly offensive" and "reasonable expectation of privacy" requirements

Courts have blurred the line between the "highly offensive" and "reasonable expectation of privacy" elements, often addressing them as a single requirement.[332] To determine whether this requirement has been met, courts consider several factors.[333]

The first factor courts look to is the employer's normal office procedures and business practices.[334] Employers are generally free to take actions that will aid in the supervision, control, and efficient operation of the workplace.[335] Employer monitoring of employees' activities or searches of employees' desks or files are more likely to be found permissible when employers notify their employees that they may be subject to monitoring or routine searches.[336]

The second factor involves the employer's purpose for monitoring and the means used to conduct the monitoring.[337] Generally, if the employer has a legitimate business interest in monitoring the employee and uses the least

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[329] *See id.* at 856.

[330] *Id.*

[331] *See id.* at 854, 856.

[332] *See* KEETON ET AL., *supra* note 324, § 117, at 856.

[333] *See id.*

[334] *See id.*

[335] *See* Saldana v. Kelsey-Hayes Co., 443 N.W.2d 382, 384 (Mich. Ct. App. 1989). The court held that "[t]he [employer's] duty to refrain from intrusion into another's private affairs is not absolute in nature, but rather is limited by those rights which arise from social conditions, including the business relationship of the parties." *Id.*

[336] *See id. See generally* Gantt, *supra* note 18, (arguing that employers may avoid liability for monitoring employees' e-mail by publishing a policy stating that all e-mail will be subject to monitoring).

[337] *See* KEETON ET AL., *supra* note 324, § 117, at 856.

intrusive means possible, the monitoring will not constitute an invasion of employees' privacy.[338]

The third factor involves balancing the employer's business interests against employees' reasonable expectation of privacy.[339] When an employer's business interests are balanced against its employees' expectation of privacy, the business usually wins.[340]

Although numerous cases have addressed employees' workplace privacy rights, no court has addressed the issue of whether employer monitoring of employees' e-mail constitutes an invasion of privacy.[341] Thus, in order to determine how courts will address e-mail monitoring, it is helpful to examine how the courts have addressed employer monitoring of analogous forms of communication. The following sections will address two forms of communication that e-mail is commonly analogized to, traditional mail and lockers or file cabinets.

B. Comparison of E-mail With Traditional Mail

Some commentators have suggested that e-mail is analogous to traditional mail.[342] This analogy seems reasonable given the legislative history of the

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[338] *See* Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1136 (Alaska 1989) (employer's requirement that employees submit to drug testing held not to constitute an invasion of privacy because the tests were justified by the employer's legitimate business interest in protecting its workers' health and safety, administered at a reasonable time, and conducted in the least intrusive means possible).

[339] *See* Bratt v. Int'l Bus. Machines Corp., 785 F.2d 352, 358 (1st Cir. 1986); Semore v. Pool, 266 Cal. Rptr. 280, 285 (Cal. Ct. App. 1990). The *Semore* court held that, "[w]hile an employee sacrifices some privacy rights when he enters the workplace, the employee's privacy expectations must be balanced against the employer's interests." *Id.*

[340] *See* Jennings v. Minco Tech. Labs, Inc., 765 S.W.2d 497, 499 (Tex. Ct. App. 1989). The *Jennings* court held that mandatory drug testing did not violate employees' reasonable expectation of privacy when balanced against the employer's legitimate interest in health and safety. *See id.* The court further noted that employment on an "at will" basis is one that mutually exists as either party can end the relationship at their discretion without cause. *See id.* Thus, when an employer notifies employees of a change in employment conditions, the employees may either accept the new terms or quit. *See id.*

[341] *But see* Smyth v. Pillsbury Co., 914 F. Supp. 97 (E.D. Pa. 1996). *Smyth* involved a wrongful termination claim arising out of an employer's monitoring of its employees' e-mail. *See id.* at 98. After holding that the employer's actions did not constitute wrongful termination, the court, in dicta, suggested that the employer's monitoring of its employees' e-mail would not constitute an invasion of privacy under Pennsylvania law. *See id.* at 100-01. While *Smyth* addresses the issue of e-mail monitoring, its impact on future e-mail monitoring cases brought under invasion of privacy claims should be minimal because it involved a wrongful termination claim rather than an invasion of privacy claim. *See id.* at 100.

[342] *See* Gantt, *supra* note 18, at 379-80; Lee, *supra* note 4, at 165-66; Michael W. Droke, Comment, *Private, Legislative and Judicial Options for Clarification of Employee Rights to the*

ECPA as well as the many similarities between e-mail and traditional mail.[343]

The ECPA's legislative history suggests that Congress may have intended e-mail to be afforded the same protection as traditional mail.[344] The Office of Technology Assessment compiled a report of legislative options for Congress regarding the ECPA.[345] This report recommended that Congress act based on the assumption that e-mail would be provided the same protection as first class mail.[346] Congress adopted the recommendations contained in this report, suggesting that it intended this analogy to be made.

This analogy is also supported by a comparison of e-mail and traditional mail. Many textbooks on intranet technology make this comparison, describing e-mail as a computerized version of traditional mail.[347] Both methods of communication involve a textual message that is placed in an envelope bearing both the sender and receiver's addresses.[348] This envelope is handled by the postmaster, who delivers it to the recipient's mailbox.[349] Given these similarities, many courts may analogize e-mail to traditional mail.[350]

1. Employees' right of privacy in traditional mail

Employees' right to privacy in traditional mail delivered to them at the workplace depends primarily on whether the mail is personal or business

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Contents of Their Electronic Mail Systems, 32 SANTA CLARA L. REV. 167, 178 (1992); *see generally* Witt, *supra* note 3, at 564 (arguing that e-mail should be protected at a level slightly below the complete protection afforded to written mail under the Federal Mail Statute).

[343] *See* 1986 U.S.C.C.A.N. 3555, 3559 (commenting that modern businesses often use e-mail in lieu of or side-by-side with traditional mail). The ECPA was enacted to ensure that modern forms of communication were granted the same level of protection as traditional forms of communication. *See id.*

[344] *See id.*

[345] *See* OFFICE OF TECHNOLOGY ASSESSMENT, FEDERAL GOVERNMENT INFORMATION TECHNOLOGY: ELECTRONIC SURVEILLANCE AND CIVIL LIBERTIES 51-52 (1985).

[346] *See id.*

[347] *See, e.g.*, JACK QUINN, DIGITAL DATA COMMUNICATIONS 230-31 (1995); BRYAN COSTALES, SENDMAIL 11-16, (1993); STEVE DAVIS & CANDY TRAVIS, THE ELECTRIC MAILBOX 24-26 (1986) (discussing the similarities between e-mail and traditional mail).

[348] *See* RIK DRUMMOND & NANCY COX, LAN TIMES E-MAIL RESOURCE GUIDE 29 (1994); CASWELL, *supra* note 24, at 100 (explaining the process by which e-mail is sent).

[349] *See* DAVIS & TRAVIS, *supra* note 347, at 24-26 (noting the process by which e-mail is transmitted between sender and receiver).

[350] *See* Lee, *supra* note 3, at 165-66 (commenting that courts may analogize the monitoring of e-mail to opening personal mail).

related. Employers are generally free to open business related mail; however, they may not open employees' personal mail.[351]

This distinction is illustrated by *Vernars v. Young*.[352] In *Vernars*, the plaintiff's employer opened mail addressed to the plaintiff and clearly marked as personal.[353] In holding that the employer's actions could constitute an invasion of privacy, the court stated that "private individuals . . . have a reasonable expectation that their personal mail will not be opened and read by unauthorized persons."[354]

2. *Application to e-mail*

If courts analogize e-mail to traditional mail, employers will be able to monitor business related e-mail but will not be allowed to monitor personal e-mail.[355] This may require employers to determine that an e-mail message is business related before monitoring its content.

Making this determination could prove difficult for employers. While it is often easy to determine whether traditional mail is personal or business related by simply looking at the envelope, this may not be the case with e-mail.[356] E-mail "envelopes" contain only three pieces of information, the sender's address, the recipient's address, and a header briefly describing the "envelope's" content.[357] Employers could require employees to clearly identify personal messages as such in the message header, or employers could simply adopt a policy forbidding employees from sending personal e-mail over the employer's system. While either solution would allow employers to determine whether a message sent by an employee is personal or business related, neither would assist employers in determining whether mail sent to an employee from someone outside of the office is personal or business related.

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[351] *See* Vernars v. Young, 539 F.2d 966 (3d Cir. 1976) (employer's opening of mail addressed to employee and marked "personal" stated a claim for an invasion of privacy); Birnbaum v. United States, 436 F. Supp. 967 (E.D.N.Y. 1977), *aff'd in part, rev'd in part*, 588 F.2d 319 (2d Cir. 1978) (plaintiffs whose mail was intercepted, read and copied by Central Intelligence Agency without a warrant were entitled to recover damages under invasion of privacy claim); Miller v. Brooks, 472 S.E.2d 350 (N.C. Ct. App. 1996) (husband may have claim against estranged wife for invasion of privacy when estranged wife intercepted and read his mail).

[352] 539 F.2d 966 (3d Cir. 1976).

[353] *See id.* at 969.

[354] *Id.*

[355] *See* discussion *supra* notes 351-54 and accompanying text.

[356] *See* discussion *supra* notes 219-20 and accompanying text.

[357] *See* discussion *supra* notes 219-20 and accompanying text.

Courts may avoid this dilemma by applying the standards used in telephone monitoring cases arising under the ECPA's business-extension exception.[358] Under this approach, employers would be allowed unlimited rights to monitor business related e-mail, but would only be allowed to monitor personal e-mail to the extent necessary to determine that it is personal.[359] This approach would be consistent with the common-law's practice of allowing employers to take actions that aid in the supervision and control of the workplace while balancing the employer's business interests against the employees' expectations of privacy.[360]

C. E-mail Compared to Lockers, Desks, and File Cabinets

Commentators have also suggested that courts may find e-mail analogous to employees' lockers, desk drawers, or file cabinets.[361] This analogy also seems reasonable. E-mail messages are stored for back-up purposes as "files" in the mailserver's memory.[362] These files are often secured by a password.[363] Courts could easily view mailserver's memory as a locker or file cabinet and the password as a lock. From this, the courts could conclude that e-mail is similar to items placed within a locker or documents stored in a file cabinet.[364]

1. Employees' right of privacy in lockers, desks, and file cabinets

Employees generally have a right to privacy in items locked in a desk, file cabinet, or locker if their employer does not require them to provide their supervisor with a duplicate copy of the key or combination necessary to open

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[358] *See* discussion of the business-extension exception, *supra* notes 73-135 and accompanying text.

[359] *See* discussion of the business-extension exception *supra* notes 73-135 and accompanying text.

[360] *See, e.g.*, Bratt v. Int'l Bus. Machines Corp., 785 F.2d 352, 358 (1st Cir. 1986).

[361] *See* Gantt, *supra* note 18, at 379-80; Lee, *supra* note 4, at 165-66 (noting that courts may compare e-mail monitoring to opening an employee's locker).

[362] *See* DAVIS & TRAVIS, *supra* note 347, at 24-26 (discussing how e-mail is stored). *See also* technical overview of e-mail, *supra* notes 33-36 and accompanying text.

[363] *See* PHILLIP ROBINSON, DELIVERING ELECTRONIC MAIL 20 (1992) (discussing the technical aspects of e-mail). *See also* technical overview of e-mail, *supra* notes 33-36 and accompanying text.

[364] *See* Lee, *supra* note 4, at 163-64 (commenting that e-mail monitoring may be analogized to opening an employee locker or file cabinet).

the lock.[365] The leading case discussing workplace privacy rights related to desks, file cabinets, and lockers is *K-Mart v. Trotti*.[366]

In *K-Mart*, an employer provided its employees with lockers for the storage of their personal effects during work hours.[367] Employees could secure their lockers with locks provided by the employer or with their own personal locks.[368] When the employer provided an employee with a lock, it retained a master key; however, employees who provided their own locks were not required to provide the employer with a duplicate key.[369]

The court held that the lockers, in their unlocked state, were subject to reasonable searches by the employer.[370] Lockers secured with locks provided by the employer were also subject to reasonable employer searches because the employer, by retaining a master key, had manifested an interest in "maintaining control over the locker and . . . conducting legitimate, reasonable searches."[371] On the other hand, when an employee secured his locker with his own lock, the employer was barred from searching the locker because "the employee [had] manifested, and the employer recognized, an expectation that the locker, and its contents would be free from intrusion and interference."[372]

2. *Application to e-mail*

If courts analogize e-mail to lockers, *K-Mart* suggests that the level of privacy afforded to employees' e-mail will depend on the nature of the password employees' use to access their e-mail.[373] When an employer issues passwords to its employees, or requires them to register their passwords with a supervisor, the employer will probably have "maintained control" over its employees' e-mail and be allowed to monitor it.[374] On the other hand, if an employer allows its employees to provide their own passwords and does not require the passwords to be registered with a supervisor, the employer will probably be barred from monitoring its employees' e-mail, having "recognized an expectation" that its employees' e-mail is private.[375]

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[365] *See generally* K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632 (Tex. Ct. App. 1984).

[366] *See id.*

[367] *See id.* at 634.

[368] *See id.* at 634-35.

[369] *See id.*

[370] *See id.* at 637.

[371] *Id.*

[372] *Id.*

[373] *See* discussion *supra* notes 366-72 and accompanying text.

[374] *See* discussion *supra* notes 366-72 and accompanying text.

[375] *See* discussion *supra* notes 366-72 and accompanying text.

3. Public-sector employees' workplace privacy rights: the Ortega standard

The privacy rights of public-sector employees are protected under the Fourth Amendment, rather than the common-law.[376] These rights were significantly reduced by *O'Connor v. Ortega*.[377] While no case has formally applied the Fourth Amendment standard to common-law invasion of privacy claims, courts often consider Fourth Amendment standards when determining whether a private-sector employer's monitoring of its employees constitutes an invasion of privacy.[378] Given this, it is necessary to examine *Ortega* and discuss its possible effect on invasion of privacy claims.[379]

In *Ortega*, the plaintiff, a psychiatrist at a state hospital, became the subject of an investigation regarding his alleged mismanagement of the hospital's residency program.[380] During the investigation, hospital employees entered and searched the plaintiff's locked office and seized numerous items from his desk and files.[381] After being terminated, the plaintiff sued the hospital, claiming that the search violated his fourth amendment rights.[382] The Court found that the plaintiff had a reasonable expectation of privacy in his desk and files; however, the Court held that this expectation was limited, stating that:

> The operational realities of the workplace . . . may make some employees' expectations of privacy unreasonable when an intrusion is by a supervisor . . . . Public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation.[383]

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[376] The Fourth Amendment covers only public-sector employees because private-sector employers are not normally considered state actors. *See* Simmons v. Southwestern Bell Tel. Co., 452 F. Supp. 392, 394-95 (W.D. Okla. 1978), *aff'd*, 611 F.2d 342 (10th Cir. 1979).

[377] 480 U.S. 709 (1987).

[378] *See* Gantt, *supra* note 18, at 380 (commenting that many state courts have followed the Fourth Amendment balancing approach in addressing invasion of privacy claims).

[379] *See id.*

[380] *See Ortega*, 480 U.S. at 712.

[381] *See id.* at 713.

[382] *See id.* at 713-14.

[383] *See id.* at 717. The Court found support for its "operational realities" assertion in Mancusi v. DeForte, 392 U.S. 364 (1968). *Mancusi* involved a union official under investigation for criminal activity. *See id.* at 365. State officials searched and seized union records from his private office without a warrant. *See id.* The Court held that the plaintiff had an expectation of privacy in his office that protected it from the state officials' unwarranted search. *See id.* at 372. However, the Court suggested that a union employee probably would not have had a reasonable expectation of privacy against his union supervisors. *See id.*

Under *Ortega*, once a court finds a reasonable expectation of privacy, it must proceed to analyze the reasonableness of the search under the circumstances.[384] A search will be considered reasonable when the government employer's need for supervision, control, and efficiency in the workplace outweighs the invasion of the public-sector employee's privacy.[385] Thus, public-sector employees' privacy interests may be outweighed by their employer's interest in an efficient workplace.[386]

4. How Ortega may affect workplace privacy rights in the private-sector

Although *Ortega* addresses public-sector employees' workplace privacy, it may also affect private-sector employees' workplace privacy interests because the Court made reference to private-sector employees in its holding.[387] To date, three federal cases have applied the holding in *Ortega*. These cases, *Schowengerdt v. General Dynamics Corp.*,[388] *Shields v. Burge*,[389] and *Walker v. Darby*,[390] have all involved public-sector employees. A recent case addressing private-sector employees, *Sowards v. Norbar Inc.*,[391] did not

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[384] *See Ortega*, 480 U.S. at 719.

[385] *See id.* at 719-20.

[386] *See* Steven B. Winters, Note, *Do Not Fold, Spindle, or Mutilate: An Examination of Workplace Privacy in Electronic Mail*, 1 S. CAL. INTERDISCIPLINARY L.J. 85, 102 (1992) (analyzing *Ortega*'s impact on public-sector employees' privacy rights).

[387] *See Ortega*, 480 U.S. at 717.

[388] 823 F.2d 1328 (9th Cir. 1987). *Schowengerdt* held that a public sector employee has a reasonable expectation of privacy in "areas given over to his exclusive use" unless his employer notifies him that his office may be subject regular, work-related searches. *Id.* at 1333. The court reasoned that when a public-sector employee is forewarned of an office search, his expectation of privacy diminishes accordingly. *See id.* at 1334.

[389] 874 F.2d 1201 (7th Cir. 1989). *Shields* involved a police sergeant subjected to an internal investigation due to his alleged misconduct. *See id.* at 1201-02. During the investigation, two officers conducted warrantless searches of the plaintiff's desk and automobile. *See id.* at 1202. Relying on *Ortega*, the court held the search to be reasonable. *See id.* at 1202-03.

[390] 911 F.2d 1573 (11th Cir. 1990). *Walker* involved a public-sector employee who brought suit against his employer for bugging his work station. *See id.* at 1574-75. Because this suit was brought under the ECPA, the court only briefly addressed the *Ortega* standard, holding that, under the ECPA, a plaintiff's expectation of privacy must be both objectively reasonable, as in *Ortega*, and subjectively reasonable. *See id.* at 1578.

[391] 605 N.E.2d 468 (Ohio Ct. App. 1992). In *Sowards*, the plaintiff worked as a truck driver. *See id.* at 470. During layovers between routes, the plaintiff would stay in a motel room paid for by his employer. *See id.* at 474. During one such layover, the plaintiff's employer searched his motel room for a missing permit book. *See id.* The court held that this unconsented search constituted an invasion of privacy. *See id.*

address the *Ortega* holding.[392] This may suggest that courts will not apply the *Ortega* standard to private-sector employees.

If courts apply the *Ortega* standard to the private-sector workplace, private-sector employers would be able to search their employees' e-mail as long as their interests in workplace efficiency outweigh their employees' privacy interests.[393] This would eliminate much of the privacy afforded to private-sector employees under *K-Mart*.[394]

Thus, although it appears that the common law tort for invasion of privacy offers greater protection to employees' e-mail than the ECPA, this protection is speculative at best. The common law has not specifically addressed e-mail monitoring in the private-sector workplace, making it difficult to determine the level of privacy, if any, e-mail will be afforded by the courts. Because of this, employees should not rely on the common law tort for invasion of privacy to protect e-mail messages sent over an employer's intranet.

V. CONCLUSION

Employer monitoring of employee e-mail has become a serious and widespread problem in the modern workplace. While most employees believe their e-mail messages are private, recent data shows that many employers are monitoring their employees' e-mail. No cases have addressed whether e-mail monitoring violates an employees' right to privacy under federal statutory law or the common-law, leaving employees unsure as to what their employers can and cannot do.

The ECPA was enacted to provide privacy protection for modern forms of electronic communication such as e-mail; however, employers that operate their own intranet appear to be granted unlimited monitoring rights under Title II's service-provider exception and the consent exception. Clearly, the ECPA does not provide adequate privacy protection for private-sector employees' e-mail and should be amended to close the loopholes created by these exceptions.

The common law tort for invasion of privacy may provide greater protection against employer monitoring, particularly if courts analogize e-mail to lockers, desks, and file cabinets. Under this analogy, employees' e-mail would be protected from employer monitoring as long as the employer did not require employees to register their e-mail passwords with a supervisor. Employees' e-mail would receive slightly less protection if courts analogized

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[392] *See id.*

[393] *See* Winters, *supra* note 386, at 103-04 (arguing that *Ortega* eliminates most workplace privacy).

[394] *See id.*

e-mail to traditional mail. Under this analogy, employers would be prohibited from monitoring personal e-mail, but would be allowed to monitor business-related e-mail. Because no cases have addressed the tort for invasion of privacy as it applies to e-mail monitoring, any protection offered by the common law is, however, speculative at best.

Neither the ECPA nor the common-law tort for invasion of privacy offers complete protection for employees' e-mail. Legislation addressing the ECPA's flaws was introduced before Congress, but was not voted into law and has not been reintroduced. Until similar legislation is passed into law, private-sector employees should assume that the law does not protect the privacy of e-mail sent over an employer's intranet. In light of this, employees should not send personal e-mail over their employer's e-mail system.

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The Search for the Truth: Admitting Evidence of Prior Abuse in Cases of Domestic Violence

I. INTRODUCTION

In May of 1987, Alexander "Boy" Carvalho brutally beat his wife, Cathy, to death.[1] He broke her nose, her arms, and several of her ribs, which punctured her lungs.[2] The beating lasted for an hour and a half, yet during the trial for Cathy's murder, Carvalho was convicted only of manslaughter.[3] Carvalho claimed that during the prolonged beating, he never intended to kill her.[4] He also argued that the fatal injuries were not caused by him, but by the emergency medical personnel as Cathy was being transported to the hospital and at the hospital itself.[5]

After serving a mere eight year prison term for his wife's death,[6] Carvalho was paroled. Within a year, he was once again standing trial, this time for battering his new girlfriend, Nora, on two separate occasions. Carvalho was also charged for threatening to kill Nora in an attempt to prevent her from testifying at the trial.[7] As in many other cases of domestic violence, Nora recanted her allegations.[8] To help prove Carvalho's guilt and to overcome Nora's recantation, the prosecution attempted to introduce evidence of the fatal beating of Cathy in 1987.[9] The trial judge excluded the evidence.[10] Absent that evidence, the prosecution was unable to illustrate to the jury the true fear that Nora faced knowing that Carvalho could kill again.[11] The jury therefore never had the opportunity to appreciate the reasons for Nora's recantation.[12]

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[1] *See* Ken Kobayashi, *"I've Seen Boy Change," Says Recanting Accuser: Convicted Wife-Killer Denies Battering Girlfriend*, HONOLULU ADVERTISER, Apr. 15, 1996, at A1.

[2] *See id.* at A3.

[3] *See id.* at A1.

[4] *See id.*

[5] *See id.* at A3.

[6] *See id.* at A1.

[7] *See* Linda Hosek, *Carvalho Acquitted on Abuse Charges: Prosecutor Says the Jury Needed to Hear that He Beat His Wife to Death in 1987*, HONOLULU STAR BULLETIN, Aug. 3, 1996, at A1.

[8] *See id.* During the trial, domestic violence expert Wendy Mow-Taira testified that in domestic violence cases, victims frequently recant their stories out of fear of being beaten or of never having another relationship. *See id.* She also said that the "victim's initial story is usually the truth." *Id.*

[9] *See id.*

[10] *See id.*

[11] *See id.*

[12] *See id.*

Evidence of Carvalho's prior conviction for Cathy's death was excluded by Rule 404(b) of the Hawai'i Rules of Evidence.[13] The purpose of Rule 404(b) is to protect defendants from prejudice[14] that may result from the introduction of evidence of other crimes, wrongs or acts.[15] The rule is defended as being a necessary safeguard to the presumption of innocence,[16] ensuring that a defendant is "tried for what he did, not for who he is."[17] However, across the country, judiciaries and legislatures have recognized that evidence of prior crimes and acts are especially relevant in certain types of cases.[18] This article advocates the position that in cases of domestic violence, prior acts of abuse are not only relevant,[19] but essential. Due to the unique nature of domestic

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[13] HAW. R. EVID. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible where such evidence is probative of any other fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.

Id.

[14] *See* MOORE, FEDERAL RULES OF EVIDENCE, § 404.21[1] ("Precaution against prejudice serves as the rationale for the exclusion of other crimes evidence . . . ."). *See also* Benjamin Z. Rice, Note and Comment, *A Voice From People v. Simpson: Reconsidering the Propensity Rule in Spousal Homicide Cases*, 29 LOY. L.A. L. REV. 939, 944 (1996)("[M]ost states have adopted elaborate rules of evidence to help assure that jurors do not hear or see evidence that might be unduly prejudicial.").

[15] Both FED. R. EVID. and HAW. R. EVID. 404(b) are titled "Other crimes, wrongs or acts." *See supra* note 13 for the full text of Rule 404(b).

[16] *See* Government of the Virgin Islands v. Toto, 529 F.2d 278, 283 (3d Cir. 1976) (acknowledging the "tradition of protecting the presumption of innocence that accompanies a defendant throughout the trial. The accused is not only presumed to be innocent of the crime with which he is charged, but our legal tradition protects him from the possibility of guilt by reputation.").

[17] United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977), *cert. denied*, 439 U.S. 847 (1978). In *Myers*, the court described the precept of trying a defendant for what he did and not for who he is as a "concomitant of the presumption of innocence." *Id.* In this case, the defendant was charged with bank robbery. On review, the Fifth Circuit held that the district court erred in allowing evidence of a subsequent bank robbery to be used to generate the inference that the defendant committed the crime for which he was on trial. *See id.*

[18] *See* FED. R. EVID. 413 (providing for the introduction of evidence of similar crimes in sexual assault cases without qualification); FED. R. EVID. 414 (allowing in child molestation cases evidence that the defendant has committed other offense(s) of child molestation). *See also* People v. Zack, 229 Cal. Rptr. 317 (1986)(holding that evidence of prior assaults against the same victim in cases of violence against an intimate partner is admissible for the purpose of proving a disputed issue).

[19] As shall be discussed *infra* Part II.A., the relevancy requirement distilled in Rule 401 is lax, requiring merely that the evidence have "any tendency" to make a fact of consequence to the case more or less probable than it would be without the evidence. *See* Joan L. Larsen, Comment, *Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory*

violence crimes, prior acts of abuse are necessary to provide the fact-finder with the whole truth.[20] As it stands today, Hawai'i courts fail to admit prior acts of abuse because of their strict application of Rule 404(b).[21] This prevents the introduction of evidence reflecting the pattern of abuse inherent in domestic violence cases, thus denying the fact-finder the opportunity to appreciate the nature and seriousness of the crime involved.

Domestic violence is a pervasive problem affecting almost a third of intimate relationships.[22] Studies show that four women die each day at the hands of their husbands, ex-husbands, or boyfriends.[23] In fact, women in the United States are more likely to be killed by their partners than by anyone else.[24] This demonstrates the urgent need to address the problem of domestic violence and to protect its victims.

This Comment first examines the traditional rule excluding evidence of other crimes in Part II. Part III focuses generally on Hawai'i's application of Rule 404(b). Part IV discusses how other jurisdictions have altered their application of Rule 404(b) to allow for the introduction of evidence of prior abuse in domestic violence cases. This part also urges that Hawai'i take a similar stance in combating the problem of domestic violence.

Ultimately, this Comment recommends either of two actions. First, the Hawai'i Supreme Court should declare a special rule allowing evidence of prior abuse in domestic violence cases. In the alternative, the State should adopt legislation providing for such a rule. By taking this action, perpetrators of domestic violence will be held accountable for their actions. This will bring us a step closer to ending the continuing cycle of domestic violence in Hawai'i.

Specific Acts Evidence and the Need to Amend Rule 404(b), 87 NW. U. L. REV. 651, 654-55 (1993).

[20] *See* Laurie L. Levenson, *Abuse by Any Other Name: The Admissibility of Domestic Violence Evidence in the Simpson Case*, Jan. 9, 1995, *available in* 1995 WL 5632 (O.J. Comm.)("The public is waiting to see whether the jury will be given the 'whole story' about Simpson and his relationship with his wife or whether, through the rules of evidence, the criminal justice system will sanitize the case for the jury.").

[21] *See supra* note 13 for the text of Rule 404(b).

[22] *See, e.g.*, M. STRAUSS, VIOLENCE BEHIND CLOSED DOORS (1980). Some even estimate that as much as fifty percent of all married women are affected by domestic violence. *See States Take Aim at Domestic Abuse Crimes*, PR NEWSWIRE, Oct. 11, 1995.

[23] *See* LynNell Hancock, *Why Batterers So Often Go Free*, NEWSWEEK, Oct. 16, 1995, at 61.

[24] *See* R.J. GRUNSKI ET AL., SUPPORT AND EDUCATION GROUPS FOR CHILDREN OF BATTERED WOMEN (1988).

II. EXAMINING THE RULES OF EVIDENCE

The premise that a person is presumed innocent until proven guilty is inherent to the American system of justice.[25] For this reason, Rule 404(b) of the Hawai'i Rules of Evidence prohibits the introduction of other crimes, also referred to as "other bad acts,"[26] to infer a person's guilt.[27] This exclusionary rule prevents the prosecution from using evidence of "other bad acts" to suggest that the accused has a criminal character and has acted in conformity with that character in committing the charged crime.[28]

Rule 404(b) is generally referred to as the "propensity rule."[29] The purpose of the rule is to bolster the presumption of innocence by ensuring that criminal trials focus on the commission of the acts being charged, not on the character of the accused.[30] Therefore, the rule prohibits the introduction of other crime evidence merely to show that the defendant possesses a propensity for criminal behavior.[31]

Other policy reasons support the application of Rule 404(b). For example, the introduction of prior crime evidence may influence a jury to convict a defendant with a less compelling demonstration of guilt than required by law.[32] This could occur for several reasons. Knowledge of a defendant's prior criminal conduct may curtail a juror's worry of punishing an innocent person.[33] Further, if the defendant was not criminally charged or convicted for the prior conduct, the jury may use this as justification for punishing the

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[25] *See* Government of Virgin Islands v. Toto, 529 F.2d 278, 283 (3d Cir. 1976)("The accused is . . . presumed to be innocent of the crime with which he is charged.").

[26] Note that Rule 404(b) is entitled "other crimes, wrongs, or acts." This rule protects against the introduction of both prior and subsequent crimes, wrongs or acts. *See, e.g.*, United States v. Myers, 550 F.2d 1036, 1044 n.10 (5th Cir. 1977) (noting that admissibility is not affected when the uncharged act occurred after, rather than prior to, the charged crime).

[27] Rule 404(b) is aimed at protecting against the "two-step inference": to infer defendant's general character from other conduct, and then to infer that the defendant acted in conformity with that general character to infer guilt for the crime in question. *See* HAW. R. EVID. 404(b) commentary.

[28] *See* Rice, *supra* note 14, at 942.

[29] *See* E.W. CLEARY, MCCORMICK ON EVIDENCE § 185 (3d ed. 1984).

[30] *See* Rice, *supra* note 14, at 945. *See also* Larsen, *supra* note 19, at 655 (stating that our collective intuition and common sense causes us to believe that specific act evidence is the best predictor of future behavior).

[31] *See* CLEARY, *supra* note 29, § 185.

[32] *See* MOORE, *supra* note 14, § 404.21[1] (citing United States v. Burkhart, 458 F.2d 201, 204 (10th Cir. 1972)("[A]n obvious truth is that once prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality.")).

[33] *See* A. BOWMAN, HAWAI'I RULES OF EVIDENCE MANUAL § 404-2B(2), at 115 (1983). The introduction of prior crime evidence may diminish "juror hesitation and anxiety resulting from concern about the possibility of convicting an innocent person[.]" *Id.*

accused in the instant matter.[34] Lastly, juror animosity may be created toward the defendant because of what he has done in the past.[35]

Another policy reason for not admitting evidence of other crimes is that it forces the defendant to explain conduct other than that which he is being charged for at trial.[36] Consequently, a defendant may have to defend actions for which he has already answered, and for which he has already served his sentence.[37] Despite these potential prejudicial effects, the introduction of evidence of prior conduct may be highly probative in certain situations.[38] Recognizing this entanglement and the danger that Rule 404(b) may exclude relevant evidence, the Hawai'i Supreme Court has stated, "[p]robative evidence always 'prejudices' the party against whom it is offered since it tends to prove the case against that person."[39] Nevertheless, Hawai'i courts only allow the presentation of other crime evidence if its proposed use is other than to show character propensity.[40] Comprehending Rule 404(b) requires an understanding of Rules of Evidence 401,[41] 402,[42] and 403.[43] These rules govern relevancy and determine the initial admissibility of evidence at trial.

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[34] *See id.* "[T]he appropriateness of redressing previous unpunished culpability will tend to vindicate current punishment even if other justifications are wanting." *Id.*

[35] *See* CLEARY, *supra* note 29, § 190 (citing 22 WRIGHT AND GRAHAM, FEDERAL PRACTICE AND PROCEDURE, § 5232 (1978)). Evidence of prior crimes may "arouse juror hostility or sympathy without regard to the probative value of the evidence." *Id.*

[36] *See* Ortega v. State, 669 P.2d 935, 947 (Wyo. 1983). For a further discussion of *Ortega*, *see also* discussion *infra* notes 228-34 and accompanying text.

[37] *See* MOORE, *supra* note 14, § 404.21[1].

[38] *See id.* (stating that "[p]robity and prejudice are not mutually exclusive characteristics") (citing Comment, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 764 (1961)).

[39] State v. Klafta, 73 Haw. 109, 115, 831 P.2d 512, 516 (1992). The defendant in this case was convicted of attempted second degree murder for abandoning her fifteen month old infant, Heather. *See id.* at 111, 831 P.2d at 515. The defendant appealed the conviction, contending that evidence admitted during the trial of Heather's maggot infestation was unduly prejudicial. *See id.* The court upheld the conviction, ruling that the prosecution was using the evidence to paint a complete picture of Heather's condition when her body was found. *See id.* at 116, 831 P.2d 516. Thus, the evidence was deemed relevant and not unduly prejudicial. *See id.*

[40] *See* State v. Castro, 69 Haw. 633, 644, 756 P.2d 1033, 1041 (1988)(citing CLEARY, *supra* note 29, § 190)(holding that evidence becomes unequivocally inadmissible when the only purpose for the evidence is to show a propensity to commit the crime being charged). For a more complete discussion of *Castro*, *see also* discussion *infra* notes 88-94 and accompanying text.

[41] Rule 401 is entitled "Definition of 'relevant evidence.'" *See infra*, Part II.A. for the full text of Rule 401.

[42] Rule 402 is entitled "Relevant evidence generally admissible; irrelevant evidence inadmissible." *See infra*, note 46 for the full text of Rule 402.

[43] Rule 403 is entitled "Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time." *See infra*, Part II.B. for the full text of Rule 403.

A. Rules 401 and 402: Relevance and Admissibility

"A trial is the search for the truth."[44] The rules of evidence are designed to facilitate this search. Therefore, the parties must be allowed to present all the evidence during trial that bears on the issues to be decided.[45] Thus, Hawai'i Rule of Evidence 402 states in pertinent part, "[a]ll relevant evidence is admissible . . . . Evidence which is not relevant is not admissible."[46]

Rule 401 defines "relevant evidence" as:

> [E]vidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[47]

Relevancy, however, does not ensure admissibility.[48] Although relevant, evidence may still be held inadmissible under Rules 403 and 404.[49]

B. Rule 403: Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Hawai'i Rule of Evidence 401, the general rule of admissibility, requires only that evidence presented possess "any tendency" to prove a consequential fact.[50] To meet this threshold, the proffered evidence need only "tip the balance of the probabilities, ever so slightly, toward the truth of the proposi-

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[44] People v. Zack, 229 Cal. Rptr. 317, 320 (1986). *See* discussion *infra* notes 170-85 and accompanying text for further discussion of *Zack*.

[45] *See* CLEARY, *supra* note 29, § 184. *See also* HAW. R. EVID. 102 ("[The evidence] rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined.").

[46] HAW. R. EVID. 402 provides in full:

> All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the State of Hawaii, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.

Id. The Hawai'i rule is similar to its federal counterpart by "establish[ing] the basic precondition for admissibility of all evidence: it must be 'relevant' as that term is defined in Rule 401." HAW. R. EVID. 402 commentary.

[47] HAW. R. EVID. 401 (emphasis added).

[48] *See* CLEARY, *supra* note 29, § 185.

[49] *See* HAW. R. EVID. 402 commentary. "There are . . . many qualifications to the general [rule of] admissibility[.]" *Id.* For example, Rule 404(b) works to exclude evidence of other crimes in criminal cases. *See id.* Similarly, Rule 403 requires the court to exclude relevant evidence where its relevance or probative value is outweighed by its prejudicial effect. *See id.*

[50] HAW. R. EVID. 401. *See supra* Part II.A. for the full text of Rule 401.

tion at issue."[51] However, determining admissibility in accordance with Rule 403 is more complex.[52]

Rule 403 recognizes the necessity for the discretionary application of the general admissibility rule.[53] The rule states:

> Although relevant, evidence may be excluded if its probative value[54] is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[55]

Under this rule, the trial judge has the power to exclude relevant evidence on the grounds of unfair prejudice, confusion, or waste of time.[56] Unfair prejudice "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[57]

The Hawai'i Supreme Court has held that the responsibility for maintaining the balance between the probative value[58] of the evidence offered and its prejudicial effect lies with the trial court.[59] In maintaining this balance, the trial court has the discretion to exclude relevant evidence under Rule 403.[60] However, this discretion may be exercised only when the trial court determines that the probative value of the evidence is substantially outweighed by its prejudicial effect.[61]

In *State v. Murphy*,[62] the Hawai'i Supreme Court set out factors to consider

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[51] Larsen, *supra* note 19, at 654.

[52] *See* BOWMAN, *supra* note 33, § 403-2A(1).

[53] *See* HAW. R. EVID. 403 commentary. The rule recognizes the need for the discretionary qualification of the general admissibility rule, Rule 402, "based on such factors as potential for engendering juror prejudice, hostility, or sympathy; potential for confusion or distraction; and the likelihood of undue waste of time." *Id.* (citing McCormick § 185).

[54] *See* CLEARY, *supra* note 29, § 185. (defining probative value as "the tendency of the evidence to establish the proposition that it is offered to prove").

[55] HAW. R. EVID. 403.

[56] *See id.*

[57] FED R. EVID. 403 advisory committee's note. Rule 403 of the HAW. R. EVID. is identical to its federal counterpart, FED. R. EVID. 403.

[58] Probative value is "the tendency of evidence to establish the proposition that it is offered to prove." CLEARY, *supra* note 29, § 185.

[59] *See* State v. Iaukea, 56 Haw. 343, 349, 537 P.2d 724, 729 (1975).

[60] *See* BOWMAN, *supra* note 33, § 403-2.

[61] *See id.*

[62] 59 Haw. 1, 575 P.2d 448 (1978). In this case, the defendant was found guilty for the murder of a victim who was sexually assaulted and strangled to death. *See id.* at 1, 575 P.2d at 452. On appeal, the defendant alleged that evidence admitted during the trial that he had accosted someone else on the same day as the murder was inadmissible under Rule 404(b). *See id.* at 6, 575 P.2d 453. The court affirmed the trial court's decision to allow the evidence in order to place the defendant at the scene of the crime and to prove other circumstantial evidence. *See id.* The court held that the need for the evidence was greater than any prejudicial effect. *See id.*

when determining whether the prejudicial effect of the profferred evidence substantially outweighs its probative value.[63] These factors include: the actual need and the probative value of the evidence, the availability of other evidence, and the degree to which the jury may be prejudiced by the evidence.[64] This balance is particularly important when evidence of other crimes is offered under Rule 404(b).[65]

C. Rule 404(b): Admitting Evidence of Other Crimes, Wrongs or Acts

Rule 404 provides another qualification to the general admissibility rule and represents a particularized application of the Rule 403 analysis.[66] Subsection (a) of the Rule prohibits the use of character evidence to prove conduct.[67] Subsection (b), the portion of the rule on which this article concentrates, forbids the use of other crime evidence to prove propensity.[68]

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[63] *See id.* at 9, 575 P.2d at 455.

[64] *See id.* (citing CLEARY, *supra* note 29, § 190). The court in *Murphy* ruled that in determining whether evidence of the prior crime was too prejudicial, the following factors must be balanced:

> [O]n the one side, the actual need for the other-crimes evidence in light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other, the degree of which the jury will probably be roused by the evidence to overmastering hostility.

Id.

[65] *See* HAW. R. EVID. 403 commentary. The commentary also notes that other instances implicitly calling for the application of the Rule 403 balancing principal include Rule 608(b) (Evidence of character and conduct of witness) and Rule 609 (Impeachment by evidence of conviction of crime). *See id.*

[66] *See* HAW. R. EVID. 403 commentary.

[67] HAW. R. EVID. 404(a) reads:

> Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
>
> (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, 609, and 609.1.

Id.

[68] As stated in the commentary to HAW. R. EVID. 404(b), the difference between the Hawai'i rule and the Federal rule is the inclusion in the former of the words "modus operandi." *See* HAW. R. EVID. 404(b) commentary. This addition "is not a difference of substance because this category is actually a species of 'identity' proof." *Id.* Evidence of modus operandi supports the

Rule 404(b) reiterates the common law rule that "the prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is introduced for some purpose other than to suggest that because the defendant is a person of criminal character, it is more probable that he committed the crime for which he is on trial."[69] Although evidence of other crimes may be logically relevant to the determination of guilt, Rule 404(b) excludes such evidence if it is offered only to prove propensity.[70] This rule, governing the admission of specific acts evidence, is intended to protect the defendant.[71] It is based upon the policy that an innocent man should not be convicted merely because he is a "'bad person' deserving of punishment."[72] This ensures that a defendant is tried on the facts of the case, not on whether he or she possesses good or bad character.[73]

If the trial court determines that the proffered evidence is relevant[74] for a proper purpose,[75] it must then perform the Rule 403 balancing test, weighing the probative against the prejudicial value of the other crime evidence.[76]

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inference that the other crime and the crime being litigated are the "handiwork" of the same person because of the distinctive methods used in the commission of both crimes. *See id.* However, in order to qualify as modus operandi, "the pattern and characteristics of the crime must be so unusual and distinctive as to be like a signature." CLEARY, *supra* note 29, § 190.

[69] State v. Castro, 69 Haw. 633, 643, 756 P.2d 1033, 1043 (1988) (quoting CLEARY, *supra* note 29, § 190). For a further discussion of *Castro*, *see also* discussion *infra* notes 88-94 and accompanying text.

[70] *See supra* note 13 for the full text of Rule 404(b).

[71] *See* John McCorvey, Comment, *Corroboration or Propensity? An Empty Distinction in the Admissibility of Similar Fact Evidence: Heuring v. State, 513 So.2d 122 (Fla. 1987)*, 18 STETSON L. REV. 171, 175 (1988). The court of appeals of New York expressed its concern in protecting defendants from the use of prior bad act evidence in its notable quote:

> There may be cogency in the argument that a quarrelsome defendant is more likely to start a quarrel than one of milder type, a man of dangerous mode of life more likely than a shy recluse. The law is not blind to this, but equally it is not blind to the peril to the innocent if character is accepted as probative of crime. "The natural and inevitable tendency of the tribunal . . . is to give excessive weight to the vicious record of crime thus exhibited, and either allow it to bear too strongly on the present charge, or to take the proof of it as justifying condemnation irrespective of guilt of the present charge."

People v. Zackowitz, 172 N.E. 466, 468 (N.Y. 1930)(quoting 1 WIGMORE, EVIDENCE, § 194).

[72] *See* Larsen, *supra* note 19, at 658.

[73] *See* McCorvey, *supra* note 71, at 175.

[74] Relevancy, as defined by Rule 401, is the first evidentiary hurdle that proffered specific act evidence must clear before the evidence will be admitted in court. *See* Larsen, *supra* note 19, at 654.

[75] Evidence of other crimes may be presented if "such evidence is probative of any other fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident." HAW. R. EVID. 404(b).

[76] *See* State v. Castro, 69 Haw. 633, 756 P.2d 1033 (1988). The word "may" in the second sentence of Rule 404(b) was not intended to confer upon the trial judge arbitrary discretion. *See*

Where a balancing test is not performed, this could result in reversible error because of the potential prejudicial effect of admitting specific act evidence.[77]

The Hawai'i Supreme Court in *State v. Burkhart*[78] confirmed the Rule 401 test for general admissibility.[79] There, the court stated that "[e]vidence of other crimes is deemed to be admissible if it is found to be relevant and to have a tendency to establish the offense charged."[80] In so holding, the court explained that evidence of other crimes is inadmissible except when offered to establish one of five issues: intent, motive, absence of mistake or accident, identity, or common scheme or plan.[81] However, the court further noted that the above exceptions are not intended to be exhaustive.[82]

If the evidence is relevant under the *Burkhart* test, the next issue for the court to address is whether the danger of admitting the evidence of prior crimes or bad acts substantially outweighs its incremental probative value.[83] In *State v. Castro*,[84] the Hawai'i Supreme Court set out the following factors to consider when applying this balancing test:

> [T]he strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence will probably rouse the jury to overmastering hostility.[85]

HAW. R. EVID. 404 commentary. Rather, it was designed to trigger the Rule 403 analysis. *See id. See supra* note 13 for the full text of Rule 404(b).

[77] *See* MOORE, *supra* note 14, § 404.02.

[78] 5 Haw. App. 26, 27, 675 P.2d 811, 812 (1984)(holding that in a case of kidnaping where the issue is whether or not the complaining witness was a "forcibly compelled victim," evidence that the defendant told the victim that he was recently released from prison was relevant to prove the victim's state of mind; to prove the victim's state of mind and knowledge are permissible purposes for admittance of other crime evidence under 404(b) and the evidence was deemed properly admitted because it was more probative than prejudicial).

[79] *See id.*

[80] *Id.* (quoting State v. Murphy, 59 Haw. 1, 8, 575 P.2d 448, 454 (1978)).

[81] *See Burkhart*, 5 Haw. App. at 27, 675 P.2d at 812.

[82] *See id.* This test was originally adopted in *State v. Iaukea*, 56 Haw. 343, 537 P.2d 724 (1975), and follows HAW. R. EVID. 404(b). *See supra* note 13 for the full text of Rule 404(b).

[83] *See* BOWMAN, *supra* note 33, § 403-2. *See also* HAW. R. EVID. 404 commentary (stating that this exclusionary rule is a particularized application of the Rule 403 principle).

[84] 69 Haw. 633, 756 P.2d 1033 (1988). For a discussion of *Castro*, *see infra* notes 88-94 and corresponding text.

[85] 69 Haw. at 644, 756 P.2d at 1041 (quoting CLEARY, *supra* note 29, § 190). Whereas the factors set out in *State v. Murphy*, 59 Haw. 1, 575 P.2d 448 (1978), discussed *supra*, Part II.B., relate to evidence admissible under Rule 403, the factors described here specifically refer to evidence sought to be admitted under Rule 404(b).

If the trial court concludes that the prejudicial effect of the other crime or bad act evidence substantially outweighs its probative value, then the evidence must be excluded.[86]

III. HAWAI'I'S APPLICATION OF RULE 404(B)

Hawai'i's application of Rule 404(b) has been stringent. A number of well-recognized cases have been overturned by the Hawai'i Supreme Court because of the trial court's admission of prior crimes or bad acts into evidence.[87] One example of this is *State v. Castro*.[88] In that case, the defendant was charged and convicted for the attempted murder of his girlfriend.[89] The trial court admitted evidence that the defendant previously "slapped her, punched her, threatened her while wielding a knife, held a gun to her head, raped her, and threatened her on the telephone."[90] The Hawai'i Supreme Court overruled the conviction because that evidence was improperly admitted and in violation of Rule 403.[91] While the court acknowledged that prior bad act evidence helped to prove the intent element of the crime,[92] the court held that the evidence was too prejudicial to be admitted.[93] The court stated that the evidence was likely to "weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."[94]

In *State v. Austin*,[95] the Hawai'i Supreme Court expanded its holding in

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[86] *See* Rule 403, discussed *supra* Part II.B., and Rule 404(b), *supra* note 13.

[87] *See, e.g.*, State v. Castro, 69 Haw. 633, 756 P.2d 1033 (1988)(stating that although relevant to prove intent, the introduction of prior crime evidence leads to impermissible inferences and must therefore be excluded); State v. Pinero, 70 Haw. 509, 778 P.2d 704 (1989)(evidence of a similar incident is not admissible when there is other evidence available which is less prejudicial).

[88] 69 Haw. at 633, 756 P.2d at 1033. In this case, the defendant's girlfriend was a dancer in a night club. *See id.* at 639, 756 P.2d at 1039. The defendant entered the night club and after several beers, grabbed the victim by the hair and stabbed her several times in the back and the neck with a knife. *See id.*

[89] *See id.* at 638, 756 P.2d at 1038.

[90] *Id.* at 641, 756 P.2d at 1041.

[91] *See id.* at 645-46, 756 P.2d at 1044.

[92] *See id.* at 644, 756 P.2d at 1043.

[93] *See id.* at 645-46, 756 P.2d at 1045.

[94] *Id.* at 644-45, 756 P.2d at 1044-45 (quoting Michelson v. United States, 335 U.S. 469, 476 (1948)).

[95] 70 Haw. 300, 769 P.2d 1098 (1989). In *Austin*, the court stated that evidence of prior instances of drug smuggling in which the defendant was arrested and convicted should be admitted because the evidence was needed to prove the identity of the defendant and to prove that defendant had the necessary intent to commit the instant crime. *See id.* Further, the court

Castro by focusing on the need for the evidence and the availability of alternative proof.[96] The court ruled that other crime evidence would be excluded unless an exception applied[97] and there was no other proof of the accused's guilt.[98] Here, the court appears to have laid down "a hard and fast rule of admissibility premised on the absence of other evidence to establish the defendant's guilt."[99] As a result of this rule, relevant and probative evidence will unnecessarily be excluded because of the mere existence of other evidence which may prove the facts of the case.

The Hawai'i Supreme Court relied on this "need factor" in overturning a conviction in *State v. Pinero*.[100] In *Pinero*, the defendant was charged with first degree murder for shooting a police officer who was attempting to serve a temporary restraining order upon him.[101] The defendant allegedly grabbed the officer's revolver in a struggle and fired it at him, causing his death.[102] At trial, the State offered evidence to disprove the defendant's claim of accident, a recognized exception of Rule 404(b).[103] Specifically, the State offered evidence that on a previous occasion, at the same location and under similar

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noted that the similarity between the prior and current crimes was extremely relevant to prove a common scheme. *See id.*

[96] *See id.* at 305, 769 P.2d at 1101.

[97] *See id.* The "exceptions" referred to are those stated in Rule 404(b) which allow for the admission of evidence of prior bad acts: to prove motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident. *See* HAW. R. EVID. 404(b). *See also* State v. Burkhart, 5 Haw. App. 26, 27, 675 P.2d 811, 812 (1984)(holding that evidence would be excluded unless offered to establish intent, motive, absence of mistake or accident, identity, or common plan or scheme). *See supra* notes 78-82 and accompanying text for a discussion of *Burkhart*. The court's holding in *Burkhart* is consistent with Rule 404(b). *See supra* note 13 for the full text of Rule 404(b).

[98] *See Austin*, 70 Haw. at 306, 769 P.2d at 1101. The court ruled that the "Hawai'i Rules of Evidence 403 and 404 specifically prohibit the introduction of prejudicial character evidence unless: 1) an exception applies; and 2) there exists no other way to prove the accused's guilt." *Id.* Here, the court vacated the conviction and remanded the case based on the trial court's admission of evidence regarding an incident in which the defendant was neither arrested or implicated. *See id.* at 309, 769 P.2d at 1103. The court held that unlike the prior act evidence proffered by the prosecution, this evidence was not relevant to the issues of identity, motive, opportunity, modus operandi or state of mind. *See id.* at 308, 769 P.2d 1103.

[99] *Id.* at 311, 769 P.2d at 1104 (Nakamura, J., concurring). While concurring in the court's decision to set aside the judgment of conviction, Justice Nakamura expressed his concern regarding the court's discussion of the law governing the admission of evidence of other crimes, wrongs, and acts. *See id.* (Nakamura, J., concurring). He stated that the "need factor" is but one aspect to consider in the balancing process and that the relevant rules furnish "no basis for fashioning a subsidiary rule of admissibility based solely on the 'need for the evidence.'" *Id.* at 312, 769 P.2d at 1105, (Nakamura, J., concurring).

[100] 70 Haw. 509, 778 P.2d 704 (1989).

[101] *See id.* at 513, 778 P.2d at 708.

[102] *See id.* at 514, 778 P.2d at 709.

[103] *See id. See also supra* note 13 for a discussion of Rule 404(b).

circumstances, the defendant grabbed the revolver of another officer who was also attempting to serve a court order upon him.[104] The court ruled:

> The evidence may have been relevant, but it had a tendency nonetheless to distract the trier-of-fact from the main question of what happened on the particular occasion described in the complaint by suggesting that because Clyde Pinero was a person of criminal character, it was likely that he committed the crime for which he was on trial . . . .
>
> What was admitted here was evidence of a year-old incident in which Pinero attempted to wrestle a gun away from another police officer who came upon him under somewhat similar circumstances. Since [a witness] earlier testified about seeing [the officer's] service revolver in Pinero's hand, we cannot say the need for the evidence [that the officer in the previous incident] had to offer was great. But the evidence given by him was such that there was a probability of a hostile reaction against Pinero. We would have to say on balance, its admission constituted an abuse of discretion.[105]

The court in *Pinero* seemed to focus on the remoteness of the previous incident.[106] While the court's language in *Pinero* indicates that a year-old incident is too remote from the charged crime to be admissible under Rule 404(b),[107] other courts have held that incidents occurring a year or more prior to the present crime are not too remote.[108]

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[104] *See Pinero*, 70 Haw. at 514, 778 P.2d at 709.

[105] *See id.* at 518, 778 P.2d at 713. The court also stated that it could not sustain the admission of the prior act evidence because the record failed to indicate that the trial court weighed its probative value against the danger of unfair prejudice. *See id.* at 517, 778 P.2d at 712. One case in which the Hawai'i Supreme Court held that the trial court properly demonstrated on the record its analysis was *State v. Maelega*, 80 Hawai'i 172, 907 P.2d 758 (1995). There, the trial court made specific findings of fact and conclusions of law to support its ruling, denying the defendant's motion *in limine* to preclude evidence of prior bad acts. *See infra* note 138. Having found that the trial court performed the proper analysis before admitting the prior act evidence, the admission of the evidence was affirmed on appeal. *See Maelega*, 80 Hawai'i at 184, 778 P.2d at 770. For further discussion of *Maelega*, *see infra* notes 133-41 and corresponding text.

[106] *See* State v. Fenton, 620 P.2d 813 (Kan. 1980)(citing State v. Betts, 519 P.2d 655 (Kan. 1974))(stating that whether evidence is too remote to be admissible rests within the discretion of the trial court).

[107] *See Pinero*, 70 Haw. at 518, 778 P.2d at 713.

[108] *See, e.g.*, State v. Pena, 780 P.2d 316, 319 (Wyo. 1989)(holding that in a trial for felony assault upon a police officer, evidence suggesting that the defendant was the first aggressor in previous altercations with police officers, the oldest being seven years before the present charge and the latest just one year prior, was not so remote from the offense charged as to foreclose its admission into evidence). *See also* State v. Donahue, 549 A.2d 121 (Pa. 1988)(ruling that evidence of abuse occurring three years prior to the instant offense, although involving two different victims, was not too remote to be admitted); State v. Aniker, 536 P.2d 1355 (Kan. 1975)(stating that testimony of abuse by the defendant of his wife seven years prior to the homicide at trial was relevant and admissible on the issues or identity, intent, and motive).

Even if the incident is only within a month of the charged offense, a strong indication exists that the Hawai'i Supreme Court will hold that the evidence cannot be introduced against the defendant at trial. In *State v. Pemberton*,[109] the Hawai'i Supreme Court again vacated a conviction in which the defendant was tried for assault for an alleged stabbing incident.[110] The State procured evidence that the defendant had provoked a fight using a knife just a few weeks prior to the charged offense.[111] The evidence was admitted by the trial court as being relevant to the defendant's state of mind at the time of the offense, as well as to rebut his claim of self-defense.[112] On review, however, the Hawai'i Supreme Court found that the evidence was inadmissible under Rule 404(b).[113] The court stated that the evidence "could only prejudice [the] Defendant by showing [his] propensity towards provoking fights with a knife: the very influence Rule 404 was meant to prohibit."[114]

From the discussion above, it is evident that Hawai'i courts are committed to protecting the defendant from undue prejudice. Hence, the prosecution has to first clear the hurdle of proving that the proffered specific act evidence is being admitted for a permissible purpose: to prove intent, motive, absence of mistake or accident, identity or common scheme or plan.[115] The court then weighs the probative value against the prejudicial effect of the proffered evidence.[116] In weighing the probativeness of the evidence, the court considers the need for the evidence and alternative methods of proof,[117] as

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[109] 71 Haw. 466, 796 P.2d 80 (1990).

[110] *See id.* at 467-68, 796 P.2d at 82. This case involved an altercation in a night club. *See id.* Upon exiting the club, the victim was attacked by the defendant who brandished a knife. *See id.*

[111] *See id.* at 471, 796 P.2d at 88.

[112] *See id.* at 470, 796 P.2d at 84. The defendant claimed that he was provoked by the victim and that he used the knife in self-defense. *See id.* at 468, 756 P.2d at 82.

[113] *See id.* at 473, 796 P.2d at 86.

[114] *Id.*

[115] *See* Rule 404(b), *supra* note 13. *See also* State v. Burkhart, 5 Haw. App. 26, 27, 675 P.2d 811, 812 (1984)(citing State v. Murphy, 59 Haw. 1, 8, 575 P.2d 448, 459 (1978), discussed at *supra* note 97).

[116] See *supra* note 85 and accompanying text for the factors to consider to determine whether the probativeness of the evidence outweighs its prejudicial effect. *See also* State v. Pemberton, 71 Haw. 466, 472, 796 P.2d 80, 83 (1990)(citing State v. Pinero, 70 Haw. 509, 517, 778 P.2d 704, 710 (1989)) (stating that the acknowledged tendency of prior act evidence "to distract the trier of fact compels the trial court to weigh the evidence and to exclude it 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue influence, waste of time, or needless presentation of cumulative evidence'"). *See also* HAW. R. EVID. 404(b) commentary (stating that prior act evidence offered for a permissible purpose may be admitted if the Rule 403 test is met).

[117] *See* State v. Austin, 70 Haw. 300, 306, 709 P.2d 1098, 1101 (1989); *See supra* notes 95-99 and accompanying text, and State v. Pinero, 70 Haw. 509, 518, 778 P.2d 704, 711 (1989)(citations omitted); *see supra* notes 100-07 and accompanying text.

well as remoteness in time.[118]

If the prosecution is able to demonstrate that the probativeness of the profferred evidence is not outweighed by its prejudicial effect, the court will allow the introduction of the similar crime evidence.[119] However, the cases discussed above demonstrate the difficulty in meeting this burden. In *Pinero*, the prior bad act evidence was excluded although remarkably similar to the charged crime.[120] In *Pemberton*, even where the other crime was near in time to the crime currently charged, the evidence was prohibited, despite the evidence being offered for a valid purpose.[121] Therefore, although the prosecution may appear to meet the hurdles set by the Hawai'i Supreme Court and Rule 404(b), the court may still use its discretion to exclude evidence so prejudicial as to deprive the defendant of a fair trial. This seems to be the usual result in cases of domestic violence. As will be discussed below, the court's commitment to protect the defendant from prejudice causes prior instances of abuse from being admitted into evidence during trials for crimes of domestic violence.

Some may argue that Hawai'i courts have made progress in the treatment of domestic violence cases and have already begun admitting evidence of prior abuse. For example, in *State v. O'Daniel*,[122] the Hawai'i Supreme Court acknowledged that the circumstances surrounding a relationship in a domestic violence case are important to prove both motive and intent.[123] More recently, the Hawai'i Supreme Court appears to have considered the circumstances of a relationship to be an important factor in admitting evidence of prior abuse

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[118] *See Pinero*, 70 Haw. at 518, 778 P.2d at 711.

[119] *See* HAW. R. EVID. 403 and 404(b). Other crime evidence is admissible if it is offered to prove motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident. *See* HAW. R. EVID. 404(b). If the evidence is being offered for any of the above purposes, then the court may admit it if the probative evidence substantially outweighs its prejudicial effect. *See* HAW. R. EVID. 403.

[120] 70 Haw. at 518, 778 P.2d at 711. Both incidents involved the defendant attacking a police officer in his home and a struggle for the officer's gun. *See id. See supra* notes 100-107 and accompanying text for a discussion of *Pinero*.

[121] 71 Haw. at 471-71, 796 P.2d at 83. The other incident occurred just weeks before the crime charged and was offered to prove intent and to rebut the defendant's claim of self-defense. *See id. See* discussion *supra* notes 109-114 and accompanying text for a discussion of *Pemberton*.

[122] 62 Haw. 518, 616 P.2d 1383 (1980).

[123] *See id.* at 525, 616 P.2d at 1389. The defendant was convicted of manslaughter for the death of his wife. *See id.* at 519, 616 P.2d at 1377. In appealing the decision, the defendant alleged that the trial court erroneously admitted a letter written by the deceased victim to a friend. *See id.* at 524, 616 P.2d at 1389. The letter stated the deteriorating status of the victim's marriage with the defendant. *See id.* at 525, 616 P.2d at 1389 n.6. In affirming the admission of the evidence, the Hawai'i Supreme Court held that the state of the marriage was "critical to the prosecution in proving the motive or intent issue." *Id.*

in domestic violence cases.[124] However, it will be demonstrated that the holdings in these recent cases were very fact-sensitive and limited in application.

In *State v. Robinson*,[125] the defendant was convicted for the murder of his live-in girlfriend.[126] He appealed his conviction, contending that the trial court erred in admitting into evidence certain out-of-court statements he had made.[127] In particular, the defendant sought to exclude a statement in which he admitted that he and his girlfriend had arguments that escalated into physical violence.[128] On appeal, the Hawai'i Supreme Court restated the rule set out in *Pinero*[129] that prior bad act evidence is admissible only when relevant and more probative than prejudicial.[130] The court affirmed the conviction, holding that the statement was an admission by a party defendant, that it was highly probative on the issue of intent, and that it was not outweighed by the danger of unfair prejudice.[131] Thus, the court found that the requirements of Hawai'i Rules of Evidence 404(b) were met.[132]

In *State v. Maelega*,[133] the defendant was convicted for murdering his wife,

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[124] As the following discussion will demonstrate, the Hawai'i Supreme Court appears to have considered the evidence of prior abuse as evidence important for the fact-finder to consider in three recent cases: State v. Robinson, 79 Hawai'i 468, 903 P.2d 1289 (1995); State v. Maelega, 80 Hawai'i 172, 907 P.2d 758 (1995); and State v. Clark, 83 Hawai'i 289, 926 P.2d 194 (1996).

[125] 79 Hawai'i 468, 903 P.2d 1289 (1995).

[126] *See id.* at 469, 903 P.2d at 1290. Defendant Robinson killed his girlfriend by asphyxiation. *See id.* During the trial, the defendant testified that he and his girlfriend were arguing. *See id.* He claimed that she punched him in the back and at that point, he "snapped." *See id.* at 470, 903 P.2d at 1291. He admitted grabbing her around the throat, but asserted that his momentum caused him to fall onto the bed, landing on the victim, and covering her face with his chest. *See id.* He testified that he blacked out and when he woke up several hours later, his hand was still around his girlfriend's neck and she was dead. *See id.*

[127] *See id.*

[128] *See id.* at 469, 903 P.2d at 1290. Audio and video taped confessions were played for the jury at trial. *See id.* While the defendant opposed this evidence as a violation of Rule 404(b), he did not raise an objection as to the voluntariness of these recorded statements. *See id.*

[129] The *Robinson* court cited the test established in *Pinero*:

> When evidence of other [bad] acts of the defendant is offered to prove [or disprove] a fact of consequence in the determination of the case, a trial court must weight a variety of factors before ruling it admissible. These include the "strength of the evidence as to the commission of the other [bad acts], the similarities between the [bad acts], the . . . time that has elapsed between the [bad acts], the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence will probably rouse the jury to overmastering hostility."

79 Haw. at 471, 903 P.2d at 1292.

[130] *See id.* at 472, 903 P.2d at 1293 (citations omitted).

[131] *See id.* at 472, 903 P.2d at 1292.

[132] *See id.* at 472, 903 P.2d at 1293.

[133] 80 Hawai'i 172, 907 P.2d 758 (1995).

Eyvette.[134] The evidence presented showed that the defendant "choked [the victim] with his hands, strangled her with an electric cord . . . slashed open her throat, and stabbed her in the back and breasts."[135] The trial court admitted evidence that the defendant had beaten his wife on previous instances.[136] On appeal, Maelega challenged the admission of the evidence, arguing that the previous incidents were not similar to the instant offense and that the evidence "roused the jury to overmastering hostility."[137] The trial court, however, clearly stated on the record its reasons for admitting the evidence of prior abuse.[138] The reviewing court upheld the trial court's findings that although

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[134] *See id.* at 174, 907 P.2d at 760.

[135] *Id.* at 175, 907 P.2d at 761.

[136] *See id.* at 183, 907 P.2d at 766. The evidence in dispute included: testimony by the victim's mother that Maelega had once taken the victim to Kalihi valley, beaten her, and threatened to kill her and that Maelega beat his wife almost every night that the couple spent with the victim's family; testimony by a medical social worker that the victim told her that Maelega was verbally abusive and occasionally hit her; testimony from the manager of the store in which the victim was employed that Maelega came into the store one day, found the victim, pulled her out of the store, and told the manager that he would break him in half if he interfered; testimony by the nurse who attended the victim during her pregnancy that Maelega told her he beat her in the labor and delivery room because in Samoa, it is okay for men to beat their wives and children for obedience; and testimony from a clinical psychologist that when the victim was admitted for attempted suicide, she expressed her fear of Maelega and admitted that there was a history of physical and emotional domestic abuse. *See id.* at 183, 907 P.2d at 766 n.16.

[137] *Id.*

[138] *See id.* It was clear to the reviewing court that the trial court performed the appropriate analysis in denying the defendant's motion *in limine* to preclude the other crime evidence and did not abuse its discretion. *See id.* at 184, 907 P.2d at 770. The trial court made the following findings of fact and conclusions of law to support its ruling:

FINDINGS OF FACT:

2. This Court finds that the strength of the prior act evidence which the [prosecution] wishes to introduce is great, [Maelega] already having the admitted to it by way of pleading guilty or by having been witnessed by more than one unbiased, third party witness.
3. This Court finds that there is little similarity between [Maelega's] prior acts and the instant offense as alleged in that the prior acts do not involve strangulation or stabbing.
4. This Court finds that very little time has lapsed between the prior act evidence and the instant offense charged, most acts occurring within one month of [Eyvette's] death.
5. This Court finds that there is a great need for this evidence, in that [Maelega] is alleging extreme emotional disturbance based upon his relationship with [Eyvette]. Hence, that relationship may be scrutinized by the [prosecution] to disprove [Maelega's] alleged extreme emotional disturbance.
6. This court finds that the prior act evidence is necessary in that [Eyvette] is dead and cannot rebut [Maelega's] claims that [she] allegedly made statements to him regarding the state of their marriage and the paternity of the baby that she had delivered.
7. This court finds that there is no alternative proof available to the [prosecution] on the statements that [Eyvette] allegedly made to [Maelega] regarding the paternity of the child that she just delivered.
8. This Court finds that the prior act evidence is not of the nature which will rouse the jury to overmastering hostility.

the previous incidents were not similar to the offense presently charged because they did not involve weapons, strangulation, or stabbing, the need for the evidence was great.[139] No other evidence was available to the prosecution to rebut the defendant's claim of extreme emotional distress in causing the victim's death.[140] Thus, the probative value of the prior act evidence was found to outweigh its prejudicial effect.[141]

In *State v. Clark*,[142] the defendant was convicted of attempted second degree murder of his wife, Diana.[143] On the night in question, Diana made statements to the police that she was stabbed by her husband.[144] However, Diana recanted these statements claiming that although she originally said that her husband had stabbed her, these statements were not true.[145] The prosecution introduced into evidence Diana's original statements to impeach her

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CONCLUSIONS OF LAW:

1. The prior act evidence which the [prosecution] wishes to introduce is probative of other facts which are of consequence to the determination of the case, including, but not limited to, proof of motive, intent, plan, and to rebut the defense of extreme emotional disturbance. State v. Pinero, 70 Haw. 509, 778 P.2d 704 (1989).
2. The prior act evidence, if proved, rebuts both prongs of the extreme emotional disturbance defense in that it may show that [Maelega] acted with self-control at the time he allegedly killed his wife, and secondly, it may tend to show that even if [Maelega] did not act with self-control, then there was no "reasonable explanation" for his extreme mental or emotion disturbance.
3. This Court has weighed the probative value of the prior act evidence and finds that its probative value far outweighs any danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Maelega, 80 Haw. at 184, 907 P.2d at 769. Having found that the trial court applied the appropriate analysis on the record, the court upheld the introduction of the prior act evidence. *See id.*

[139] *See id.* at 183, 907 P.2d at 768.

[140] *See id.* at 184, 907 P.2d at 769. As the trial court indicated in its findings of fact, there was no other evidence to rebut the claims of the defendant regarding his extreme emotional disturbance defense, the victim being dead and unable to testify. *See id.*

[141] *See id.* However, the Hawai'i Supreme Court reversed and remanded the case based on the trial court's prejudicially erroneous instruction which shifted the burden of proof to the defendant when there is a defense of extreme mental or emotional distress. *See id.* at 176, 907 P.2d at 761.

[142] 83 Hawai'i 289, 926 P.2d 194 (1996).

[143] *See id.* at 292-93, 926 P.2d at 197-98.

[144] *See id.* at 291, 926 P.2d at 196.

[145] *See id.* On the night in question, Diana told the arresting officer that her husband had stabbed her. *See id.* However, Diana's testimony at trial differed substantially from her original story. *See id.* at 292, 926 P.2d at 197. Her testimony at trial "completely exculpated Clark for the stabbing." *Id.* at 293, 926. P.2d at 198. She blamed it on herself, stating that she was a drug addict and inflicted the wounds herself after her husband failed to secure more drugs for her. *See id.*

recantation and to prove that the defendant actually was the perpetrator.[146] The prosecution was also allowed to question Diana about prior instances of abuse between herself and her husband.[147] At the close of all evidence, Clark was found guilty as charged.[148]

Clark appealed the verdict, alleging error by the trial court in allowing the prosecution to question Diana about the prior incidences of abuse.[149] In affirming the admission of Diana's testimony, the Hawai'i Supreme Court held that "[t]he prior incidents of domestic violence between Diana and Clark showed the jury the context of Diana's relationship with Clark. The context of Diana's relationship with Clark was relevant because the relationship was offered as the basis for Diana's recantation at trial."[150]

While the cases discussed above indicate Hawai'i's progression towards allowing evidence of prior violence in domestic abuse cases, the decisions were based solely on those specific facts and issues. For example, the court allowed the evidence of other abuse in *Robinson* as an admission by a party defendant.[151] In *Maelega*, the court focused on the significance of the extreme emotional distress mitigation proffered by the defense in admitting the prior bad acts.[152] Further, in *Clark*, the prior instances of abuse would not have been admitted but for the victim's recantation at trial.[153] While many may argue that the admission of prior act evidence should always be done on a case by case analysis, domestic violence cases are unique compared to other

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[146] *See id.*

[147] *See id.* The trial court allowed the prosecution to question Diana about two prior occasions on which the police were called to the Clark residence. *See id.* In the first incident, the police were called to the residence after Diana sustained injuries resulting from an argument with her husband. *See id.* As in the present case, Diana recanted her story and claimed that her husband was not responsible for her injuries. *See id.* When the prosecution questioned Diana about the previous incident, she claimed that she was injured as she tried to push Clark but slipped and fell. *See id.* During the second incident, the police found considerable damage done to the Clark residence. *See id.* Only after substantial questioning on the night of the incident did Diana admit that her husband caused the said damage. *See id.* When the prosecution questioned Diana about that incident, she stated that she tried to cover up her story not to protect her husband, but to collect insurance money to support her drug habit. *See id.*

[148] *See id.* at 293, 926 P.2d at 198.

[149] *See id.* at 299, 926 P.2d at 204. See *supra* note 147 for a discussion of the prior act evidence admitted during the trial.

[150] *Id.* at 301, 926 P.2d at 206.

[151] See *supra* note 131 and accompanying text for the court's holding and reasoning in affirming the admission of the other crime evidence in *Robinson*.

[152] See *supra* notes 138-41 and accompanying text for the *Maelega* court's rationale in upholding the trial court's denial of the defendant's motion *in limine* to preclude evidence of prior bad acts.

[153] See *supra* note 150 and accompanying text for the court's holding in *Clark*, explaining that the evidence was needed to impeach Diana's recantation at trial.

crimes. A more progressive stance must be taken to ascertain the truth and to prevent further violence and death. Given the seriousness of domestic violence in Hawai'i, these goals cannot be achieved on a case-by-case basis. Hawai'i courts should declare a per se rule, as done by the California court in *People v. Zack*.[154] Such a rule would allow evidence of prior incidents of abuse to be admitted where there is a previous relationship between the victim and the perpetrator.

IV. DOMESTIC VIOLENCE AND THE APPLICATION OF RULE 404(B)

While Hawai'i courts have strictly applied Rule 404(b), the following discussion will demonstrate that many other jurisdictions have been far more liberal in their application of this rule, particularly in cases involving crimes of domestic violence. These jurisdictions include California,[155] Kansas,[156] Arizona,[157] Wyoming,[158] Illinois,[159] Utah,[160] and Minnesota.[161] The courts in these jurisdictions acknowledge the unique nature of domestic violence cases and the need for a specialized application of the evidence rules, allowing for the introduction of prior instances of abuse.

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[154] 229 Cal. Rptr. 317 (1986). *See infra* Part IV.A.1 for a discussion of *Zack*.

[155] *See, e.g., Zack*, 229 Cal. Rptr. at 317 (holding that although the defendant had not previously inflicted precisely the same wounds as sustained by the victim in the charged incident, the evidence of prior assaults on the victim was admissible to prove identity without a resort to a modus operandi analysis); People v. Johnson, 284 Cal. Rptr. 579 (1991)(expanding the holding in *Zack* to allow for evidence of prior abuse of one victim to be introduced in the murder case of another victim).

[156] *See, e.g.*, State v. Green, 652 P.2d 697 (Kan. 1982)(ruling that prior abuse evidence between the same parties is admissible to establish a continuous course of conduct between those parties or to collaborate the victim's testimony).

[157] *See, e.g.*, State v. Featherman, 651 P.2d 868 (Ariz. Ct. App. 1982)(stating that intent, an essential element of murder, is often shown by introducing evidence of other crimes similar in nature).

[158] *See, e.g.*, State v. Ortega, 669 P.2d 935 (Wyo. 1983)(acknowledging the significance of understanding the context of the relationship between the victim and the abuse in domestic violence cases to prove both motive and intent).

[159] *See, e.g.*, People v. Illgen, 583 N.E.2d 515 (Ill. 1991)(holding that evidence of prior abuse in a marriage is relevant to demonstrate an antagonistic relationship, tending to prove a motive to commit the charged crime and refuting a claim of accident).

[160] *See, e.g.*, State v. Tanner, 675 P.2d 539 (Utah 1983)(ruling that prior ill treatment of the victim by the defendant is admissible to establish a specific pattern of behavior in that relationship; this evidence is relevant in proving absence of mistake or accident, opportunity, knowledge, or identity).

[161] *See* MINN. STAT. ANN. § 634 R. 634.20 (West 1996)(quoted *infra* note 301). This statute specifically allows for evidence of prior abuse to be introduced unless its probative value is substantially outweighed by its prejudicial effect. *See id.*

Domestic violence is never a single isolated incident.[162] Rather, domestic violence is a pattern of behavior,[163] with each episode connected to the others.[164] Many times, as the pattern of abuse evolves, the level of seriousness escalates.[165] In the most unfortunate instances, the consequence of domestic violence is homicide.[166] By allowing evidence of past specific incidents of abuse in domestic violence cases, courts could help to prevent this escalation. This should be done by either adopting legislative measures which specifically allow the courts to admit prior instances of abuse in domestic violence cases, or in the alternative, having the Hawai'i Supreme Court declare such a rule. The abuser would be held accountable for his actions,[167] the truth of the relationship would be ascertained,[168] and the ultimate desired result of deterring abuse and saving lives would be achieved.[169]

A. Trends in Other Jurisdictions

1. California

In *People v. Zack*,[170] the California Court of Appeal, Second District, set an important precedent for the prosecution of domestic violence crimes.[171] In

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[162] *See* Anne L. Ganley, *Understanding Domestic Violence*, *in* IMPROVING THE HEALTH CARE SYSTEM'S RESPONSE TO DOMESTIC VIOLENCE: A RESOURCE MANUAL FOR HEALTH CARE PROVIDERS 18 (1995).

[163] *See* DOMESTIC VIOLENCE MANUAL, TWELFTH JUDICIAL DISTRICT (May 1995); Family Violence Prevention Fund, *The Health Care Response to Domestic Violence Fact Sheet*, (visited Nov. 22, 1998) <http://www.igc.apc.org/fund/ healthcare/factsheet.html (copy on file with author).

[164] *See* Ganley, *supra* note 162, at 18.

[165] *See id. See also* HAWAI'I INSTITUTE FOR CONTINUING LEGAL EDUCATION, FAMILY LAW SECTION, FAMILY PRACTICE SEMINAR: FOCUS ON THE FAMILY 36 (1993).

[166] *See* FAMILY PRACTICE SEMINAR: FOCUS ON THE FAMILY, *supra* note 165, at 36.

[167] *See* ROBERT S. TOYOFUKU, A BENCHBOOK FOR JUDGES ON DOMESTIC VIOLENCE IN CIVIL AND CRIMINAL CASES, 1-9 (1994)(stating that the courts need to provide the abuser with motivation to change and participate in the rehabilitation process by holding the abuser accountable for his actions).

[168] *See generally* the discussions of People v. Zack, 229 Cal. Rptr. 317 (1986), *infra* notes 170-85 and accompanying text; State v. Featherman, 651 P.2d 868 (Ariz. Ct. App. 1982), *infra* notes 221-27 and accompanying text; Ortega v. State, 669 P.2d 935 (Wyo. 1983), *infra* notes 228-34 and accompanying text; People v. Illgen, 583 N.E.2d 515 (Ill. 1991), *infra* notes 238-42 and accompanying text; and State v. Tanner, 675 P.2d 539 (Utah 1983), *infra* notes 253-54 and accompanying text.

[169] *See* Rice, *supra* note 14, at 957.

[170] 229 Cal. Rptr. 317 (Cal. Ct. App. 1986).

[171] In the O.J. Simpson criminal trial, the People successfully relied upon the rule set out in *Zack* to support its position that evidence of O.J. Simpson's prior abuse of Nicole Simpson was essential to "provide the jury with an appreciation of the 'nature and quality' of the relationship

Zack, the defendant was charged with murdering his former girlfriend by literally beating her to death.[172] The court described the cause of death as "aspiration of blood due to strangulation and five or six applications of blunt force trauma to the head and neck."[173] She also sustained twenty-one injuries to her body and two fractured ankles.[174]

At trial, the defendant contended that he was not in town on the night of the murder and was thus wrongly accused.[175] However, based on circumstantial evidence refuting this contention and evidence that the defendant had assaulted the same victim on several previous occasions, the jury convicted him of murder in the first degree.[176]

The defendant appealed the conviction, arguing that the trial court erred in admitting evidence of the prior bad acts.[177] He relied on prior court decisions holding that evidence of prior crimes to prove a defendant's identity must have characteristics which are similar enough to the charged crime to raise an inference that the crime was committed by the same person.[178] Under these prior decisions, a modus operandi analysis was required in order to use evidence of prior crimes to prove identity.[179] The court of appeals affirmed the conviction, setting forth the following rule:

> Where a defendant is charged with a violent crime and has or had a *previous relationship* with a victim, prior assaults upon the same victim, when offered on disputed issues, e.g., identity, intent, motive, etcetera, are admissible based solely

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. . . and to aid in establishing motive, intent, plan, and identity of the killer." Lisa A. Linsky, *Use of Domestic Violence History Evidence in the Criminal Prosecution: A Common Sense Approach*, 16 PACE L. REV. 73, 74 (1995)(citing David Margolick, *Prosecutors Win Key Simpson Fight: Judge Allows Most Material About Domestic Violence*, N.Y. TIMES, Jan. 19, 1995, at B8).

[172] *See Zack*, 229 Cal. Rptr. at 318.

[173] *Id.*

[174] *See id.*

[175] *See id.*

[176] *See id.*

[177] *See id.* at 320.

[178] *See id.* The defendant relied on *People v. Rivera*, 710 P.2d 362 (Cal. 1985), to assert his argument. In *Rivera*, the California Supreme Court held:

> In order for evidence of a prior crime to have a tendency to prove the defendant's identity as the perpetrator of the charged offense, the two acts must have enough shared characteristics to raise a strong inference that they were committed by the same person. It is not enough that the two acts contain common marks: "[T]he inference of identity arises when the marks common to the charged and uncharged offenses, considered singly or in combination, logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety and, in so doing, tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offenses."

Id. at 364 (citations and emphasis omitted).

[179] See *supra* note 68 for a brief discussion on modus operandi.

upon the consideration of identical perpetrator and victim without resort to a "distinctive modus operandi" analysis of other factors.[180]

The court held that "common sense, experience and logic" render the modus operandi analysis inapplicable in the present case.[181] The court's reasoning was based on the brutal nature of the crime: if the prior assaults on the victim were identical to the present charge, the victim would not have been able to survive them.[182] As the court stated, "[o]ne cannot kill the same person twice."[183] Thus, although the defendant contended that he had not previously broken both of the victim's ankles or inflicted twenty-one injuries to her body, the evidence of prior assaults were admissible to prove identity without resorting to the modus operandi analysis.[184]

The effect of the *Zack* rule is as follows: so long as the prosecution is offering prior abuse evidence for a valid purpose,[185] and a history of violence exists between the perpetrator and the victim, the prior abuse evidence may be admitted without the prosecution proving that the prior incidents of abuse are identical to the one being charged. Given the nature of domestic violence, it need not be shown that the brutalities occur in the same method in each episode of abuse in order to use the prior act evidence to prove the identity of the perpetrator.

To support its holding, the *Zack* court cited *People v. Daniels*,[186] which held that "[e]vidence showing jealousy, quarrels, antagonism or enmity between an accused and the victim of a violent crime is proof of motive to commit the offense. . . . Evidence relevant as proof of motive or behavior pattern is not inadmissible because it is also proof of prior crimes."[187] In essence, the *Daniels* court asserted that the probative value of prior incidents of abuse in

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[180] *Zack*, 229 Cal. Rptr. at 320 (emphasis added).

[181] *Id.*

[182] *See id.*

[183] *Id.*

[184] *See id. Cf.* Huering v. State, 513 So.2d 122 (Fla. 1987)(affirming the trial court's decision to exclude evidence of previous molestations in a case where defendant was charged with molesting his daughter because the previous acts were not sufficiently similar to the present charge); State v. Garfole, 388 A.2d 587, 590 (N.J. 1978)(requiring that profferred specific acts be a "signature crime").

[185] *See Zack*, 229 Cal. Rptr. at 320. The court listed as valid purposes "identity, intent, motive, etc." *Id.*

[186] 93 Cal. Rptr. 628 (Cal. Ct. App. 1971).

[187] *Id.* at 633. The *Daniels* rule was based upon the early California Supreme Court cases, People v. Weston, 146 P. 871 (Cal. 1915) and People v. Soeder, 87 P. 1016, 1017 (Cal. 1906) (holding that "[e]vidence having a direct tendency . . . to prove motive on the part of a person for a crime, and thus to solve a doubt . . . as to the identity of the slayer . . . is admissible against a defendant, however discreditably it may reflect on him, and even where it may show him guilty of other crimes")(internal quotation omitted).

domestic violence cases is not substantially outweighed by its prejudicial effect.[188] Because domestic violence occurs in patterns,[189] this conclusion seems correct. As the *Zack* court stated, "[a] trial is a search for the truth."[190] Prior incidences of abuse provide the fact-finder with the necessary background to understand the true circumstances of domestic violence crimes and to ascertain the truth. If such evidence is not admitted, the jury would erroneously determine the defendant's guilt or innocence based on a false conception of the relationship between the defendant and the victim.[191]

The court's holding in *Zack* was subsequently challenged in *People v. Linkenauger*.[192] In *Linkenauger*, the defendant claimed that *Zack* was

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[188] *See also* State v. Klafta, 73 Haw. 109, 115, 831 P.2d 512, 516 (1992)(Hawai'i Supreme Court acknowledging that "[p]robative evidence always 'prejudices' the party against whom it is offered since it tends to prove the case against that person"); People v. Illgen, 583 N.E.2d 515 (Ill. 1991) (asserting that other crime evidence properly offered for a permissible purpose is not inadmissible merely because it implicates the character of the accused); Pena v. State, 780 P.2d 316, 321 (Wyo. 1989)("Admittedly, this evidence strikes fairly close to demonstrating a character trait of Pena to fight with police officers. This does not make it inadmissible . . . ."). *Cf.* State v. Pinero, 70 Haw. 509, 518, 778 P.2d 704, 710-711 (1989)(although the evidence may be relevant, the court excluded the evidence holding that it distracts the fact-finder from what happened on this particular occasion by suggesting that because the defendant is of criminal character, he committed the current crime being charged).

[189] *See* Ganley, *supra* note 162, at 16; TOYOFUKU, *supra* note 167, at 1-4.

[190] *Zack*, 229 Cal. Rptr. at 320.

[191] *See id.* at 320 ("[A]ppellant was not entitled to have the jury determine his guilt or innocence on a false presentation that his and the victims relationship and their parting were peaceful and friendly."). See also *People v. Allison*, 771 P.2d 1294 (Cal. 1989) *cert. denied*, 494 U.S. 1090 (1990), in which the defendant was convicted of robbery and first degree murder. He appealed the conviction claiming that the trial court erred by instructing the jury with CALJIC No. 2.21, which essentially states that "[a] witness willfully false in one material part of his testimony is to be distrusted in others." *Id.* at 1305 n.6. The California Supreme Court affirmed, citing to *Zack*'s rule that the defendant is not entitled to a "false aura of veracity." *Id.* at 1306 n.7.

[192] 38 Cal. Rptr. 2d 868 (1995). Defendant Linkenlauger was convicted of first-degree murder and sentenced to twenty-five years to life of prison for the death of his wife. *See id.* The victim's body was found abandoned near a highway, approximately seven miles from the Linkenlauger home. *See id.* at 869-70. Upon examination of the victim's body, it was determined that she was strangled to death, having clusters of bruises and abrasions on her neck. *See id.* She also suffered 15 blunt-type injuries to her head, mouth, and arms. *See id.* Despite circumstantial evidence to the contrary, the defendant denied that he was responsible for his wife's death. *See id.* at 870-71. Relying on *Zack*, the prosecution was permitted to introduce evidence of marital discord and appellant's prior assaults against his wife. *See id.* The trial court held that the evidence could be "offered to show the violent nature of the relationship, to show that at the time that this crime occurred, he had a motive to kill her, that he planned to kill her, and that he intended to kill her and that he intended to inflict torture and great pain upon her . . ." *Id.*

overturned by *People v. Ewoldt*.[193] In *Ewoldt*, the defendant was convicted of molesting his step-daughter.[194] The Supreme Court of California, in affirming the admission of the uncharged acts, held that to admit evidence of prior conduct to prove identity, the prior conduct and the present charge "must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. . . . The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature."[195] However, the court in *Linkenlauger* distinguished *Ewoldt* from *Zack* on several grounds.[196] First, *Ewoldt* was not a violent crime and *Zack*'s rule[197] is specifically applicable to violent crimes.[198] Second, unlike *Zack*, the issue in *Ewoldt* was one of common design or plan.[199] Lastly, *Zack* dealt with the death of a victim.[200] Thus, to illustrate the difference between *Zack* and *Ewoldt*, the court held that "not even newly written Supreme Court precedent can alter the fact that no one can kill the same victim twice in a distinctive or 'signature' fashion."[201] Therefore, the *Linkenauger* court held that "*Zack* survives *Ewoldt*."[202]

The California courts did not, however, limit themselves to the rule distilled in *Zack*. *People v. Johnson*[203] extended *Zack*'s holding to allow for evidence of prior violence on one victim to be introduced in the murder case of another

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[193] 867 P.2d 757 (Cal. 1994).

[194] *See id.* at 760. During the second trial for sexual molestation of one step-daughter, the trial court allowed evidence of uncharged, lewd acts upon another step-daughter. *See id.* The defendant appealed the ruling, claiming that the evidence was admitted in violation of California's equivalent to Federal Rule of Evidence 404(b). *See id.*

[195] *Id.* at 770 (citations and internal quotations omitted). The trial court's ruling was upheld by the reviewing court which held that the victims were both the defendant's step-daughters who lived in the defendant's home, the acts occurred when the victims were of a similar age, and the defendant offered similar excuses when his acts were discovered. *See id.* The court held that the uncharged misconduct shared sufficiently common characteristics to prove a common plan or design. *See id.* However, the court made the express finding that the evidence was admitted for the limited purpose of proving common plan or design. *See id.* at 772.

[196] *See Linkenauger*, 38 Cal. Rptr. at 874.

[197] "Where a defendant is charged with a *violent crime* and has or had a previous relationship with a victim, prior assaults upon the same victim, when offered on the disputed issues, e.g., identity, intent, motive, etcetera, are admissible based solely upon the consideration of identical perpetrator and victim without resort to a 'distinctive modus operandi' analysis of other factors." *Zack*, 229 Cal. Rptr. at 320 (emphasis added).

[198] *See Linkenauger*, 38 Cal. Rptr. 2d at 874.

[199] *See id. See also supra* note 195 for a discussion of the *Ewoldt* court's analysis.

[200] *See Linkenauger*, 38 Cal. Rptr. 2d at 874.

[201] *Id.* It was on the same premise that the court in *Zack* rejected the modus operandi analysis. *See supra* notes 178-84 and accompanying text for further discussion of the court's holding in *Zack* regarding the modus operandi analysis.

[202] *Linkenlauger*, 38 Cal. Rptr. 2d at 874.

[203] 284 Cal. Rptr. 579 (Cal. 1991), *cert. denied*, 503 U.S. 963 (1992).

victim.[204] The court ruled that when a sufficient logical connection exists between the abuse of the previous victim and the crime being tried, the evidence may be introduced without resorting to the modus operandi analysis.[205] In *Johnson*, the defendant was charged separately for the murder of his first wife and for attempted murder of his second wife.[206] During the trial for the murder of the first wife, the court allowed the prosecution to introduce statements made by the defendant, while he was beating the second wife, that she would end up like the first wife.[207] The defendant appealed his guilty verdict, alleging that the trial court erred in admitting these statements.[208] The appellate court affirmed the guilty verdict and held that the

> [The] defendant verbally linked his violent abuse of his [second wife] to the murder of [his first wife]. The jury could logically infer from this and the other indications of his violence toward [his first wife] that he harbored a murderous intent and motive toward both women.[209]

The cases discussed above indicate that California courts have taken a progressive stance in dealing with domestic violence. By doing so, it appears that the courts have recognized the dynamics of domestic violence, the patterns of behavior, and the escalation of violence. By allowing the prosecution to introduce evidence of prior abuse, the jury has the opportunity to appreciate the truth of the entire situation and to hold the perpetrator accountable for his actions. This is an essential step in deterring domestic violence and a step that Hawai'i must take in order to address the problems of domestic violence.

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[204] *See id.* at 590. Defendant Johnson was convicted of murder for the death of his girlfriend, Adrianne, who disappeared and was never found. *See id.* at 583. Police investigations were unsuccessful in locating Adrianne or any clues of her whereabouts. *See id.* Six years after Adrianne's death, the defendant married Lenora. *See id.* One night, after a few drinks with the defendant, Lenora woke to find the defendant beating her, telling her that what happened to Adrianne could also happen to her. *See id.* Lenora escaped and reported to authorities that defendant indicated that he killed Adrianne and could kill her. *See id.*

[205] *See id.* at 590. The prosecution was allowed to present to the jury evidence of the defendant's beating of Lenora to prove the defendant's intent and identity for the murder of Adrianne. *See id.*

[206] *See id.* at 581.

[207] *See id.* at 582-83.

[208] *See id.* at 587. After establishing that the evidence was relevant to prove both intent and identity, the appellate court held that: 1) the evidence was not cumulative of the other evidence presented by the State because the other evidence would not have been able to sufficiently demonstrate that the defendant intentionally killed his first wife; and 2) the trial court properly instructed the jury that the evidence of the defendant's beating of his second wife was admissible for the limited purpose of proving intent, identity, and motive, and not to show that the defendant had the propensity to commit crimes. *See id.*

[209] *Id.* at 590.

2. Case law from other jurisdictions

In addition to the California courts, many other courts have adopted special rules allowing evidence of prior abuse in domestic violence cases. For example, the Supreme Court of Kansas in *State v. Green*[210] ruled that prior abuse evidence between the same parties is admissible to establish a continuous course of conduct between those parties[211] or to collaborate the victim's testimony.[212] In *Green*, the defendant was convicted for the murder of his wife.[213] During the trial, evidence of the defendant's unstable relationship with his wife were admitted.[214] The evidence included testimony that the defendant threw a hatchet at his wife, an act for which he was convicted of battery.[215] There was also evidence of two prior assault charges brought by the victim against the defendant which were still pending at the time of trial.[216]

In upholding the conviction, the court sought guidance from the rule regarding the admission of similar acts in cases involving illicit sexual relations between an adult and a child.[217] The Kansas rule in child sex assault

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[210] 652 P.2d 697 (Kan. 1982).

[211] The focus here on the "same parties" parallels the California court's analysis in *People v. Zack*, 229 Cal. Rptr. 317 (1986), discussed at *supra* notes 170-85. In having this requirement before admitting prior act evidence, the courts seem to be focusing on the context of the relationship and the dynamics within that particular relationship.

[212] *See Green*, 652 P.2d at 701.

[213] *See id.* at 699. Upon arrival at the Green home on the night in question, the police discovered the victim dead in the bathtub. *See id.* The victim suffered two deep wounds to her head and severe injury to her liver, causing her to die from loss of blood. *See id.* The murder weapon was believed to be a doubled-bladed ax. *See id.* At the time of the murder, the defendant and the victim were separated. *See id.*

[214] *See id.*

[215] *See id.* at 700. Other evidence included testimony that the victim was afraid of the defendant and that in the weeks prior to her death, the defendant had threatened to send the victim "back to Africa in a pine box." *Id.*

[216] *See id.* The trial court admitted the evidence regarding the hatchet incident and the assault charges as relevant to the issues of identity, knowledge, and absence of mistake. *See id.* However, the court failed to give the jury a limiting instruction as to the permissible use of the prior abuse evidence. *See id.* Thus, the appellate court stated that since the trial court had failed to give a limiting instruction, committing prejudicial error warranting a new trial, its admission of the prior abuse evidence could only be upheld if the evidence was admissible independent of Kansas' equivalent to Rule 404(b). *See id.*

[217] *See id.* This rule was established by the Supreme Court of Kansas in *State v. Crossman*, 624 P.2d 461 (Kan. 1981). In *Crossman*, the defendant claimed that the trial court erred in admitting testimony by the victim of prior sexual assaults for which the defendant was charged and failing to give the jury a limiting instruction concerning the testimony. *See id.* at 463. The court allowed the evidence as relevant to the victim's credibility. *See id.* at 464. Therefore, the

cases provides that evidence of similar acts between the same parties is admissible "where the evidence is offered not for the purpose of proving distinct offenses, but rather to establish the relationship of the parties, the existence of a continuing course of conduct between the parties, or to corroborate the testimony of the witnesses . . . ."[218] Upon evaluating this rule, the *Green* court held it applicable in all cases of domestic violence.[219] To support this decision, the court referred to marital homicide cases holding that evidence of an unstable relationship and of the defendant's ill treatment of the victim, bears directly on the defendant's motive and intent.[220]

Arizona courts also recognize the importance of using evidence of previous abuse to establish intent. In *State v. Featherman*,[221] the Arizona Court of Appeals held that intent, an essential element to murder, is often shown by introducing evidence of other crimes similar in nature.[222] In *Featherman*, the defendant was charged with the murder of his former wife, Twyla, whose body was recovered from a garbage dump five months after her disappearance.[223] During the trial, Twyla's daughter testified that two months prior to the murder, the defendant hit the victim with a baseball bat.[224] The trial court held that the baseball bat incident was not too remote from the

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evidence of the prior charged offenses was admissible independent of the rule governing admissibility of prior act evidence. *See id.*

[218] *Green*, 652 P.2d at 701.

[219] *See id.* If the evidence of marital discord, including prior abuse by the defendant upon the victim, was admitted to establish the relationship between the parties, the continuous course of conduct between the parties, or to corroborate the victim's testimony, then the evidence would be admissible absent a limiting instruction and independent of the prior bad act rule. *See id.*

[220] *See id.* (citing State v. Fenton, 620 P.2d 813 (Kan. 1980)). *See also* State v. Wood, 638 P.2d 908, 910 (Kan. 1982)(holding such evidence admissible independent of the Kansas equivalent of 404(b) where it was offered not for the purpose of proving the offense charged, but to establish the previous violent relationship between the parties and the defendant's prior intent to kill his wife).

[221] 651 P.2d 868 (Ariz. Ct. App. 1982).

[222] *See id.* at 873.

[223] *See id.* at 869. The medical examiners were unable to determine the cause of death as Twyla's body was highly decomposed. *See id.* The police arrested the defendant based on evidence presented to them by the defendant's new wife, Glenda. *See id.* Glenda explained that she helped the defendant dispose of Twyla's body. *See id.* While she was not there when the killing took place, the defendant admitted to Glenda that he killed Twyla by pressing on pulse points on her temples until she became unconscious. *See id.* He repeated this action as Twyla drifted in and out of consciousness, until Twyla was finally unable to recover. *See id.* Glenda cooperated with the defendant out of fear that he may hurt her or her son. *See id.*

[224] *See id.* at 871. Twyla's daughter also testified to the general state of the marriage between the defendant and the victim. *See id.* at 870. She stated that the couple had a "rocky relationship" and that the defendant beat Twyla several times upon returning home after a night out. *See id.*

charged crime and was admissible under Rule 404(b) as relevant to proving the defendant's intent and/or motive.[225] The reviewing court affirmed this ruling stating that the evidence provided proof of the defendant's hostility toward the victim.[226] This hostility, the reviewing court held, was directly relevant to proving the defendant's intent on the night of the murder.[227]

The Supreme Court of Wyoming also acknowledged the significance of understanding the context of relationships in domestic violence cases. This is reflected by their decision in *Ortega v. State*.[228] In *Ortega*, the defendant was convicted of the murder of his wife.[229] The defendant denied the charge, claiming that his wife's death was an accident or mistake.[230] To disprove this defense, the trial court allowed testimony that on a prior occasion, the defendant urinated on his wife in their back yard.[231] The appellate court upheld the verdict, stating, "[t]he act of urinating upon one's own spouse is a deliberate act and is indicative of a complete lack of respect for the spouse as a human being."[232] Thus, the trial court determined that the evidence was relevant to the defendant's motive and intent.[233] The Wyoming Supreme Court affirmed the admission, concluding that it provided "insight into a

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[225] *See id.* at 873.

[226] *See id.*

[227] *See id.* As the court explained, the defendant was charged with first degree murder. *See id.* Under this charge, the prosecution is required to prove malice aforethought and that the killing was "willful, deliberate, and premeditated." *Id.* The baseball incident was determined as bearing on whether the defendant acted with malice in killing Twyla. *See id.* The incident was also held to demonstrate the defendant's intent to kill Twyla. *See id.* As the court stated, "[i]ntent is frequently shown by evidence of other criminal acts of the same character." *Id.*

[228] 669 P.2d 935 (Wyo. 1983).

[229] *See id.* at 940. On the night of the murder, the Ortega family entertained guests at their home. *See id.* at 938. Shortly after the guests left, the defendant and his wife began arguing. *See id.* The couple's fourteen year old daughter Robin heard the defendant "call his wife a 'dumb broad' and ordered her out of bed." *Id.* Robin heard a thump, some slapping, and then a gun shot. *See id.* The defendant called to Robin and told her that he had done a "bad thing." *Id.* Robin ran into her parents' bedroom, discovering her mother's body. *See id.*

[230] *See id.*

[231] *See id.* at 939. Testimony by the defendant's neighbor revealed that two months prior to the victim's death, she and the defendant had had a domestic quarrel in their back yard. *See id.* at 938, 943. The neighbor testified that the defendant had pushed the victim down and urinated in the direction in which the victim had fallen. *See id.*

[232] *Id.* at 944. The reviewing court held that the testimony of the neighbor undermined the defendant's claim that the shooting was a mistake or accident. *See id.*

[233] *See id.* In accordance with its order *in limine*, the trial court gave the jury a limiting instruction that the evidence of the urinating incident could only be considered to the extent that it proved motive, malice, preparation or an intent on the part of the defendant to kill the victim. *See id.* at 940.

person's feelings for another which may help establish motive, a permissible use of prior behavior under Rule 404(b)."[234]

In *People v. Illgen*[235] the Illinois Supreme Court emphasized pattern as proving intent. The victim in *Illgen* suffered a fatal gunshot wound.[236] The victim's husband was charged for the murder, but claimed that the gun went off accidentally while he was working on one of the gun's mechanisms.[237] The court held that the evidence of prior abuse of the wife "tended to negate the likelihood that the shooting was an accident and thereby tended to prove [the defendant's] intent."[238] To support its holding, the court cited *Commonwealth v. Donahue*.[239] In *Donahue*, it was held that while a single incident may be accidental, as the number of incidents grow, the likelihood that the defendant's behavior was accidental decreases.[240] Ultimately, the court in *Illgen* held that the evidence that the defendant physically abused his wife throughout the marriage was relevant "to show their antagonistic relationship and thus, tended to establish the defendant's motive to kill her."[241] The evidence also refuted the defendant's claim of accident.[242]

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[234] *Id.* at 944.

[235] 583 N.E.2d 515 (Ill. 1991).

[236] *See id.* at 517.

[237] *See id.* at 519. The defendant testified that on the night of the shooting, he and his wife were watching a movie on television. *See id.* While they were watching the movie, the defendant said that he was working the mechanism of one of his guns, "repeatedly pulling the hammer back and releasing it." *Id.* He claimed that he heard a loud noise and realized that his wife had been shot. *See id.* The defendant denied pointing the gun at his wife or having any intention to kill her. *See id.*

[238] *Id.* at 520. The jury was allowed to receive testimony from a friend of the defendant and the victim. *See id.* at 518. The testimony illustrated violent behavior of the defendant toward the victim throughout their marriage, including a statement made by the defendant that he never had to worry about his wife and children leaving him because he would shoot them first and then himself if they ever tried to leave him. *See id.*

[239] 549 A.2d 121 (Pa. 1988). In *Donahue*, the defendant was convicted of homicide arising out of an incident of child abuse. *See id.* at 124. The prosecution was allowed to present evidence of an incident of abuse committed by defendant on another child three years earlier. *See id.* at 128. The Supreme Court of Pennsylvania affirmed, stating that "although two different children may, at different times, be seriously injured or killed while in a person's care, and that this may happen without his intentional conduct, as the number of incidents grows, the likelihood that his conduct was unintentional decreases. It is merely a matter of probabilities." *Id.* at 127.

[240] *See id.* at 126 (citing 2 WIGMORE, ON EVIDENCE § 302 (1979)).

[241] *Illgen*, 583 N.E.2d at 520. This holding is consistent with *People v. Daniels*, 93 Cal. Rptr. 628 (1971), in which it was stated that "[e]vidence showing jealousy, quarrels, antagonism, or enmity between an accused and the victim of a violent crime is proof of motive to commit the crime." *See also supra* notes 170-85 and accompanying text for a discussion of People v. Zack, 229 Cal. Rptr. 317 (1986).

[242] *See Illgen*, 583 N.E.2d at 520.

The above cases focus on spousal abuse. However, domestic violence is not restricted to crimes of violence between intimates or spouses.[243] It includes violence against children.[244] In many child abuse cases, courts recognize that prior violence within the relationship may establish a pattern of abuse sufficient to establish intent. For example, in *U.S. v. Harris*,[245] the defendant was charged and convicted of murdering his eight-month old son.[246] The defendant claimed that the fatal injuries were caused when he tripped while carrying his son on his shoulders.[247] During the trial, evidence of prior injuries inflicted upon the child by the defendant was admitted.[248] Medical experts testified that this evidence suggested a pattern of child abuse.[249] On appeal for his conviction, the defendant alleged that the evidence of the medical experts was inadmissible based on undue prejudice.[250] The Tenth Circuit Court of Appeals affirmed, holding that the evidence "may well have been prejudicial . . . [because] a battered child is not a pretty picture. But in our view, the evidence of other injuries was highly probative in nature."[251]

In *State v. Tanner*,[252] the Utah Supreme Court ruled that prior ill treatment is admissible to establish a specific pattern of behavior between the defendant and the victim.[253] This pattern, the court held, was relevant to establish an

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[243] *See* JoAnn E. Taira, et al., *Domestic Violence-Related Homicides in the State of Hawai'i, 1985-1994*, HAWAI'I CRIME BRIEF, Apr. 1996, at 1.

[244] *See id.* Domestic violence includes child abuse, violence among family members, and even co-inhabitants. *See id.*

[245] 661 F.2d 138 (10th Cir. 1981).

[246] *See id.* at 139.

[247] *See id.* at 139-40. The defendant's initial story to medical personnel at the first hospital was that the baby had fallen out of his crib. *See id.* The defendant changed his story when the child was transferred to another hospital. *See id.* It was at that point that the defendant claimed he was carrying the child on his shoulder when he tripped over a telephone wire, causing both he and the baby to fall to the floor. *See id.* However, the medical examiner who performed the autopsy on the child found that he suffered from severe brain and abdominal injuries which could not have resulted from an accidental fall. *See id.* Rather, the examiner stated that the injuries occurred from "no less than six blows with a solid object, such as a fist, to the head and abdominal area." *Id.*

[248] *See id.* at 140. It was discovered by medical personnel that the child had additional injuries which were in the healing process. *See id.* These injuries included fractures to the clavicle, injuries to the ribs, wrist, tibia, and a possible fracture to the right arm. *See id.*

[249] *See id.*

[250] *See id.* at 139. The defendant claimed that the evidence should have been excluded during trial because it was highly prejudicial and of little probative value. *See id.* The trial court rejected this argument, allowing for the presentation of the prior injuries. *See id.*

[251] *Id.* at 142.

[252] 675 P.2d 539 (Utah 1983).

[253] *See id.* at 548. The defendant, Kathy Tanner, was convicted of manslaughter of her three-year-old daughter, Tawnya. *See id.* at 541. At trial, the prosecution was allowed to present testimony by medical personnel, describing the condition of the child's body, the nature of the

absence of accident or mistake and proving opportunity, knowledge, or identity.[254] The court specifically addressed the necessity for such evidence in child abuse cases,[255] noting the disparity of power and control in the parent-child relationship.[256] Because of this disparity, there is likely to be little direct evidence of the charged offense as a result of secrecy and the victim's inability to testify competently due to their vulnerability.[257] Furthermore, the court recognized that such abuse often occurs in the privacy of the home, increasing the likelihood that direct evidence will be unavailable.[258] In these cases, the court held, evidence of prior abuse may be the only link between the child's injuries and the perpetrator who is unwilling to offer an adequate explanation of the injuries, creating a heightened need for the prior act evidence.[259]

The nature of the relationship between the victim and the perpetrator as described in *Tanner* apply to all cases of domestic violence cases, not just those involving child abuse.[260] All forms of domestic violence have long been regarded as a "hidden problem."[261] Further, the "disparity of power and control" between the victim and the abuser recognized by the *Tanner* court is inherent to all crimes of domestic abuse.[262] Many times, as a result of this unequal power, victims recant their allegations, leaving little evidence for the prosecution to prove their case against the abuser.[263] Therefore, the

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injuries and the cause of death. *See id.* The medical testimony revealed other non-fatal injuries on the child's body, indicating that Tawnya's injuries were the result of a pattern of abuse. *See id.* at 548. The defendant objected to the introduction of evidence demonstrating prior abuse of Tawnya. *See id.* at 545.

[254] *See id.* at 546-47.

[255] *See id.*

[256] *See id.*

[257] *See id.* at 547.

[258] *See id.* However, the court added the following caveat when introducing evidence of prior acts of abuse:

> [The] reception of such evidence is justified by necessity and, if other evidence has substantially established the element of the crime involved (motive, intent, identity, absence of mistake, etc.), the probative value of showing another offense is diminished, and the trial court should rule it inadmissible even though relevant.

Id.

[259] *See id.*

[260] *See generally* Taira et al., *supra* note 243, at 1.

[261] *See Domestic Violence is Widespread in Massachusetts*, JET, Aug. 21, 1995, at 5.

[262] *See Family Violence: an AAFP White Paper*, AM. FAM. PHYSICIAN, Dec. 1994, at 1636 (stating that "gender and unequal power are factors in domestic violence . . . .").

[263] *See, e.g.*, State v. Clark, 83 Hawai'i 289, 298, 926 P.2d 194, 203 (1996), discussed *supra* notes 142-50 and accompanying text. In *Clark*, domestic violence expert Wendy Mow-Taira testified about domestic violence cases generally. *See id.* She stated that it was not uncommon for victims to recant their stories after they have been victimized. *See id.* The reason for the recantation is usually to protect the abuser. *See id.*

heightened necessity for admitting evidence of prior abuse described by Utah's Supreme Court in *Tanner* is applicable to all domestic violence cases.

The cases above reflect the trend of judiciaries across the country to respond to domestic violence. The common themes recognized by the courts in admitting prior abuse evidence are the existence of a previous relationship and a pattern of behavior. As seen in *Zack*[264] and *Green*,[265] the existence of a previous relationship and previous incidences of abuse in a particular relationship are relevant to prove the permissible issues in 404(b): motive, opportunity, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.[266] *Featherman*,[267] *Ortega*,[268] *Illgen*,[269] *Harris*[270] and *Tanner*[271] also reflect the use of past patterns of behavior to prove the above issues. However, Hawai'i's courts have failed to recognize the significance of a previous relationship or a pattern of behavior, thereby leaving Hawai'i ineffective in its fight against domestic violence.

B. Taking Steps to Address the Problem of Domestic Violence in Hawai'i

Domestic violence is a tremendous and growing problem.[272] It is a crime that knows no national or cultural boundaries.[273] Worldwide estimates show that thirty to sixty percent of all female homicides result from domestic violence.[274] In the United States, half of all married women will be physically

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[264] 229 Cal. Rptr. 317 (1986). *See supra* notes 170-85 and accompanying text for a further discussion of *Zack*.

[265] 652 P.2d 697 (Kan. 1982). *See supra* notes 210-20 and accompanying text for a further discussion of *Green*.

[266] *See supra* note 13 for the text of HAW. R. EVID. 404(b).

[267] 651 P.2d 868 (Ariz. 1982). *See supra* notes 221-27 and accompanying text for a discussion of *Featherman*.

[268] 669 P.2d 935 (Wyo. 1983). For a further discussion of *Ortega*, *see supra* notes 228-34 and accompanying text.

[269] 583 N.E.2d 515 (Ill. 1991). *See supra* notes 235-42 and accompanying text for a discussion of *Illgen*.

[270] 661 F.2d 138 (10th Cir. 1981). *See supra* notes 245-51 and accompanying text for further discussion of *Harris*.

[271] 675 P.2d 539 (Utah 1983). For a complete discussion of *Tanner*, *see supra* notes 252-59 and accompanying text.

[272] *See* Sandra Oshiro & Linda Aragon, *Life-and-death Challenge to Our Community*, THE HONOLULU ADVERTISER, June 4, 1996, at A2.

[273] *See* Carol Goldberg, *LI Employers Confront Domestic Violence*, LI BUS. NEWS, Aug. 21, 1995, at 1. "Domestic violence occurs at all socio-economic levels, in all cultures, and occupations." *Id.*

[274] *See* HAWAII LAWYERS CARE, STUDENTS AND ADVOCATES FOR VICTIM'S OF DOMESTIC VIOLENCE: A PROJECT OF HAWAI'I LAWYERS CARE (1995).

abused at least once during their marriage.[275] Seriously under-reported and undiagnosed,[276] almost four million American women were physically abused by their intimate partners in 1992 alone.[277] Accounting for thirty-five percent of all emergency room visits,[278] domestic violence is labeled as the leading cause of injury to women in the United States,[279] claiming a victim every fifteen seconds,[280] and taking the lives of four women every day.[281] Totaling about 1,400 deaths each year, the number of women murdered in crimes of domestic violence exceeds the number of soldiers killed in the Vietnam War.[282]

In Hawai'i, domestic violence is an especially pressing problem. "[H]usbands murder wives, boyfriends slay girlfriends, and parents kill children at a higher rate in Hawai'i than the nation as a whole."[283] Between 1985 and 1994 alone, twenty-nine percent of all homicides in Hawai'i were linked to domestic violence.[284] This has raised much concern in the community, and the Attorney General's Office has even stated that there is no indication that the seriousness and high level of domestic violence homicides in Hawai'i is subsiding.[285] The domestic violence statistics have been steady for at least three to four years.[286]

Domestic violence results in death, serious injury, and mental health issues to victims, their children, and their families.[287] Advocates against domestic violence suggest that domestic violence deaths can be prevented through

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[275] *See* Renee M. Yoshimura, Comment, *Empowering Battered Women: Changes in Domestic Violence Laws in Hawai'i*, 17 U. HAW. L. REV. 575 (1995).

[276] *See* Family Violence Prevention Fund, *supra* note 163. Domestic violence has long been considered a hidden problem which is difficult to measure. *See Domestic Violence is Widespread in Massachusetts*, *supra* note 261, at 5.

[277] *See* THE COMMONWEALTH FUND (NEW YORK), FIRST COMPREHENSIVE NATIONAL HEALTH SURVEY OF AMERICAN WOMEN (July 1993).

[278] *See* Family Violence Prevention Fund, *supra* note 163.

[279] *See* Elena Salzman, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329 (1994). *See also Family Violence: an AAFP White Paper*, *supra* note 262 at 1636 ("Women in the United States are more likely to be assaulted, injured, raped or killed by a current or previous male partner than by all other assailants.").

[280] *See* Joan Ryan, *Why Sports Heroes Abuse Their Wives*, REDBOOK, Sept. 1995, at 5.

[281] *See Violence Against Women in the United States*, (Sept. 5, 1997) <http://www.org/issues/ violence/ stats.html>. *See also* Goldberg, *supra* note 273, at 1 (present-ing statistics that of all the women murdered in the United States, forty-two percent are killed by their male partners).

[282] *See Violence Against Women in the United States*, *supra* note 281.

[283] Oshiro & Aragon, *supra* note 272, at A2.

[284] *See id.*

[285] *See id.*

[286] *See id.*

[287] *See* Ganley, *supra* note 162, at 15.

intervention and by holding the perpetrator accountable for his or her actions.[288] When abusers are not punished for their acts of violence, the clear message sent to the public is that "men can beat their wives, perhaps even kill then, and go unpunished."[289]

To hold the perpetrators of domestic violence accountable, the prosecution must be allowed to show the truth of the situation. As the *Tanner* court articulated, domestic violence is a crime which occurs in the confines of the home.[290] Therefore, it is difficult to ascertain the truth through direct evidence.[291] This is especially true when homicide is involved and the victim is therefore unable to testify.[292] The truth can only be attained if the jury is given enough evidence to completely understand the dynamics of domestic violence, such as its escalating pattern of abuse.

Truth is the purpose of trials.[293] In domestic violence cases, history provides the truth of the situation.[294] Domestic violence is unique compared to other crimes. It is repetitive[295] and cyclical[296] in nature. It is estimated that approximately one of every five victims of domestic violence has been abused at least three times in the prior six months.[297] Further, of the women who suffered death as a result of domestic violence, estimated at forty-two percent of all female murders,[298] two-thirds were previously abused in an incident prior to the one causing their death. If evidence of the prior violence is not admitted, a jury will be greatly uninformed concerning the circumstances

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[288] *See* Oshiro & Aragon, *supra* note 272, at A3. *See also* TOYOFUKU, *supra* note 167, at 1-9; Rice, *supra* note 14, at 952.

[289] Hancock, *supra* note 23 at 61. The effect of O.J. Simpson's acquittal for the death of his wife, Nicole Brown Simpson, has created great concern for both victims and advocates of domestic violence. *See id.* It is said that "O.J." has become a new slang in crimes of domestic violence to mean torture. *See id.* Where batterers once said, "I'm going to kill you," they are now saying "I'm going to O.J. you." *Id.* O.J's acquittal has given domestic abusers the green light to continue their behavior without the fear of punishment. *See id.*

[290] *See* State v. Tanner, 675 P.2d 539, 547 (Utah 1983). For a discussion of *Tanner*, *see supra* notes 252-59 and accompanying text.

[291] *See id.*

[292] *See* Rice, *supra* note 14, at 952.

[293] *See* People v. Zack, 229 Cal. Rptr. 317, 320 (1986), discussed *supra* notes 170-85 and accompanying text.

[294] *See id.* (affirming admittance of prior abuse because the "[a]ppellant was not entitled to have the jury determine his guilt or innocence on a false presentation that his and the victim's relationship and their parting were peaceful and friendly").

[295] *See* Family Violence Prevention Fund, *supra* note 163.

[296] *See* DOMESTIC VIOLENCE MANUAL, *supra* note 163.

[297] *See* Family Violence Prevention Fund, *supra* note 163.

[298] *See* LEAGUE OF WOMEN VOTERS OF HONOLULU, HAWAI'I STATE COMMISSION ON THE STATUS OF WOMEN, REPORT: DOMESTIC VIOLENCE FAMILY COURT MONITORING PROJECT (Sept. 1996).

surrounding the crime and society will be left unarmed against the consequences of domestic violence. Without the evidence of prior instances of abuse, the "whole truth" is kept from the fact-finder, justice will not be served, and the perpetrator will be unpunished. Without punishment, there is no deterrent against domestic violence.[299] Without deterrence, lives will continue to be lost to domestic abuse.

While the Hawai'i Supreme Court in *State v. O'Daniel*[300] appeared to have recognized the importance of a relationship in establishing motive and intent just as other jurisdictions have done, it has still failed to adopt any rule specifically allowing evidence of prior abuse in domestic violence cases. This is shown by the *Robinson*,[301] *Clark*,[302] and *Maelega*[303] opinions. Although these cases appear to bring hope for improved prosecution of domestic violence cases, they merely indicate that the court has carved out specific, fact-dependent exceptions to Rule 404(b). The court's loyalty in over-protecting the defendant against undue prejudice remains, and hence, Rule 404(b) is still strictly applied. However, these cases do provide a glimmer of hope. In all three cases, specific prior instances of abuse were admitted for the purpose of showing the history and the nature of the relationship. Thus, although the court allowed the evidence in extremely narrow exceptions to Rule 404(b), the admission of the evidence resulted in the conviction of the defendants. Therefore, these cases demonstrate the effect that prior act evidence can have and its importance in holding the abuser accountable for his actions.

Domestic violence is a societal problem.[304] The effects of this crime are not confined to the victim and the perpetrator.[305] The emotional and mental repercussions are felt by the entire family in which the abuse occurs.[306]

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[299] *See generally* Rice, *supra* note 14. Domestic violence can be prevented if the abuser knows that their crime will be exposed in a public trial. *See id.* at 953.

[300] 62 Haw. 518, 616 P.2d 1383 (1980). For a further discussion of *O'Daniel*, *see supra* notes 122-23 and corresponding text.

[301] 79 Hawai'i 468, 903 P.2d 1289 (1995). *See supra* notes 125-32 for a discussion of *Robinson*.

[302] 80 Hawai'i 172, 907 P.2d 756 (1995). *See supra* notes 142-50 for a discussion of *Clark*.

[303] 83 Hawai'i 289, 926 P.2d 194 (1996). *See supra* notes 133-41 for a discussion of *Maelega*.

[304] *See Family Violence: an AAFP White Paper*, *supra* note 262, at 1636 (recognizing that "family violence has become all-pervasive in our society").

[305] *See id.* Family violence affects us as individuals, family physicians, parents, spouses, educators and citizens of our communities. *See id.*

[306] *See id.* For children raised in homes of domestic violence, the consequences follow them into their adult lives as they are unable to learn nonviolent behavior. *See id.*

Inevitably, domestic violence affects entire communities.[307] Hawai'i must react and follow the trend across the country addressing the problem of domestic violence as other jurisdictions have done. A necessary step to do this requires the Hawai'i Supreme Court to declare a rule specifically for domestic violence cases, as done by the California court in *Zack*,[308] the Kansas court in *Green*,[309] the Illinois court in *Illgen*,[310] and the Utah court in *Tanner*.[311] Under the rules declared by the courts in these cases, evidence tending to show antagonism and hostility in the relationship are relevant and will be admitted to prove the following issues essential to the crime: intent, absence of mistake, opportunity, knowledge, motive, and identity. By declaring such a rule, the court would be recognizing, as other courts have, the importance of a previous relationship between the perpetrator and the victim and the dynamics of that relationship. Further, by doing so, the court would be acknowledging the unique pattern of behavior involved in domestic violence situations. The cases discussed above reflect that the most common defenses in domestic violence cases are identity, mistake, lack of intent, and lack of motive. Pattern is relevant to prove identity, lack of mistake, identity and motive, thus rebutting the common defenses. As expressed by the Supreme Court of Pennsylvania in *Commonwealth v. Donahue*,[312] the more often violence occurs, the less likely it is that there is a lack of intent.[313]

Alternatively, the legislature can take action to address the problems of domestic violence. As has been done in at least one other state,[314] the

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[307] *See id.* The effects of domestic violence include loss of life, human potential, substance abuse, depression, suicide, anxiety, and chronic pain. *See id.* It is estimated that domestic abuse costs Americans between $5-10 billion per year in health care. *See id.*

[308] 229 Cal. Rptr. 317 (1986). For discussion of *Zack*, *see supra* notes 170-85 and accompanying text.

[309] 652 P.2d 697 (Kan. 1982). For discussion of *Green*, *see supra* notes 210-20 and accompanying text.

[310] 583 N.E.2d 515 (Ill. 1991). For discussion of *Illgen*, *see supra* notes 235-42 and accompanying text.

[311] 675 P.2d 539 (Utah 1983). For discussion of *Tanner*, *see supra* notes 252-59 and accompanying text.

[312] 549 A.2d 121 (Pa. 1988). For discussion of *Donahue*, *see supra* notes 239-40 and accompanying text.

[313] *See id.*

[314] *See* MINN. STAT. ANN. ch. 634, R. 634.20 (1985). The Minnesota legislature adopted a special rule applicable to cases of domestic violence. The rules states:

> Evidence of similar prior conduct by the accused against the victim of domestic abuse, as defined under section 518B.01, subdivision 2, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Id.

legislature can adopt an abrogated rule. Such a rule would specifically allow, in cases of domestic violence, instances of prior abuse to be admitted into evidence.

Time is a benefit of the Hawai'i Supreme Court declaring a per se rule over the enactment of a legislative rule. If the legislature promulgates a rule, advocates against domestic violence would need to wait until the next legislative session. While the law is being proposed, legislators will grapple over each word in the bill while in the interim, more lives will be lost to crimes of domestic violence. Domestic violence is a pressing problem that needs to be addressed immediately. The court would be better equipped than the legislature to address the issues in a time sensitive manner.

Regardless of the alternative chosen, either of the above two will have the effect of allowing the prosecution to present to the fact-finder the entire truth and all of the circumstances surrounding domestic violence. By showing the continuing relationship between the victim and the abuser, the fact-finder will become aware that repetition of the abuse is more likely. The purpose of implementing a rule to allow evidence of prior abuse is not to show the defendant's general criminal or violent propensity. Its purpose is to demonstrate that the relationship between the defendant and the victim fits within the unique nature of domestic violence: the repetition, the secrecy, the vulnerability of the victim, and the perpetrator's control over the victim. Thus, the rule should be fashioned to allow only evidence of prior abuse in the domestic violence context and in cases of domestic violence. This will allow the courts to provide a fair trial to the defendant by preventing a judgment based on general character evidence. It also allows the courts to provide the victim a fair trial by allowing the circumstances of the crime involved to be revealed.

While evidence of prior abuse may have prejudicial effects, the court in *Daniels*[315] recognized the relevancy of such evidence, holding that its probative value outweighs its prejudicial effect, and acknowledged its importance in disproving the defendant's defenses. As the Hawai'i Supreme Court has stated, probative evidence is always prejudicial since it proves the case against the accused.[316] Ultimately, allowing evidence of prior abuse will hold perpetrators of domestic violence responsible for their actions. They will be put on notice that their actions will be punished. This will deter further similar conduct. Correspondingly, their convictions will have a substantial impact in decreasing the instances of domestic violence in Hawai'i, preventing negative impacts upon families and society.

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[315] *Daniels*, 93 Cal. Rptr. at 628. *See supra* notes 186-88 and accompanying text for a discussion of *Daniels*.

[316] *See* State v. Klafta, 73 Haw. 109, 831 P.2d 512 (1992). *See supra* note 188 for a brief discussion of *Klafta*.

V. CONCLUSION

With a women beaten every nine seconds by her partner,[317] the seriousness of domestic violence in the United States cannot be ignored. The ultimate goal in domestic violence prosecutions should be to protect victims of domestic violence. To do this, the truth must be ascertained. The truth can only be ascertained by allowing evidence of prior instances of abuse. Once the truth is revealed, perpetrators can be properly held accountable for their actions.

Had the jury in the Carvalho case known that the defendant had brutally beaten his first wife to death, the verdict in the trial for the abuse of Nora may have been different. The jury would have realized that Nora recanted her story, not because it was untrue, but out of fear of her life. Nora knew that Carvalho had killed before, and that he was capable of killing again. Carvalho was released under the false aura of veracity that he is peaceful and had no intention of harming Nora. In this case, the jury never knew the whole truth. It was as if the jury was required to critique a movie based on a viewing of only the last five minutes without being able to appreciate the events leading to the climax. As a result, Boy Carvalho is on the loose and another victim may soon fall prey to him. This could have been prevented had evidence of Carvalho's prior conviction been revealed.

Sarah J. Lee[318]

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[317] *See* REPORT: DOMESTIC VIOLENCE FAMILY COURT MONITORING PROJECT, *supra* note 298.

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Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian "Cultural Property" Repatriation

"The famous spear rest. . . .
If this thing could talk, imagine the stories we'd have."
- Mayor Vincent A. Cianci Jr., City of Providence, Rhode Island.[1]

I. INTRODUCTION

Nearly two centuries ago, the Hawaiians[2] lost a *ki`i la`au*.[3] No one quite

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[1] Jonathan Saltzman, *Hawaiian Artifact at Center of Custody Dispute: Providence's Museum of Natural History Wants to Sell the Spear Rest, but Native Hawaiians Say the Object Should be Returned to Them*, THE PROVIDENCE SUNDAY JOURNAL, Jan. 19, 1997, at B1.

[2] At the outset, this Comment must address the difficulties in using the term "Hawaiian." *Compare* HAW. REV. STAT. § 10-2 (1995)(defining "Hawaiian" as any descendant of the peoples inhabiting the Hawaiian isles prior to 1778), *with* Hawaiian Homes Commission Act of 1920, Pub. L. No. 67-34, ch. 42 § 201, 42 Stat. 108 (1921)(defining "native Hawaiian" as those of not less than fifty percent blood quantum). Although the notion of a monolithic Hawaiian community appeals to advocates across the political spectrum due to its conceptual tidiness, it remains a social abstraction only partially grounded in reality. "Culture, class, lineage, historical memory, geography and gender are among the many factors contributing to vast differences in lifestyles, group relations, cultural practices and political outlooks." Eric K. Yamamoto et al., *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 7 n.21 (1994)[hereinafter Yamamoto, *Cultural Performance*]. "Hawaiian" is largely a racially and politically constructed concept—a human description of reality. *See infra* notes 180-81 and accompanying text ("race" as a social construction); BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1991)(nation as an "imagined community"). As such, the term carries not only meaning as forged by the pre-contact inhabitants of Hawai'i and their descendants themselves, but a history of dominant-society prejudice as well. *See infra* note 269 (majority stereotypes of Natives).

The diversity of the Hawaiian community, however, does not deprive the word "Hawaiian" of all conceptual value; in many contexts, "Hawaiian" remains the most accurate one-word description of the people descended from pre-contact inhabitants of Hawai'i. The social origins of the Hawaiian identity, furthermore, demand critical interrogation rather than willful ignorance, especially in socio-political controversies such as the present dispute. Indeed, the definition of Hawaiian identity is not a sterile anthropological or epistemological exercise, but an essentially political act impacting the lives of real people. *See* HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I 134-36 (1993)(decrying the harm caused to Native peoples by imposed legal identities); *see also infra* notes 276-78 and accompanying text (assertion of culture as a political statement). This Comment thus proceeds under the view that the rich and meaningful historical, cultural, social, and political background of the term "Hawaiian" justifies its use at least with respect to the federal policy of repatriation of Hawaiian human remains and cultural objects. *Cf.* Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, 648 (1992)(arguing for a concept of groups that recognizes their central significance as well as their

remembers when or how such a sacred *`aumakua* ("guardian spirit") image and important cultural symbol left the islands.[4] Some say the *ki`i la`au* was stolen from a burial site of an *ali`i* ("chief") by a pot hunter. Others speculate that the owner of the *ki`i la`au* presented it as a gift to a visitor from the West. Still others claim it was improperly sold by an individual Hawaiian who had no right to give away such a cultural treasure. If the Hawaiians grieved over the loss of the *ki`i la`au* at the time, they soon lost that grief among the greater tragedies they endured over the next century and a half.[5]

Some time after the *ki`i la`au* disappeared, a small, fifteen-inch, wooden spear rest carved in the shape of a goblin arrived on the East coast of the United States, in the town of Providence, Rhode Island.[6] Archaeological authorities speculate that the spear rest belonged to an important Hawaiian chief who used it to hold spears on his fishing or war canoe;[7] antique art appraisers estimate its value at over $200,000.[8] According to the records, either a Ms. Betty Earl or a Captain Aborn donated it in the 1820's to the

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shifting changeability). This Comment also pays foremost attention, under the universal principle of self-determination, *see infra* note 273, to the Hawaiians' own definitions of group identity and culture. *See* Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1776 (1990)(adopting as a conceptual starting point the granting of "particular weight to a group's internal process for identifying group membership")[hereinafter Matsuda, *Pragmatism Modified*].

[3] *"Ki`i la`au"* translates literally as "wooden image." The meaning of the *ki`i la`au* beyond these immediate features is the subject of the dispute described herein. Approximately 150 such objects are known to exist in museums and private collections throughout the world. *See* HALLEY J. COX & WILLIAM H. DAVENPORT, HAWAIIAN SCULPTURE 118 (1988) [hereinafter COX & DAVENPORT].

[4] *See* Interview with Lani Ma`a Lapilio, Director, Judiciary History Center, State of Hawaii and Legal Consultant, Office of Hawaiian Affairs, in Honolulu, Haw. (Apr. 20, 1997)[hereinafter Lapilio Interview].

[5] For an overview of modern Hawaiian history, see *generally* RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM (1953); SAMUEL M. KAMAKAU, RULING CHIEFS (1961); LAWRENCE H. FUCHS, HAWAII PONO: AN ETHNIC AND POLITICAL HISTORY (1961); GAVAN DAWS, SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS (1968); LILIKALA KAME`ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES (1992); NOEL KENT, HAWAII: ISLANDS UNDER THE INFLUENCE (1993).

[6] *See* Gregory Smith, *It's Up to U.S. to Put Spear Rest Issue to Rest: A Federal Review Committee Will Decide Whether the City's Museum of Natural History or the State of Hawaii Rightfully Owns the Historic Hawaiian Artifact*, THE PROVIDENCE JOURNAL-BULLETIN, May 30, 1996, at D1. Nancy Derrig, Parks Superintendent of the City of Providence, says that a "Hawaiian chief probably gave the spear rest to a whaler, who brought it back to New England." *Id.*

[7] *See* Saltzman, *supra* note 1, at B1.

[8] *See* Smith, *supra* note 6, at D1. One of several anonymous individuals interested in buying for the *ki`i la`au* has reportedly offerred this amount, and experts have confirmed the reasonableness of the bid. *See id.*

Providence Franklin Society, a private association for sailors.[9] When the Society disbanded years later, it left the spear rest with the Museum of Natural History, owned and operated by the City of Providence.[10] There it stayed for the better part of this century, as the centerpiece of the museum's Pacific collection.[11]

In November 1996, these two stories—one about the *ki`i la`au*, the other about the spear rest—finally collided in a federal suit in Rhode Island district court.[12] The manner in which the conflict between these stories escalated into full-blown federal court litigation is a story in itself. Unable to afford the security required to guard such a valuable artifact,[13] the Museum decided to sell the *ki`i la`au* through Sotheby's auction house to help fund much needed improvements to Museum facilities and exhibits.[14] Two Hawaiian groups, the Hu`i Malama I Na Kupuna `O Hawai'i Nei ("Hui Malama")[15] and the Office of Hawaiian Affairs ("OHA"),[16] learned of the imminent sale and demanded the return of the *ki`i la`au*.[17] The Hawaiian representatives invoked the Native American Graves Protection and Repatriation Act ("NAGPRA"), a newly passed federal statute mandating, *inter alia*, the return of various culturally important items to their communities of origin.[18] The City of Providence,

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[9] *See* John Castelluci, *Hawaiians Spar For Spear Rest Fight: Hawaiian Officials Have Urged Mayor Cianci to Delay the Sale of the Valuable Artifact Until the Issue of Ownership Has Been Decided*, THE PROVIDENCE JOURNAL-BULLETIN, Apr. 5, 1996, at C1.

[10] *See id.*

[11] *See id.*

[12] *See* Saltzman, *supra* note 1, at B1 (chronicling the history of the *ki`i la`au* dispute).

[13] *See* John Castelucci, *Park Museum Ready to Cut a Deal on Rare Hawaiian Spear Rest*, THE PROVIDENCE JOURNAL-BULLETIN, Feb. 16, 1996, at C1. The object in fact disappeared from its display for a brief period in 1973, reappearing in the Museum's basement. The City Parks Superintendent at the time later faced charges for theft. Since that incident, the Museum has kept the object hidden away in a bank safe deposit box. *See id.*

[14] *See id.*

[15] *Hui Malama I Na Kupuna `O Hawai'i Nei* means "Group Caring for the Ancestors of Hawai'i." The *Hui Malama* is a Native Hawaiian organization specifically authorized under the "NAGPRA" federal repatriation statute, *see* 25 U.S.C. §§ 3001-13 (1994), to represent the Hawaiian community. *See id.* § 3001. *See also* Edward H. Ayau, *Restoring the Ancestral Foundations of Native Hawaiians: Implementation of the Native American Graves Protection and Repatriation Act*, 24 ARIZ. ST. L.J. 193, 195-98 (1992)(describing several repatriation efforts by *Hui Malama*).

[16] The repatriation statute also authorizes the Office of Hawaiian Affairs, a Hawai'i state agency established by state constitutional amendment in 1978, to participate in the repatriation process. *See* 25 U.S.C. § 3001(12).

[17] *See* John Castelucci, *Hawaiians Challenging Artifact Sale: Providence Officials Are Told the Sale of an 1800s Islands Spear Rest May Violate Federal Laws*, THE PROVIDENCE JOURNAL-BULLETIN, Mar. 11, 1996 at C-1.

[18] *See* 25 U.S.C. §§ 3001-13. See *infra* Part II.B. for a full analysis of NAGPRA's operation in the *ki`i la`au* dispute. For a summary of other domestic laws besides NAGPRA

however, insisted that the *ki`i la`au*, as a trivial utilitarian and decorative object, fell outside of NAGPRA's scope.[19]

In November 1996, the dispute went before the Review Committee[20] established under NAGPRA to facilitate the repatriation process.[21] After hearing seven hours of testimony, the Committee unanimously recommended the repatriation of the *ki`i la`au*.[22] Undeterred, the City responded by bringing a state action of replevin to recover the *ki`i la`au* from Sotheby's.[23] City officials personally escorted the object from New York to a downtown Providence bank, where they locked it up in a safe deposit box.[24] They also filed suit in Rhode Island federal district court against the Hawaiian groups and the United States Department of the Interior.[25] The City's complaint requests a declaratory judgment that the City of Providence owns the *ki`i la`au* and that NAGPRA, as applied, violates the Due Process Clause and Takings Clause of the Fifth Amendment of the United States Constitution.[26] The Hawaiians counterclaimed, seeking an injunction against the City blocking the sale of the *ki`i la`au* and an order mandating consultations[27] and

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relating to "cultural property" protection, see Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 73 B.U. L. REV. 559 (1995).

[19] *See* Saltzman, *supra* note 1, at B1.

[20] NAGPRA establishes a Review Committee composed of seven members appointed by the Secretary of the Interior: three from nominations submitted by the Indian tribes; three from nominations submitted by the museum and scientific community; and one from a list drawn up by all of the appointed members. *See* 25 U.S.C. § 3006(b). The Committee's responsibilities include monitoring, consultations and inventories. *See id.* § 3006(c). The Committee however, does not have the authority to make binding legal decisions; the statute limits its adjudicatory function to "facilitating the resolution of any disputes." *Id.* § 3006(c)(4). For a summary of the enforcement mechanisms under NAGPRA, see *infra* note 82.

[21] *See* Saltzman, *supra* note 1, at B1.

[22] *See id.*

[23] *See* Complaint for Replevin of the City of Providence, City of Providence v. Sotheby's, Inc. (Super. Ct., R.I. 1996)(No. 96-6074)(on file with author)[hereinafter Replevin Complaint]. For an explanation of the common law action in replevin, see *infra* notes 52-53 and accompanying text.

[24] *See* Jonathan Saltzman, *Hawaiian Spear Rest Returns, But Not to Remain: The City Retrieved the 200-Year-Old Artifact from Sotheby's, But Its Ownership Will be Decided in Court, and Mayor Cianci Plans to Sell It if the City Wins*, THE PROVIDENCE JOURNAL-BULLETIN, Nov. 22, 1996, at C1.

[25] *See id*; Complaint of the City of Providence, City of Providence v. Bruce Babbitt (D. R.I. 1996)(No. 96-668)(on file with author)[hereinafter Complaint].

[26] *See* Complaint, *supra* note 25; *see also* U.S. CONST. amend. V.

[27] *See infra* note 85 (statutory requirement of consultations between Native claimants and museums).

repatriation[28] pursuant to NAGPRA.[29] In the meantime, the NAGPRA Review Committee, which had retracted its original decision,[30] held a second hearing on the *ki`i la`au* in March 1997.[31] Once again, however, the Review Committee recommended its return.[32]

As the first "test case" on the "takings" implications on NAGPRA, the present dispute will not only determine the rights of the Hawaiians to the *ki`i la`au*, but also impact future NAGPRA claims and possibly speak to the continued viability of NAGPRA's repatriation mandate.[33] The effect of the

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[28] For a discussion of the legal procedures and criteria for repatriation, see *infra* notes 90-105 and accompanying text.

[29] *See* Answer, City of Providence v. Bruce Babbitt (D. R.I. 1996)(No. 96-668)(on file with author)[hereinafter Answer]. The federal government also reacted swiftly, filing a motion dismiss mainly on grounds of jurisdiction and ripeness. *See* Memorandum in Support of Federal Defendant's Motion to Dismiss, City of Providence v. Bruce Babbitt (D. R.I. 1996)(No. 96-668)(on file with author). This Comment, focusing on the merits of the present case, does not address these threshold issues of jurisdiction and ripeness.

[30] *See* Lapilio Interview, *supra* note 4. The Review Committee retracted its original decision in light of the controversy caused by the proceeding. William Davenport, a retired archaeologist, was willing to testify over the phone on the City's behalf during the Review Committe meeting. The Review Committee, however, did not hear his testimony. *See id.*

[31] *See infra* note 130.

[32] In its second decision, however, the Review Committee only recommended the return of the *ki`i la`au* as a matter of policy, reserving judgment on the legal issue of "right of possession." *See infra* note 132.

[33] *See infra* Part II. This Comment addresses the repatriation of "cultural property" under NAGPRA, specifically "sacred objects" and "cultural patrimony" like the *ki`i la`au*. *See infra* notes 86-88 (definitions of items covered by NAGPRA). *See also infra* note 37 (debate over cultural property). Human remains and burial items not only involve distinct legal issues, see *infra* notes 64-66, 90-95 (common law view of human remains and burial items as "quasi-property" and the separate treatment of these items under NAGPRA), but possibly different questions of morality as well. *See* James Riding In, *Without Ethics and Morality: A Historical Overview of Imperial Archaeology and American Indians*, 24 ARIZ. ST. L.J. 11 (1992)(criticizing archaeology from a historical and moral perspective). The repatriation effort to date, focusing on "human remains" and "funerary objects," has progressed substantially, *but cf.* Bonnichsen v. United States Dep't of the Army, 969 F. Supp. 928 (D. Or. 1997)(vacating a decision by the Army Corps to repatriate the recently exhumed skeleton in Kennewick, Washington, fueling the controversy that some say portends an anti-Native backlash), but has left the "cultural property" issues largely unexplored. *See* Lapilio Interview, *supra* note 4. For example, while museums and agencies have published 2,713 Federal Register repatriation notices for "human remains" and 122,948 notices for "funerary objects," they have published only 212 of such notices for "sacred objects" and 16 for "cultural patrimony." S. REP. NO. 104-356, at 2 (1996). Some commentators have already concluded that NAGPRA fails to sufficiently address the rights of Native claimants to their sacred objects and cultural patrimony. *See* Christopher Byrne, Comment, *Chilkat Indian Tribe v. Johnson and NAGPRA: Have We Finally Recognized Communal Property Rights in Cultural Objects?*, 8 J. ENVTL. L. & LITIG. 109, 131 (1993); Steven Platzman, Comment, *Objects of Controversy: The Native American Right to Repatriation*, 41 AM. U. L. REV. 517, 549-51 (1992).

ki`i la`au dispute, however, extends far beyond the narrow confines of the law. As critics of traditional legal scholarship demonstrate, courts provide a stage on which claimants not only enforce their legal rights, but also engage in a larger political process of framing issues, reinforcing or undermining social norms, and crafting cultural narratives.[34] The law shapes the "stories" of society by limiting or expanding the scope of the debate; these social "stories" in turn manifest themselves in the law.[35] Participants in a lawsuit thus not only play their roles as courthouse actors, but also write "the script" from which society as a whole reads.[36]

In the present case, the parties' competing arguments shed light on the deeper social and cultural meanings permeating the ownership dispute over the *ki`i la`au*.[37] As explained in this Comment, the "legal" arguments of the

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[34] Yamamoto et al., *Cultural Performance*, *supra* note 2, at 27. While a diverse body of critical scholarship recognizes this link between the law and society or culture, *see infra* note 168, this Comment focuses on two representative schools, Legal Realism and Critical Race Theory, that offer two different analytical approaches to the present dispute. *See infra* Part III.A.

[35] *See infra* notes 182-86 and accompanying text (discussion of legal storytelling).

[36] *See* Yamamoto et al., *Cultural Performance*, *supra* note 2, at 20-21 ("[C]ourts in important instances not only decide disputes, they also transform particular legal controversies and rights claims into larger public messages.").

[37] *See infra* Part III. The *ki`i la`au* dispute relates to the general debate—international in scope—over the ownership of cultural property. *Compare* Roger W. Mastalir, *A Proposal For Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 FORDHAM INT'L L.J. 1033 (1992-93)(arguing that the "cultural" aspects of cultural property dictate its return), *and* John Moustakas, Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179 (1989)(advocating recognition of communal rights to cultural property), *with* John Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339 (1989)(asserting that cultural objects are the common property of all humankind)[hereinafter Merryman, *Public Interest*]. These issues of cultural property ownership in turn connect to an even larger discourse on communal versus individual property rights. *Compare* Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982)(positing that property is an essential element of personal identity), *with* Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417 (1984)(advancing the concept of communal rights contrary to the conventional notion of rights as individual property).

A full discussion of these issues of theory and policy, however, lies beyond the scope of this Comment. The analytical approach adopted here does not question the ability of our legal system to comprehend or accommodate the notion of communal rights to cultural property per se. Indeed, some advocates of "communal rights" would argue that the *ki`i la`au* represents the "communal property" of the American public at large, rather than Native communities alone. *See generally* Merryman, *Public Interest*, *supra* note 37. This Comment's approach instead focuses on the manner in which legal "rights" translate into social relationships, and social relationships shape legal "rights." *See infra* notes 175-76, 181 and accompanying text. In the *ki`i la`au* dispute, the parties' legal arguments not only advance certain legal rules ("ownership," "possession," "title") and concepts ("private property" and "communal rights"), but also describe certain relationships of power between the litigants and the communities they represent.

City officials reflect an underlying narrative of control and superiority over the *ki`i la`au* and its culture of origin.[38] The narratives of the Hawaiian representatives, on the other hand, challenge the prevailing cultural values and assumptions on which the City officials rely.[39] These Hawaiian narratives also begin to describe a new framework for viewing reality grounded in Hawaiian understanding and experience.[40]

This Comment examines the dispute over the *ki`i la`au* within its legal, social, and cultural context.[41] Part II presents a standard legal analysis of the facts and law relevant to the dispute, explaining the possible legal stalemate created by the statute's own language. Part III employs analytical tools developed under two schools of legal critique, Legal Realism and Critical Race Theory, to excavate the competing narratives implicit in the parties' legal claims.[42] Part IV describes the contours of an alternative critical vantage point from which one may both examine the larger historical and cultural context of the *ki`i la`au* dispute, as well as develop and evaluate potential solutions for this case. This Comment concludes with the hope that its critical

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[38] *See infra* Part III.B.

[39] *See infra* Part III.C.

[40] *See infra* Part IV.A. Describing traditional Hawaiian culture is no easy task for the self-analytical. *See supra* note 2 (discussion of Hawaiian identity). By listening to the cultural accounts of Hawaiians themselves, this author hopes to avoid the worst dangers of such an undertaking. *See generally* JOHN PAPA I'I, FRAGMENTS OF HAWAIIAN HISTORY (1959); DAVID MALO, HAWAIIAN ANTIQUITIES (1961); SAMUEL M. KAMAKAU, *supra* note 5; KAME`ELEHIWA, *supra* note 5. Hawaiians, like many other indigenous groups, lived in a highly organized society founded on communal values and a holistic, spiritual view of the universe. *See* KAME`ELEHIWA, *supra* note 5, at 8-11. Western notions of "property" were alien to traditional Hawaiian society. *See id.* at 11. The Hawaiians instead enjoyed a reciprocal relationship with their external environment conceived in "spiritual" and "familial" terms. *See id.* at 23-25. This environment most significantly included the Hawaiians' ancestral lands, but also encompassed sacred cultural objects like the *ki`i la`au*. *See id.* at 74-79 (analyzing the historical significance of the abandonment of the *`aikapu*, the traditional Hawaiian religion). Following contact with Western culture, however, Hawaiian society underwent a rapid physical, cultural, and political decline. *See generally id.* (describing the detrimental effect the Mahele, or land divide, had on the Hawaiian community).

[41] This Comment goes beyond mere arguments of "policy"—the last, sometimes gratuitous step in any standard legal analysis—and questions the ability of either the "law" or "policy" of the dominant society to adequately consider the interests of Native communities. *See infra* Part IV.B.

[42] The author admits that neither Legal Realism or Critical Race Theory fully address the unique circumstances of Native American and Hawaiian groups. *See infra* note 250. At the same time, the author submits that these movements establish a valuable alternative theoretical foundation on which Native critics may further build. *See generally* Robert A. Williams, Jr., *Taking Rights Aggresively: The Perils and Promise of Critical Legal Studies*, 5 LAW & INEQ. J. 103 (1987)(noting that the critical legal studies movement, though culturally biased, still offers valuable analytical tools for minorities).

approach—understanding law as a means to an end, rather than an end in itself—will lead to more honest and realistic, if not just, results in the ongoing debate over the repatriation of Native "cultural property."

II. EXHIBITING THE FACTS AND THE LAW: THE STANDARD LEGAL ANALYSIS OF THE *KI`I LA`AU* DISPUTE

In the legal battle over the *ki`i la`au*, the Hawaiian representatives and the Providence officials contest both the underlying facts and the applicable law in the case. The Hawaiians identify the *ki`i la`au* as a sacred cultural symbol, while the City of Providence classifies the object as strictly utilitarian. The parties' conflicting versions of the facts correlate with two competing legal claims. The Hawaiians assert their right to repatriation based on original title and allegedly improper alienation. The City, on the other hand, invokes its constitutionally protected property rights founded on its claim of rightful present possession.

The fact-intensive aspects of the *ki`i la`au* dispute suggest that the case belongs in the province of anthropologists and cultural experts rather than lawyers.[43] The present case, however, involves much more than the simple classification of the *ki`i la`au* or determination of its provenance. Close examination of the parties' opposing arguments reveals the basic tension between traditional property rights and newly affirmed repatriation rights that the cited legal authorities tend only to conceal, rather than resolve. The *ki`i la`au* dispute, by resurrecting issues unaddressed by the law, thus begins to cast doubt on the ultimate ability of the law to resolve the present case in a systematic and logical fashion.[44]

A. The Common Law of Property Ownership: Rule or Relic?

Under the common law, property ownership begins with "first possession" and continues through subsequent owners in a "chain of title."[45] In the case of "lost" or "mislaid" personal property or "chattel," either the finder or the owner of the premises gains the "right to possession" against all but the "true

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[43] *See infra* notes 112-22 and accompanying text (debate over the nature of the *ki`i la`au*).

[44] While lawyers often refer to "splitting the baby" to describe convenient resolutions of hard cases, one can hardly think of a scenario that more closely resembles the legendary case alluded to by this idiom. *See* 1 *Kings* 3:16-28.

[45] *See* Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979)(identifying "first possession" as the sole source of property rights). *But see* Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985)(recognizing "first possession" as a "text" presupposing a readership that views objects as something to be subdued, managed and traded).

owner."[46] The finder or landowner gains full title, however, to property classfied as "abandoned."[47]

The true owner may transfer his or her property interests by sale or gift.[48] Under the general rule of *nemo dat quod non habet*, however, a "good faith" purchaser of property from one without title or a right of sale must relinquish the property to its rightful owner.[49] Various statutes of limitations, however, may preclude the true owner from reclaiming property after a certain window of time.[50] Depending on the jurisdiction, the limitation period may run from the time the current possessor assumes possession ("adverse possession" rule); the time when the current possessor refuses to return the property upon a demand by the original owner ("demand and refusal" rule), absent "unreasonable or inexclusable delay" ("laches"); or the time at which the original owner discovers, or should have discovered, the location of the property ("discovery" rule).[51]

The common law action in replevin is the standard means of personal property recovery.[52] To prevail, the plaintiff must establish title or a prior right of possession according to the aforementioned rules.[53] Replevin actions have proved successful in several cases of international repatriation.[54] Their usefulness in the context of Native cultural objects, however, remains severely limited.[55] Indeed, Congress enacted NAGPRA in response to the unqualified

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[46] *See* RAY A. BROWN, THE LAW OF PERSONAL PROPERTY §§ 3.1-3.5 (3d ed. 1975). "True owner" is a relative concept; prior possessors in the chain of title represent "true owners" vis-a-vis subsequent possessors. *See id.*

[47] *See id.* § 1.6.

[48] *See id.* §§ 7.1-7.21, 9.1-9.8.

[49] *See id.* at § 9.3.

[50] For a thorough discussion on the operation of statutes of limitations and their relation to Native repatriation claims, see Platzman, *supra* note 33, at 528-36; Daniel J. Hurtado, *Native American Graves Protection and Repatriation Act: Does it Subject Museums to an Unconstitutional "Taking"?*, 6 HOFSTRA PROP. L.J. 1, 29-65 (1993).

[51] *See* Hurtado, *supra* note 50, at 29-53.

[52] *See* D. DOBBS, REMEDIES § 5.17(2) (2d ed. 1993).

[53] *See id.*

[54] *See* Joshua E. Kastenberg, *Assessing the Evolution and Available Actions for Recovery in Cultural Property Cases*, 6 DEPAUL-LCA J. ART & ENT. L. 39 (1995)(reviewing several successful international repatriation claims brought in U.S. courts).

[55] *See generally* Platzman, *supra* note 33 at 521 n.16, 522 n.17 (reviewing the historical difficulties faced by Native groups in securing the return of cultural objects); FEDERAL AGENCIES TASK FORCE, UNITED STATES DEPARTMENT OF THE INTERIOR, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT 78 (1979)[hereinafter RELIGIOUS FREEDOM REPORT](noting the refusal of museums and agencies to recognize Native claims to sacred objects). The most frequently cited example of the failure of common law litigation in the Native cultural property context is the Onondaga Tribe's unsuccessful attempt to repatriate its sacred wampum belts in New York state court at the turn of this century. *See* Onondaga Nation v. Thatcher, 61 N.Y.S. 1027 (Sup. Ct. 1899). Only after 75 years of negotiations were the belts finally returned. *See*

failure of existing property laws to protect Native rights, not only to their sacred cultural objects, but even to the remains of their own deceased ancestors.[56]

Several reasons lie behind the complete dearth of successful repatriations pursuant to the common law. First, until recently, Native communities were generally unaware of either the whereabouts of their lost cultural objects, or the existence of actionable legal rights to them.[57] Second, Native communities, many struggling for mere survival, often lacked the resources to locate and inventory all the items they had lost, much less engage in protracted litigation in faraway courts to secure their return.[58]

Even assuming knowledge and capacity on the part of Native groups to enforce their legal rights, the formidable obstacles under the existing rules to Native "cultural property" replevin actions undoubtedly convinced many of the futility of pursuing such claims in court. Separated from the event of original transfer by an ever widening span of time, Native claimants often lacked the hard proof necessary to establish group affiliations with or prior possession of particular items.[59] Furthermore, in many cases cultural objects left Native control under dubious circumstances that did not lend themselves to proper documentation.[60] Native communities often found their sacred

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Martin Sullivan, *A Museum Perspective on Repatriation: Issues and Opportunities*, 24 ARIZ. ST. L.J. 283, 285-90 (1992)(chronicling the history of the wampum belt controversy). *See also* Adele Merenstein, Comment, *The Zuni Quest for Repatriation of the War Gods: An Alternative Basis for Claim*, 17 AM. INDIAN L. REV. 589, 591-92 (1992)(describing the eventual repatriation of the Zuni war gods "only [through] the power of persuasion"). For a recent example of the obstacles to Native common law claims, see *Chilkat Indian Village v. Johnson*, 870 F.2d 1469 (9th Cir. 1989)(denying an Indian cultural property claim on jurisdictional grounds).

[56] "It is virtually only in instances where a museum has agreed for moral or political reasons to return the goods that tribes have had success in retrieving property." 149 CONG. REC. S17174 (daily ed. Oct. 26, 1990)(statement by Sen. Inouye).

[57] *See* Hurtado, *supra* note 50, at 36-40 (arguing that Native claimants cannot be compared to owners of lost art for statute of limitations purposes because of the different problems of notice in the case of Native claimants).

[58] *See* 149 CONG. REC. S17174 (daily ed. Oct. 26, 1990)(statement by Sen. Inouye). *See also* Platzman, *supra* note 33, at 536 n.109 (citing House committee testimony by Henry Sockbeson, Native American Rights Fund, on the deterrent effect of litigation expenses).

[59] The oral traditions of many Native groups produced little in the way of written documentation, and original witnesses have long passed away. *See* Catherine Bell, *Aboriginal Claims to Cultural Property in Canada: A Comparative Legal Analysis of the Repatriation Debate*, 17 AM. INDIAN L. REV. 457, 481 (1992)(explaining the difficulty of proving prior possession). *See also* RELIGIOUS FREEDOM REPORT, *supra* note 55, at 77 (noting the difficulties faced by Native claimants regarding the issue of "standing").

[60] *See* Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 43-45 (1992)(describing the "irrevocable flow" of objects out of Indian control through military confrontation, missionary pressure, and the greed of Native art collectors); RELIGIOUS FREEDOM

cultural objects missing or their graves emptied, only to see the vanished objects reappear in museum exhibits or private auctions.[61]

Aside from these problems of proof, potential Native claimants also faced legal barriers such as the statute of limitations and adverse possession.[62] These technical pitfalls epitomized an entire system of law inherently unreceptive to Native interests.[63] The context of human remains and burial objects provides a classic example of the disparate treatment of Natives and non-Natives under the law.[64] The common law does not recognize a property interest in human remains,[65] nor does it classify items placed in a grave as "abandoned."[66] Native communities nevertheless could not prevent the mass disinternment of their buried ancestors, nor regain control over the exhumed remains and burial objects "kept in boxes, crates, and small wooden file drawers, tagged and numbered."[67] In light of such history, the absence of replevin actions brought by Native "cultural property" claimants offers perhaps the most telling commentary on the actual viability of such claims.

In the *ki`i la`au* dispute, similar factors may undermine the Hawaiian claim pursuant to the common law. According to old handwritten records kept by the Museum, the Museum first gained possession of the artifact in 1916 on loan from a sailing association called the Providence Franklin Society.[68] In 1922, the Society disbanded, leaving the *ki`i la`au* with the museum.[69] The

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REPORT, *supra* note 55, at 77 (concluding that many sacred objects were stolen from their original owners, sold by individuals who did not have title, relinquished through pressure from federally sponsored missionaries or Indian agents, or illegally expropriated by pot hunters).

[61] *See* 149 CONG. REC. S17176 (daily ed. Oct. 26, 1990)(statement of Sen. McCain summarizing committee testimony by tribal leaders).

[62] *See supra* note 50.

[63] *See infra* notes 260-65 and accompanying text (explaining the law's historical role as an instrument of Native subordination).

[64] For a thorough discussion of the distinct legal issues related to human remains and burial objects, see Trope & Echo-Hawk, *supra* note 60, at 38-43, 45-52; Ayau, *supra* note 15, at 200-05.

[65] *See* Margaret B. Bowman, *The Reburial of Native American Skeletal Remains: Approaches to the Resolution of a Conflict*, 13 HARV. ENVTL. L. REV. 147, 167-174 (1989)(reviewing common law property rights in the dead). Under the common law, human remains represent "quasi property," in which relatives or descendants have a limited property interest for the sole purpose of proper burial. *See id.* at 167-68.

[66] *See* Trope & Echo-Hawk, *supra* note 60, at 48.

[67] 136 CONG. REC. H10988 (daily ed. Oct. 22, 1990)(statement by Rep. Campbell). Trope and Echo-Hawk cite national estimates placing the number of exhumed Native human remains somewhere in the range of 100,000 to two million. *See* Trope & Echo-Hawk, *supra* note 60, at 39. *See also* Bowman, *supra* note 65, at 149 (noting that 99% of the human remains in federal institutions are of Native American origin, representing an estimated 300,000 persons).

[68] *See* Complaint, *supra* note 25, at 2.

[69] *See id.* The records, however, do not establish whether or not the society actually gifted the *ki`i la`au* to the Museum upon disbandment. *See* Laplilio Interview, *supra* note 4.

documented chain of title leads as far back as two individuals, Betty Earl and Captain Aborn, one of whom originally donated the *ki`i la`au* to the Franklin Society.[70] The manner in which the object found its way out of Hawaiian control and into either person's hands, however, remains the subject of pure speculation.[71] The dearth of information on the object's origin, alienation, and chain of title thus forces the Hawaiian claimants into a difficult "swearing contest" with the City's anthropologists and cultural experts.[72] Even if the court accepted the Hawaiians as rightful owners of *ki`i la`au*, it could still rule that the museum acquired title to the object by operation of a legal rule such as the statute of limitations—essentially taking with one hand what it gave with the other.[73] If the court adopts a rigid view towards the admissible evidence and applicable law, the *ki`i la`au* dispute could very well join the vast majority of Native claims to cultural objects historically thwarted by the traditional rules of property.[74]

The common law, according to popular theory, establishes clear guidelines with which courts may sift through various claims to objects such as the *ki`i la`au* and create certainty in an otherwise chaotic world of scarcity and competition.[75] In the present case, the rote application of these rules would conceivably result in the City of Providence retaining possession of the *ki`i la`au*. By favoring the possessory rights of the Museum, however, these laws would discount the Hawaiians' original rights to the *ki`i la`au*. Given the

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[70] Hui Malama I Na Kupuna `O Hawai'i Nei & The Office of Hawaiian Affairs, Information and Documentation Related to a Dispute Over a Hawaiian Object Currently Under the Control of the Museum of Natural History at Roger Williams Park, Providence, Rhode Island 1 (Oct. 16, 1996)(written submissions to the NAGPRA Review Committee)(on file with author)[hereinafter Information]. As far as can be ascertained from the donor record, the Franklin Society received the *ki`i la`au* either from "Miss Betty Earl" on February 13, 1827, or from "Captain D.T. Aborn" on August 11, 1829. *See id.*

[71] *See* Lapilio Interview, *supra* note 4.

[72] *See supra* note 59-61 and accompanying text (traditional difficulties of proof in Native claims).

[73] *See supra* notes 50-51 and accompanying text. Several commentators, however, question the applicability of statutes of limitations to Native cultural property claims. *See supra* note 50. As discussed above, Native claims raise different issues of notice and availability of relief. *See supra* notes 57-67 and accompanying text. Furthermore, by affirming a federal right to repatriation in NAGPRA, Congress may have preempted state law altogether. *See infra* note 156.

[74] *See* Platzman, *supra* note 33, at 536 (concluding that the action in replevin and statute of limitations combine to effectively bar Native repatriation claims); C. Bell, *supra* note 59, at 520 (concluding that "the likelihood of a successful repatriation claim is slim.").

[75] *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 30 (3d ed. 1986)(asserting that property creates incentives for maximum efficiency in resource management). *But see* Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723, 743-49 (1997)(presenting an efficiency-based argument for repatriation based on "ethnic externalities"). For other theories of property, see *infra* notes 172-76, 181.

inadequacy and uncertainty of relief under common law remedies, NAGPRA becomes all the more critical as an avenue of legal redress for the Hawaiians seeking the *ki`i la`au*'s return.

B. The Shift of the Burden of Proof Under NAGPRA: Rediscovering the Native "Right of Possession?"

NAGPRA is both sweeping and limited in scope.[76] On the one hand, the law covers everything from inventories[77] and summaries[78] of existing collections, to repatriations of human remains and cultural property,[79] to new excavations and discoveries.[80] NAGPRA also establishes a Review Commit-

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[76] *See* 25 U.S.C. §§ 3001-13. The congressional record describes NAGPRA as "embody[ing] several delicate compromises." 136 CONG. REC. H10990 (daily ed. Oct. 22, 1990)(statement by Rep. Richardson). Representatives of the museum, scientific, and Native communities negotiated for "many, many, long hours" to lay the foundation for the bill. *See id.* at H10989 (statement by Rep. Campbell). *See generally* H.R. REP. NO. 101-877 at 10-13 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4369-72 (describing the political process leading up to the passage of NAGPRA that included a "national dialogue" sponsored by the Heard Museum in Arizona, congressional hearings, and several proposed bills).

[77] NAGPRA requires federal agencies and museums to compile an inventory of "human remains" and "associated funerary objects" under their control, identifying the geographical and cultural affiliation of these objects. *See* 25 U.S.C. § 3003(a). If the inventory establishes a cultural connection between human remains or associated funerary objects and a particular Native group, the agency or museum must notify that group within six months after the completion of the inventory. *See id.* § 3003(d)(1). The Secretary of the Interior publishes a copy of each notice in the Federal Register. *See id.* § 3003(d)(3).

[78] NAGPRA also requires federal agencies and museums to produce written summaries of their collections of "unassociated funerary objects," "sacred objects," and "cultural patrimony." *See* 25 U.S.C. § 3004(a). Unlike the inventories for "human remains" and "associated funerary objects," these summaries do not involve "object-by-object" detail, nor do they require contemporaneous consultations with Native communities. *See id.* § 3004(b). Once the museum compiles the summaries, however, Native claimants can request additional information on an object-by-object basis. *See id.* § 3003 (b)(2).

The original NAGPRA bill required a full inventory of all the cultural property types covered in NAGPRA. *See* 136 CONG. REC. H10989 (daily ed. Oct. 22, 1990)(statement of Rep. Campbell). However, this provision was scaled back in committee in response to concerns of the museum community that such comprehensive inventories would be too burdensome and costly. *See id.* NAGPRA does authorize the Secretary of the Interior to make grants to museums for inventories and summaries. *See* 25 U.S.C. § 3008.

[79] *See id.* § 3005.

[80] *See id.* § 3002. NAGPRA provides standards for determining the ownership of Native American cultural items excavated or discovered on Federal or tribal lands after November 16, 1990. *See id.* § 3002(a). It also establishes standard procedures for intentional excavations and removals, *see id.* § 3002(c), and inadvertent discoveries, *see id.* § 3002(d), of Native remains and objects.

tee to monitor and facilitate the law's implementation,[81] as well as a wide range of enforcement mechanisms.[82] On the other hand, NAGPRA's inventory and repatriation requirements only apply to federal agencies and federally-funded museums,[83] and the statutory controls on new excavations and discoveries cover only federal or tribal lands.[84] The enforcement measures available under NAGPRA remain largely unused, last-resort alternatives to the principal process of consultations and negotiations.[85] NAGPRA furthermore limits repatriation to "cultural items" that meet one of its statutory classifications: "human remains," "funerary objects,"[86] "sacred

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[81] *See supra* note 20 for a description of the Review Committee.

[82] NAGPRA allows the Secretary of the Interior to assess civil penalties on any museum failing to comply with the statutory requirements through a contested case hearing. *See* 25 U.S.C. § 3007(a). In calculating the penalty, the Secretary may consider factors such as the "archaeological, historical, or commercial value" of the item, the economic and non-economic damages suffered by the aggrieved party, and the number of violations. *See id.* § 3007(b). Native communities may also bring enforcement actions against NAGPRA violations in federal district court. *See id.* § 3013. Another, commonly overlooked section of NAGPRA amends the United States Criminal Code, illegalizing the trafficking in Native American human remains and cultural items. *See* 18 U.S.C. § 1170.

[83] NAGPRA defines "museum" as "any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency." *See* 25 U.S.C. § 3001(8). The Smithsonian is covered by a separate repatriation statute, the National Museum of the American Indian Act, 20 U.S.C. §§ 80q to 80q-15.

[84] The provisions relating to ownership of newly excavated or discovered cultural property only apply to items excavated from federal or tribal lands after November 16, 1990. *See* 25 U.S.C. § 3002(a).

[85] The new excavations, inventory, summary, and repatriation provisions in NAGPRA all mandate consultations with the concerned Native groups. *See id.* §§ 3002-3005. NAGPRA's savings clause furthermore invites federal agencies and museums to freely enter into agreements with Native groups concerning the disposition of cultural objects. *See id.* § 3009(1). As NAGPRA's creators probably intended, the negotiations process, rather than the enforcement mechanisms, has acted as the main engine for the repatriation effort. *See* Lapilio Interview, *supra* note 4.

[86] NAGPRA divides "funerary objects" into two categories. "Associated funerary objects" represent:

> objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, *and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum*, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.

Id. § 3001(3)(A) (emphasis added). "Unassociated funerary objects" constitute:

> objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, *where the remains are not in the possession or control of the Federal agency or museum*

objects,"[87] or "cultural patrimony."[88] As in the common law of personal property, therefore, the discussion on repatriation revolves around categories and definitions.[89]

Repatriation under NAGPRA differs in procedure according to the item involved.[90] For "human remains" and "associated funerary objects," NAGPRA conditions repatriation on a showing of the "cultural affiliation" of the object in question.[91] In many cases, the initial museum inventory or summary mandated by NAGPRA will establish this cultural relationship at the outset.[92] If the "cultural affiliation" of the object remains undetermined after this process, however, the party requesting its repatriation must prove such a relationship through a "preponderance of evidence."[93] In meeting this burden

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and the objects can be identified, by a preponderance of the evidence, as related to specific individuals or families or to known human remains or, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe.

Id. § 3001(3)(B) (emphasis added).

[87] "Sacred objects" means "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents . . . ." *Id.* § 3001(3)(C). *See infra* note 112 (detailed analysis of this definition).

[88] "Cultural patrimony" entails:

an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

Id. at § 3001(3)(D). *See infra* note 115 (detailed analysis of this definition).

[89] The Congressional record states that none of the definitions in NAGPRA "include objects which were created for a purely secular purpose, such as for sale or trade in Indian art." 149 CONG. REC. S17176 (daily ed. Oct. 26, 1990)(statement by Sen. McCain).

[90] For a comprehensive discussion of NAGPRA and the repatriation process, see Trope & Echo-Hawk, *supra* note 60, at 58-76.

[91] *See* 25 U.S.C. § 3005(a)(1). "Cultural affiliation" means "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group." *Id.* § 3001(2). In essence, the question of "cultural affiliation" is one of "standing." *See supra* note 59 and accompanying text.

[92] The express purpose of the inventory process is to identify the "cultural affiliation" of human remains and associated funerary objects in the possession of the museum or agency. *See* 25 U.S.C. § 3003(a).

[93] *See id.* § 3005(a)(4). NAGPRA requires agencies and museums, upon request by Native groups, to produce additional "documentation" to supplement the information provided by the inventory, for the limited purpose of determining issues such as "cultural affiliation." *See id.* § 3003(b)(2). "Documentation" means a "summary of existing museum or Federal agency records, including inventories or catalogues, relevant studies, or other pertinent data . . . ." *Id.*

of proof, however, the requesting party may rely not only on "scientific" documentation, including geographical, biological, archaeological, or historical evidence, but also oral traditional, folkloric information, and expert opinion.[94] Once the "cultural affiliation" of "human remains" and "associated funerary objects," is established, NAGPRA requires the museums in possession to carry out their expeditious return.[95]

Parties seeking the return of "unassociated funerary objects," "sacred objects" and "cultural patrimony," however, must undergo a more rigorous process of proof.[96] As in the case of "human remains" and "associated funerary objects" above, any repatriation claim for "unassociated funerary objects," "sacred objects," or "cultural patrimony" must first pass the threshold issue of "cultural affiliation."[97] For "unassociated funerary objects," the process for establishing "cultural affiliation" is identical to that of "human remains" and associated funerary objects" described above.[98] In the case of "sacred objects" and "cultural patrimony," however, should the museum summary fail to establish "cultural affiliation," the requesting party must instead prove their relationship to the object in the form of prior "ownership" or "control" by a lineal ancestor, member of their group, or the tribe or organization itself.[99]

Having fulfilled the requirement of "cultural affiliation" or "prior ownership or control," however, parties requesting the repatriation of "unassociated funerary objects," "sacred objects," or "cultural patrimony" must clear an additional legal hurdle in the "standard of repatriation."[100] In order to meet this standard, claimants must make an initial showing that the

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[94] Evidence may include "geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion." *Id.* § 3005(a)(4).

[95] *See id.* § 3005(a)(1). Two other provisions in NAGPRA may result in a denial of an otherwise valid claim for repatriation. The federal museum or agency may delay the return of any item "indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States." *Id.* § 3005(b). In the case of multiple claims for a single object, the inability to "clearly determine which requesting party is the most appropriate claimant" may also postpone repatriation until the resolution of the dispute. *See id.* § 3005(e).

[96] *See supra* note 33 (discussing the distinction between the human remains and cultural property aspects of NAGPRA repatriation). NAGPRA, however, does afford Native claimants access to museum records, in addition to any information produced by the mandated summary process, "for the limited purposes of determining the geographic origin, cultural affiliation, and basic facts surrounding the acquisition and accession of ["unassociated funerary objects," "sacred objects," or "cultural patrimony"]." 25 U.S.C. § 3004(b)(2).

[97] *See id.* § 3005(a)(2).

[98] *See supra* notes 91-95 and accompanying text.

[99] *See* 25 U.S.C. § 3005(a)(5).

[100] *See id.* § 3005(c).

federal agency or museum did not have the "right of possession."[101] The burden then shifts to the museum in possession to rebut this prima facie case.[102] NAGPRA defines "the right of possession" as: "original acquisition . . . with the voluntary consent of an individual or group with authority to alienate . . . unless the phrase so defined would, . . . result in a Fifth Amendment taking by the United States as determined by the United States Court of Federal Claims . . . ."[103] Should the Court of Claims find a "taking," "otherwise applicable property law" would determine the "right of possession."[104] Upon fulfillment of the "standard of repatriation," NAGPRA mandates the expeditious return of "unassociated funerary objects," "sacred objects," and "cultural patrimony."[105]

In the present case, both parties agree on the Hawaiian "cultural affiliation" of the *ki`i la`au*.[106] They instead draw their battle-lines along the issues of the classification of the *ki`i la`au* and the determination of the "right of possession."[107] The Hawaiian claimants argue that the *ki`i la`au* falls under three of the five categories of cultural items subject to repatriation under NAGPRA: "sacred object," "object of cultural patrimony," and "unassociated funerary object."[108] Under the law and custom of Hawai'i at the time of transfer, they allege, the museum could never have acquired possessory rights to such an item.[109] The Providence officials, on the other hand, counter that the *ki`i*

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[101] *See id.*

[102] *See id.*

[103] *Id.* § 3001(13). The issue of "right to possession" thus requires detailed factual inquiry into the date and circumstances of original transfer and complex analysis of the laws governing the transaction. *See* Thomas H. Boyd & Jonathan Haas, *The Native American Graves Protection and Repatriation Act: Prospects for New Partnerships Between Museums and Native American Groups*, 24 ARIZ. ST. L.J. 253, 266 (1992). "Authority to alienate" depends on the laws of the government with jurisdiction over the original transaction, usually the former laws of the Native groups. Trope & Echo-Hawk, *supra* note 60, at 67-68.

[104] *See* 25 U.S.C. § 3001(13).

[105] *Id.* §§ 3005(a)(2), 3005(a)(5). Again, a need for further scientific study or the inability to resolve competing claims to the same object may delay repatriation. *See supra* note 95.

[106] *See* Complaint, *supra* note 25, at 2 (calling the *ki`i la`au* a "Hawaiian support figure"). Because the *ki`i la`au* is unmistakably Hawaiian in origin, and NAGPRA recognizes Hui Malama and OHA as proper Hawaiian representatives for purposes of repatriation, *see supra* notes 15-16, "cultural affiliation" is not at issue in this case.

[107] *See supra* notes 100-04 and accompanying text. These two issues merge substantially into a single problem of identification: is the *ki`i la`au* inalienable communal property or transferable personal property? The two issues are not identical, however. For example, while NAGPRA incorporates inalienability in its definition of "cultural patrimony," it does not treat "sacred objects" as inalienable per se. Conversely, many cultural objects considered inalienable by their communities of origin may not qualify as "sacred objects" or "cultural patrimony" entitled to repatriation under NAGPRA.

[108] *See* Answer, *supra* note 29, at 7.

[109] *See id.*

la`au*, as a "utilitarian" object, fails to meet the statutory definition of "cultural property."[110] Even if NAGPRA applies to the *ki`i la`au, they argue, Hawai'i law and custom at the time of transfer did not render the object inalienable per se.[111]

According to the arguments of the Hawaiian representatives, the *ki`i la`au* first qualifies as a "sacred object" necessary for ongoing religious practices.[112] The *ki`i la`au* displays various characteristics normally associated with sacred *`aumakua*, or guardian spirit, images.[113] These distinct features include the *ki`i la`au*'s intermediate size, free-standing structure, smooth head, inlaid mother-of-pearl eyes, imposing stance, jutting chest, and snarling features.[114] Based on the same arguments of the *ki`i la`au* as an *`aumakua* image, the Hawaiian claimants also maintain that the *ki`i la`au* constitutes "cultural patrimony," an inalienable object of central cultural significance.[115] Finally,

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[110] *See* Complaint, *supra* note 25, at 6.

[111] *See id.*

[112] *See* Answer, *supra* note 29, at 6. NAGPRA appears to leave much more room for interpretation by Native groups in its definition of "sacred object" than in its other definitions of "cultural patrimony" and "associated funerary object." See *supra* notes 86-88 for the definitions of these terms. By designating a "sacred object" as an object needed for current religious practices or for the renewal of traditional practices, Congress intended Native communities to decide what is "sacred" themselves. Trope & Echo-Hawk, *supra* note 60, at 65-66. The House Committee recognized that objects could be "sacred" if needed to renew traditional ceremonies "interrupted because of governmental coercion, adverse societal conditions, or the loss of certain objects through means beyond the control of the tribe at the time." H.R. REP. NO. 101-877, at 14 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4373. Proposed language that the sacred object be "irreplaceable" was not included, however, because "courts should not determine what is intrinsically necessary for the practice of religion." 136 CONG. REC. H10990 (daily ed. Oct. 22, 1990)(statement of Rep. Richardson). The definition of "sacred object" thus appears to involve less inquiry into historical and archaeological "fact" than the definitions of "cultural patrimony" and "unassociated funerary objects." The Hawaiian claimants in the present case focused their arguments before the NAGPRA Review Committee on the "sacred object" category. Lapilio interview, *supra* note 4.

[113] *See* Information, *supra* note 70, at 2-5 (citing COX & DAVENPORT, *supra* note 3).

[114] *See id.*

[115] *See* Answer, *supra* note 29, at 6-7. The definition of "cultural patrimony," like the definition of "sacred object," involves some degree of subjectivity; the term "ongoing historical, traditional, or cultural importance" leaves much to the judgment of Native claimants. *See* 25 U.S.C. § 3001(3)(D). The added requirement that the object "shall have been considered inalienable . . . at the time the objected was separated from such group," *see id.*, however, directs the "cultural patrimony" inquiry towards greater "factual" detail concerning not only the nature of the object, but also the Native laws or customs at the time that the object was alienated. *See* Trope & Echo-Hawk, *supra* note 60, at 66 (asserting that tribal law or custom is determinative of the legal question of alienability). Despite the potentially broad reach of the term, the legislative history is noticeably sparse on "cultural patrimony." Due to the conceptual vagueness of "cultural patrimony" and its direct relation to the unsettled debate over the concept of "inalienable cultural property," *see supra* note 37, this category may prove less than helpful

the Hawaiian claimants assert that the *ki`i la`au* falls under the category of "unassociated funerary objects."[116] Carved *`aumakua* images usually belonged to "families of considerable rank, wealth and power."[117] Among the *ki`i la`au* with documented origins, "the vast majority originated from, or were likely to have originated from, burial caves or a repository for deified chiefs on the island of Hawai'i."[118]

The arguments of the City of Providence form the mirror image of the Hawaiians' claims. The "utilitarian" function of the *ki`i la`au* undermines the Hawaiian's theory of the *ki`i la`au* as an *`aumakua* image.[119] A mere "spear rest" would not meet the requisite level of religious or cultural importance under NAGPRA's definitions of "sacred objects"[120] and "cultural patrimony."[121] Finally, even if one assumed that such a practical instrument would be buried with an *ali`i*, the speculative evidence offered by the Hawaiian claimants fails to establish the *ki`i la`au* as an "unassociated funerary object under NAGPRA definition."[122]

In contrast to the rigid rules of ownership and proof under the common law, the repatriation criteria in NAGPRA arguably work in favor of the interests of the Hawaiian claimants. As discussed above, NAGPRA facilitates the repatriation process for unassociated funerary objects, sacred objects, and cultural patrimony by requiring only a basic showing by claimants that the

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for Native claimants. *See* Byrne, *supra* note 33, at 128 (arguing that the definition "begs the question of proper ownership, rather than definitively deciding it.").

[116] *See* Answer, *supra* note 29, at 7.

[117] Information, *supra* note 70, at 4 (citing COX & DAVENPORT *supra* note 3).

[118] *Id.* Six of the 24 known *'aumakua* images have traceable origins. *See id.* at 5 (citing COX & DAVENPORT). Of these six, three came from burial caves. *See id.*

[119] *See* Letter from Nancy Derrig, Superintendent of Parks, City of Providence, to Robert Whitcomb, Chief Editorial Editor, *The Providence Journal* 3-4 (Mar. 13, 1996)(on file with author)[hereinafter Derrig Letter].

[120] Although the definition of "sacred object" involves a great deal of subjectivity, *see supra* note 112, a Native religious leader's assessment of an object's "sacredness" may be challenged as "insincere," according to traditional First Amendment analysis. Trope & Echo-Hawk, *supra* note 60, at 66. "A religious leader simply cannot proclaim that an object is sacred . . . ." *Id.*

[121] The Senate Committee report, expressing reservations with the "broad" scope of NAGPRA's cultural property definitions, maintains that "cultural patrimony" involves only objects of "great importance," on par with the "Zuni war gods" or the "wampum belts of the Iroquois." S. REP. NO. 101-473, at 6-8 (1990). The Congressional record confirms that " this legislation does not include every basket, every pot and every blanket ever made by Indian hands. It refers to . . . only the most sacred of religious items which were taken from a tribe without permission." 136 CONG. REC. H10988 (daily ed. Oct. 22, 1990)(statement by Rep. Campbell).

[122] *See* 25 U.S.C. § 3001(3)(B)(limiting "unassociated funerary object" to items traceable by a preponderance of evidence to "specific individuals or families," "known human remains," or "a specific burial site.").

museum does not have the "right of possession"[123] and accepting the authority of oral testimony presented by Native cultural experts and practitioners in substantiating such repatriation claims.[124] NAGPRA in effect shifts most of the burden of proving the right of possession to the museums.[125] Perhaps more significantly, NAGPRA appears to circumvent state statutes of limitations by recognizing traditional Native concepts of strict inalienability and providing a federal cause of action for Native claimants.[126] In the present case, depending on the court's treatment of the evidence and the law, the same lack of concrete evidence on original alienation that may have denied the Hawaiians' common law claims may instead benefit their NAGPRA repatriation claims.

The decisions of the NAGPRA Review Committee in the *ki`i la`au* case offers some indication of how far the legal pendulum has swung towards Native interests. In its original decision in November 1996, the NAGPRA Review Committee unanimously recommended the repatriation of the *ki`i la`au* after hearing seven hours of testimony.[127] When the City filed suit, contesting inter alia the Committee's refusal to hear the telephone testimony

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[123] *See supra* note 100-01 and accompanying text.

[124] *See supra* note 94 and accompanying text. Although the NAGPRA provision on the broad spectrum of allowable evidence specifically applies to determinations of "cultural affiliation," this provision may extend by implication to the "right of possession" issue as well. Commentators maintain that, due to the difficulties of proof by written document, "evidence, *by necessity*, may include oral traditional and historical evidence, as well as documentary evidence." Trope & Echo-Hawk, *supra* note 60, at 67 (emphasis added).

[125] As no court has ruled on a sacred object or cultural patrimony repatriation case since NAGPRA's passage, *see infra* note 136, such a blanket statement may be premature. However, this conclusion seems to conform with the analysis of many NAGPRA commentators. *See* Harding, *supra* note 75, at 738 ("NAGPRA has effectively created a presumption in favor of tribal possession of cultural patrimony."); Rennard Strickland, *Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 ARIZ. ST. L.J. 175, 180 (1992)(asserting that NAGPRA allows Native communities to "define themselves and their lifeways, including their own legal system's definition of what is a sacred object, what is cultural patrimony, what property may be transferred by individuals, and what property can be alienated . . . .")[hereinafter Strickland, *Human Rights*]. For a more skeptical view, see June C. B. Raines, *One Is Missing: Native American Graves Protection and Repatriation Act: An Overview and Analysis*, 17 AM. INDIAN L. REV. 639, 658-63 (1992)(arguing that NAGPRA's vague standards invite courts to rule against, as well as for, the interests of Native groups); Byrne, *supra* note 33, at 131 (criticizing NAGPRA as bold in intent, but structurally unenforceable).

[126] *See* Harding, *supra* note 75, at 735-36 (concluding that NAGPRA "essentially obliterates the operation of the doctrine of adverse possession."). Again, the lack of court cases interpreting these provisions precludes final judgment. As seen below, NAGPRA does not definitively answer the question of how state statutes of limitations relate to Native repatriation claims. *See infra* Part II.C.

[127] *See* Saltzman, *supra* note 1, at B1.

of William Davenport, a retired archaeologist and co-author of a definitive work on Hawaiian sculpture,[128] the Review Committee elected to retract its recommendations and hold another hearing.[129] On March 27, 1997, in Norman, Oklahoma, both sides presented their cases again before the Review Committee.[130] This time, however, the City marshalled the support of not only several anthropologists, including Davenport, but also several Hawaiian cultural experts who disagreed with the designation of the *ki`i la`au* as a sacred object.[131] Following this second hearing, the Review Committee once again recommended the repatriation of the *ki`i la`au* as a "sacred object" under NAGPRA.[132]

The City has nonetheless ignored the Review Committee's reaffirmed decision, pressing on with its suit in Rhode Island federal district court.[133] Despite the pro-repatriation opinion of the Review Committee, the question still remains whether the City has any property rights in the *ki`i la`au* that would trigger the Fifth Amendment's protection against uncompensated "takings" should the court or any other authority validate the Committee's recommended result.[134] In its complaint, the City contests only NAGPRA's application to the *ki`i la`au*, not NAGPRA's mandate of repatriation as a whole.[135] The present case nevertheless raises the "takings" issue relating to NAGPRA repatriation for the first time ever in court.[136] The City's complaint

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[128] *See generally* COX & DAVENPORT, *supra* note 3.

[129] *See* Lapilio Interview, *supra* note 4.

[130] *See* NAGPRA Review Committee Meeting Notice, 62 Fed. Reg. 10,877 (1997).

[131] *See* Lapilio Interview, *supra* note 4. For a summary and analysis of the testimony of the dissenting Hawaiian cultural experts, see *infra* note 239.

[132] *See* Carved Wooden Figure from the Hawaiian Islands, 62 Fed. Reg. 23,794 (NAGPRA Review Committee findings)(Dep't Interior 1997). The Committee found the *ki`i la`au* to be a "sacred object," but not an object of "cultural patrimony" or "associated funerary object." *See id.* at 23,794-95. The Committee also reserved its opinion on the "right of possession" issue, stating: "There was insufficient information presented regarding the circumstances of the acquisition of the carved wooden figure to make an advisory finding . . . ." *Id.* at 23,795. Nevertheless, on a policy basis, the Committee recommended that the "City of Providence reconsider its determination regarding the definition of the carved wooden figure . . . [and] repatriate the carved wooden object to a Native Hawaiian organization in the spirit of NAGPRA and its implementing regulations." *Id.*

[133] *See* Lapilio Interview, *supra* note 4.

[134] *See* U.S. CONST. amend. V. Several legal commentators have analyzed the "takings" implications of NAGPRA. *See generally* Hurtado, *supra* note 50 (analyzing the NAGPRA's repatriation requirement); Ralph W. Johnson & Sharon I. Haensly, *Fifth Amendment Takings Implications of the 1990 Native American Graves Protection and Repatriation Act*, 24 ARIZ. ST. L.J. 151 (1992)(examining NAGPRA's provisions on new excavations and discoveries).

[135] *See* Complaint, *supra* note 25.

[136] To date, only a handful of NAGPRA cases have reached published dispositions in federal court. None of these cases have involved any "takings" challenges. *See generally* United States v. Corrow, 119 F.3d 796 (11th Cir. 1997)(upholding the criminal trafficking statute against a

thus not only reasserts the City's property rights to the *ki`i la`au*, but also alludes to possible constitutional problems fundamental to NAGPRA itself.

C. The Shadow Cast by the Fifth Amendment: "Back to the Stone Ages?"

The Fifth Amendment of the United States Constitution prohibits the taking of "private property . . . for public use, without just compensation."[137] The Supreme Court has construed the "public use" requirement liberally,[138] focusing its attention on the definition of a "taking." While a direct physical invasion or appropriation of property would tend to meet this definition readily,[139] regulatory actions by the state may also rise to a "taking" if they result in a deprivation of "all economically viable use" of the property,[140] or a sufficient "diminution of [its] value."[141] The definition of "private property" for Fifth Amendment purposes encompasses real estate and chattel,[142] as well as "legitimate expectations."[143]

The issue of whether or not NAGPRA subjects the City to a "taking" returns the discussion to "the right of possession"—the point of intersection between all three sources of law in the *ki'i la'au* dispute.[144] The common law of property, at least as traditionally applied, tends to favor the City by subjecting Native claims to stiff proof requirements, or vesting ownership

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vagueness challenge); Bonnischen v. United States Dep't of the Army, 969 F. Supp. 628 (D. Or. 1997)(vacating an Army Corps decision to repatriate newly discovered human remains); Pueblo of San Ildefonso v. Ridlon, 103 F.3d 936 (10th Cir. 1996)(confirming that NAGPRA's date and place limits on newly excavated property did not apply to objects already in museum's possession); Na Iwi O Na Kupuna O Mokapu v. Dalton, 894 F. Supp. 1397 (D. Haw. 1995)(rejecting Native Hawaiian action for repatriation of human remains as premature); Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234 (D. Vt. 1992)(ruling that federal regulatory powers did not place regulated land under "control" of agency for NAGPRA purposes).

[137] U.S. CONST. amend. V.

[138] *See* Berman v. Parker, 348 U.S. 26 (1954)(condemnation for urban renewal); Hawai'i Hous. Auth. v. Midkiff, 467 U.S. 229 (1984)(forced conversions of private leaseholds to fee simple interests).

[139] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)(installation of cable box and wires constitutes a "physical taking").

[140] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015-19 (1992)("total regulatory taking").

[141] *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987)(engaging in "ad hoc factual inquiries" to determine whether "partial regulatory takings" violate the Fifth Amendment).

[142] *See* Andrus v. Allard, 444 U.S. 51 (1979)("takings" clause protects personal property interests).

[143] *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring)(citations omitted).

[144] *See supra* notes 45-53, 100-04 and accompanying text ("right of possession" under the common law and NAGPRA).

through operation of law.[145] NAGPRA, as evidenced by its plain language and intent as well as the Review Committee's recommendations in the present case, substantially tilts the legal playing field towards the Hawaiian right to repatriation.[146] Nevertheless, although Congress can alter common law rights by statute, it cannot take property without compensation.[147] If NAGPRA's burden shifting indeed effects a substantive change in the City's rights, the forced repatriation of the *ki`i la`au* would constitute a classic "physical taking" of property violating the Fifth Amendment.[148]

Congress, cognizant of the potential for such conflict, included explicit language in the statute to guard against "takings" challenges.[149] This language, however, merely adds to the uncertainty caused by the City's federal suit. The definition of "right of possession" in NAGPRA specifically excludes instances where the term, as applied in the "standard of repatriation," would result in a taking of property rights established under "otherwise applicable property law."[150] The legislative history of this clause confirms that Congress added it with the intent to exempt museum property interests

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[145] *See supra* notes 55-74 and accompanying text.

[146] *See supra* notes 123-32 and accompanying text.

[147] *But see Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)(upholding laws that illegalized the sale of eagle parts, regardless of the legality of acquisition, as the owners still retained other rights and uses of the property). Even as it rallied behind private property rights in the *Lucas* decision, the United States Supreme Court seemed to draw a distinction between real and personal property, implying that the government could impose greater regulations on the latter. *See* 505 U.S. at 1027-28 (citing *Andrus* to show that government regulation of commercial transactions could render personal property "economically worthless" without committing a taking). In *Andrus*, however, the Court did imply that the forced surrender of personal property would in fact constitute a taking. *See* 444 U.S. at 65.

[148] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-40 (1982). As seen below, NAGPRA's text and legislative history simply fail to resolve the issue of whether the statute actually alters existing rights. *See infra* notes 149-64, and accompanying text. Some observers have concluded that NAGPRA transfers rights, at least in a *de facto* sense. *See* Platzman, *supra* note 33, at 549 (concluding that NAGPRA "increases the rights" of Native claimants to recover their cultural property); 149 CONG. REC. S17176 (daily ed. Oct. 22, 1990)(question by Sen. Simpson on the new "property rights" seemingly "created" by NAGPRA and the availability of fair compensation for "lawful owners"). This interpretation, however, seems to contradict the public stance taken by Congress that NAGPRA does not change rights, but merely confirms rights that already exist. *See infra* notes 149-55, 160 and accompanying text.

[149] "I believe that this bill has been crafted in such a way as to avoid any problems with unconstitutional takings under the fifth amendment." 136 CONG. REC. S17176 (daily ed. Oct. 22, 1990)(statement by Sen. McCain). Senator McCain, one of the sponsors of NAGPRA, claimed that the added language would provide a "clear standard" for resolving the question of original alienation. *See id.*

[150] *See* 25 U.S.C. § 3001(D)(13). This definition, however, gives exclusive jurisdiction to determine a "taking" to the United States Court of Federal Claims pursuant to 28 U.S.C. § 1491. *See id.* This Comment does not address this threshold issue of venue.

vested under other sources of law, whether federal, state, or tribal.[151] The plain reading of NAGPRA's text and intent, therefore, would suggest that the statute exempts cultural objects established as museum property under traditional property laws from its repatriation requirements. As discussed above, a court could very well find that the *ki`i la`au* is such an object.[152]

The drafters of NAGPRA, however, maintained that this "taking" safety provision would come into play rarely, if ever.[153] The legislative history indicates that Congress added this clause in response to the concerns of the Justice Department,[154] but nonetheless felt that the statute without the addition would not have violated the Fifth Amendment.[155] Nothing in the legislative history, however, explains the legal basis for this position. Congress clearly stated that NAGPRA "reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations,"[156] thus raising possible issues of federal preemption or the federal "trust relationship" with Indian tribes.[157] It also restricted NAGPRA's scope to federally-funded

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[151] The House committee report states that "nothing in the paragraph is intended to affect the application of relevant State law to the right of ownership of unassociated funerary objects, sacred objects or objects of cultural patrimony." H.R. REP. NO. 101-877, at 14 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4373. Elsewhere, the legislative history reiterates that "the act shall not supersede right of possession properly established under State property laws." 139 CONG. REC. H10991 (daily ed. Oct. 22, 1990)(statement by Rep. Richardson). The record also expresses that the review of the "right of possession" under NAGPRA is "very similar to the transfer of title of other forms of property. This definition is intended to operate in a manner that is consistent with general property law." 149 CONG. REC. S17176 (daily ed. Oct. 26, 1990)(statement of Sen. McCain).

[152] *See supra* notes 72-74 and accompanying text.

[153] *See* H.R. REP. NO. 101-877, at 15.

[154] *See id.* at 14-15. *See also id.* at 25-29 (letter to Rep. Udall from Bruce C. Navarro, Deputy Attorney General, Department of Justice).

[155] "While the Committee did not feel that implementation of the Act would give rise to such a taking, the language was accepted to make clear its intention." *Id.* at 15.

[156] 25 U.S.C. § 3010. Although the federal government has not recognized Hawaiians as an official Indian tribe, *see* 25 C.F.R. § 83.3 (1978)(administrative procedures for federal recognition covering only Native Americans in the continental United States), two Hawai'i district court opinions suggest that the Native American "trust relationship" with the federal government affirmed by the United States Supreme Court in *Morton v. Mancari*, 417 U.S. 535 (1974), applies in some form to Hawaiians as well. *See* Nali`ielua v. State of Hawai'i, 795 F. Supp. 1009, 1012-13 (D. Haw. 1990)(recognizing United States "commitment to the native people" of Hawai'i); Rice v. Cayetano, 941 F. Supp. 1529, 1542-43 (D. Haw. 1996)(noting the Hawaiians' "special relationship" with the federal government). *But see* Stewart M. Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996)(arguing that the Indian trust relationship does not apply to the Hawaiian people).

[157] Congress may use its broad authority over Indian affairs, *see* U.S. CONST. art. VI, § 2 ("Supremacy Clause"); U.S. CONST. art. I, § 8, cl. 3 ("Indian Commerce Clause"), to benefit Indians versus non-Indians. *See* County of Oneida, New York v. Oneida Indian Nation of New York, 470 U.S. 226 (1985)(applying "preemption doctrine" to find that state statutes of

agencies or museums, perhaps in view of the Supreme Court's tentative approval of "unconstitutional conditions" on government funding.[158] A liberal construction of the "otherwise applicable property law" clause would deprive NAGPRA of even this limited effect, essentially imputing to Congress an intent to create a paper law.[159] Nothing in the record suggests that the legislators even considered the possibility of such a fatal internal contradiction, much less planned such a result.[160]

Nevertheless, by downplaying the significance of the "takings" provision, Congress merely deferred the final resolution of the fundamental legal questions raised by NAGPRA regarding cultural property ownership. Shifting the burden of proof on the "right of possession," NAGPRA created an apparent advantage for Native claimants in the large number of cultural property cases, including the present *ki`i la`au* dispute, complicated by the mystery of original alienation and the time bar of the statute of limitations.[161] The mere potential for such a wholesale transfer provides little cause for voiding NAGPRA's cultural object repatriation provisions altogether; the City in fact limits its constitutional attack to the statute as applied to the *ki`i la`au*,

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limitations do not apply to Indian land claims); *see also* Morton v. Mancari, 417 U.S. 535 (1974)(invoking the "plenary power doctrine" in support of the preferential hiring policy of the Bureau of Indian Affairs). For a detailed analysis of the issues of federal preemption and plenary powers with respect to NAGPRA, see Hurtado, *supra* note 50, at 53-65, 70-78, and Johnson & Haensly, *supra* note 134, at 160-66.

[158] One might defend NAGPRA as a legal use of Congressional spending power, conditioning federal funding on the waiver of constitutionally protected rights. *See* Rust v. Sullivan, 500 U.S. 173 (1991)(upholding statute preventing federally funded clinics from giving out information on abortions). *But see* Dolan v. Tigard, 512 U.S. 374, 385 (1994)(maintaining that the doctrine of "unconstitutional conditions" does not allow the government to abridge the right to just compensation "where the property sought has little or no relationship to the benefit").

[159] *See* Hurtado, *supra* note 50, at 59 (observing that applying state statute of limitations to NAGPRA claims would contradict the apparent intent behind NAGPRA).

[160] *See id.* at 58. Hurtado speculates that Congress may have passed NAGPRA as only a "symbolic gesture," but concludes that the clear pro-repatriation intent in the Congressional record contradicts this view. *See id.* at 57 n.298. Similarly, this author does not preclude the possibility that Congress intended NAGPRA as a "policy statement" to encourage good faith negotiations between museums and Native communities, rather than as a substantive change of the law. *See* 136 CONG. REC. H10989 (daily ed. Oct. 22, 1990)(statement by Rep. Rhodes)(calling NAGPRA a "major policy statement"). In response to claims that NAGPRA would incite a "wholesale raid on museum collections," Senator Inouye maintained that "for museums that have dealt honestly and in good faith with native Americans, [NAGPRA] will have little effect." 149 CONG. REC. S17174 (daily ed. Oct. 26, 1990). The Senator, however, also indicated that Congress meant to effect some change: "For museums and institutions which have consistently ignored the requests of native Americans, this legislation will give native Americans greater ability to negotiate." *Id.* at 17174-75.

[161] *See supra* notes 123-32 and accompanying text.

rather than on its face.[162] By pursuing the "takings" issue in relation to NAGPRA for the first time in court, however, the City looks to compel a decision having potentially far reaching effects on the statute's future scope and validity.[163] The return of long lost cultural objects such as the *ki`i la`au* to the Native communities of their origin seems the very kind of outcome sought by Congress when it passed NAGPRA; the legislative history confirms Congressional intent that the "takings" exception not swallow the NAGPRA rule.[164] This added qualification to the statutory "right of possession," however, offers an open invitation for a reactionary court not only to deny the Hawaiians' claim to the *ki`i la`au*, but also to interpret NAGPRA's repatriation mandate into oblivion in the process.

Though limited in scope, the federal suit initiated by the City thus strikes directly at the basic unresolved tension between NAGPRA's repatriation rights and established common law property rights. Common law rules of property have historically failed to protect Native rights to their ancestral remains and sacred cultural objects.[165] In passing NAGPRA, Congress sought to ensure that the law protected the rights of Native Americans and Hawaiians to the same extent as other citizens.[166] NAGPRA, however, threatens to upset

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[162] *See supra* note 135. Even if a museum had the initiative or temerity to launch a facial attack on NAGPRA, it probably would face a major roadblock in the "ripeness" doctrine. *See* Suitum v. Tahoe Regional Planning Agency, 117 S. Ct. 1659, 1666 n.10 (1997)(noting that facial takings challenges face an "uphill battle" due to the difficulty in showing that "mere enactment of a piece of legislation" effected a taking of property).

[163] Some have suggested that "precedent" may not be a controlling factor in NAGPRA repatriation cases due to the specific facts and cultural context involved in each case. *See* Lapilio Interview, *supra* note 4. In cases such as the *ki`i la`au* dispute, however, where the unknown circumstances of original transfer lead to a debate on the nature of the object, some cross-cultural comparisons seem inevitable. *See supra* note 121 (Senate Committee analogy of "cultural patrimony" to Iroquoi wampum belts and Zuni war gods). In the end, the precedential impact of the *ki`i la`au* case will depend on whether the court frames its decision in narrow terms limited to the present controversy, or in broad terms casting a more inclusive legal net.

[164] The Congressional record is replete with references to past and present injustices, human rights, and civil rights. *See infra* note 275. Senator Moynihan referred to NAGPRA as "hugely important legislation." 136 CONG. REC. S17175 (daily ed. Oct. 26, 1990). Representative Udall went even further: "In the larger scope of history, this is a small thing. In the smaller scope of conscience, it may be the biggest thing we've ever done." *Id.* at E3484 (daily ed. Oct. 27, 1990). These bold proclamations seem to contradict the view that Congress intended NAGPRA to carry no legal weight. Although one may infer political motivations behind these statements, courts may not second guess the express Congressional intent of NAGPRA.

[165] *See supra* notes 55-67 and accompanying text.

[166] "When human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first European settlers that came to this continent that are lying in glass cases. It is Indian remains." 149 CONG. REC. S17174 (daily ed. Oct. 26, 1990)(statement by Sen. Inouye).

long-standing property rights vested under the common law.[167] The maddening circularity of this reasoning highlights the inability of legal rules alone to produce a clear and uncontrived answer to the *ki`i la`au* dispute. This failure of the law to mediate between these seemingly irreconcilable interests underscores the necessity of considering other factors at work in the present "legal" case.

III. EXCAVATING THE DISCOURSE: DECIPHERING THE NARRATIVES IN THE *KI`I LA`AU* DISPUTE

As developed in the previous part, the basic paradox between the ownership rights of the City based on present possession and the repatriation rights of the Hawaiians based on prior possession eludes a simple solution at law. This part begins with a summary of two different theories that account for the shortfalls of the standard legal analysis. These unconventional legal approaches supply the analytical tools for examining the wider social context in which the law operates and probing the larger cultural issues at stake in the *ki`i la`au* dispute.

A. The Digging Tools: Legal Realism and Critical Race Theory

Since its inception in the 1920's, the school of Legal Realism or Pragmatism and its many conceptual offspring have challenged the basic understanding of the law as a formula that produces "correct" or "just" results when mechanically applied to specific cases.[168] Realists contest time-honored legal concepts such as "rights" or "precedent" as abstract justifications for subjective, ad hoc judgments.[169] "Rights" rely on an authority to define or enforce them; "precedent" similarly has little value without an authority to

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[167] *See supra* notes 145-48 and accompanying text.

[168] *See generally* Elizabeth Mensch, *The History of Mainstream Legal Thought, in* THE POLITICS OF LAW (David Kairys ed., 1990); Joseph W. Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465 (1988)[hereinafter Singer, *Legal Realism*]. The Legal Realism movement has contributed to many modern schools of critcal legal thought including feminist legal theory, critical legal studies, law and literature, law and society, legal anthropology, and critical race theory. Despite variations in approach and emphasis, all realist or critical legal theories share a common skepticism of the "Positivist" or "Formalist" concept of law that attempts to separate law and morality and exalts rules for their own sake. *See* Singer, *Legal Realism*, *supra* note 168, at 474 (describing the realist project as replacing formalism with a pragmatic emphasis on law as "made, not found").

[169] *See* Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 364-68 (1992)[hereinafter Bell, *Realism*].

determine its relevance.[170] In short, Legal Realism advances a functional, rather than metaphysical concept of the law.[171]

The notion of property comes under particular scrutiny in Legal Realism.[172] The Realist microscope brings into sharp focus the circularity of property rights, based on "a distinction between formalistically bounded spheres between public and private."[173] Realists point out that the textbook "legal" formulation of property as individual "rights " obscures how "private" rights both necessarily intrude on public space and ultimately rely on public authority.[174] Peering through the smokescreen of legal definitions and rules, Realists recognize "property" as a product of particular values and beliefs accepted by society.[175] Conversely, Realists comprehend "society" as a function of property, revealing how "property" defines relationships, not only between people and things, but also between people themselves.[176]

Critical Race Theory ("CRT") refines the Realist critique in its analysis of race, racism and the law in America.[177] This genre of legal theory emerged with the advent of what writers term "post-civil-rights America," an ongoing

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[170] *See id.* at 367.

[171] *See id.* at 366.

[172] *Compare* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985)(advocating an "original understanding" of property as an individual right to unfettered possession, disposition, and use) *with* C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986)(analyzing the interplay between property rights and social relations).

[173] Bell, *supra* note 169, at 366. *See generally Symposium: The Private/Public Distinction*, 130 U. PA. L. REV. (1982); *Symposium on the State Action Doctrine*, 10 CONST. COMMENT. (1993).

[174] *See generally* Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393 (1991)(exploring the conceptual difficulties underlying "takings" jurisprudence).

[175] *See supra* note 45 (differing interpretations of the rule of "first possession"). *See also* Myrl L. Duncan, *Property as a Public Conversation, not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095, 1102-27 (1996)(reviewing the cultural sources of private property).

[176] *See* Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 13 (1927)("[W]e must not overlook the actual fact that dominion over things is also *imperium* over our fellow human beings." (emphasis in original)). Carol Rose notes that, despite its durable and central role in our society, property remains a "fragile" concept, because "property entails the cooperation of others. You cannot have property all alone." Carol Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 363 (1996). While Professor Rose identifies the relational aspect of property, in many contexts, property involves coercion more than cooperation. *See infra* note 181.

[177] *See generally* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991)[hereinafter WILLIAMS, ALCHEMY]; CRITCIAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberle Crenshaw et al. eds., 1995).

era marked by the "realization that the Civil Rights Movement of the 1960's had stalled and that many of its gains, in fact, were being rolled back."[178] CRT rejects the current "colorblind" ideology portraying race as an "immutable" trait completely devoid of social and historical context.[179] Unmasking race as a social construction and racism as an American institution,[180] CRT examines the interplay between legal concepts such as "property" and racial subordination.[181]

As part of its multi-faceted approach, CRT advocates the use of narratives and storytelling to subvert the conventional presumptions of the dominant society.[182] CRT writers identify the law, and courts in particular, as sites of social discourse on which competing claimants "focus issues, illuminate institutional power arrangements, and tell counter-stories in ways that assist larger social-political movements."[183] The arguments of institutional interests describe a "master narrative" that frames the case in terms that the dominant society can comprehend and appreciate.[184] The stories told by "oppositionists," however, destabilize the idioms, symbols and, metaphors of the dominant discourse.[185] These "counter-narratives" not only expose the "contingency, cruelty, and self-serving nature" of the law, but also provide the impetus and direction for its transformation.[186]

In the *ki`i la`au* dispute, the analytical tools developed by Legal Realism and CRT enable one to look beyond the legal arguments of both parties and to examine the broader issues of culture, race, and power surrounding the present case. The statements of the Providence officials, focusing on property rights and the "utilitarian" nature of the object, project a "master narrative" of control and superiority over both the *ki`i la`au* and the culture that produced

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[178] Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 461 (1993).

[179] *See* MARI J. MATSUDA ET AL., WORDS THAT WOUND 6 (1993).

[180] *See generally* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (1986)(analyzing racial formation as a two-part process involving both cultural representations and social structures).

[181] *See* Patricia Williams, *Fetal Fictions: An Exploration of Property Archetypes in Racial and Gendered Contexts*, 42 FLA. L. REV. 81 (1990)(exploring the social meanings of race and gender and their relation to property); WILLIAMS, ALCHEMY, *supra* note 177, at 216-36 (exposing property as power over people); Joseph W. Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 42-45 (1991)(demonstrating how "property" creates a "racial caste system" between Indians and non-Indians)[hereinafter Singer, *Sovereignty and Property*].

[182] *See* Delgado & Stefancic, *supra* note 178, at 462. *See generally* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

[183] *See* Yamamoto et al., *Cultural Performance*, *supra* note 2, at 27.

[184] *See id.* at 21.

[185] *See id.* at 22.

[186] *See* Delgado & Stefancic, *supra* note 178, at 462.

it.[187] The Hawaiian claim, in contrast, emphasizes the Hawaiians' cultural, religious, even familial bond to the *ki`i la`au*.[188] This counter-story thus begins to replace the accepted wisdoms reflected in the laws of the dominant society with an alternative reality based on Hawaiian experience and understanding.[189]

B. The Old School: The "Master" Narrative of the City of Providence

In their formal pleadings, letters, and comments to the media, the City of Providence repeatedly employ terms such as "property" and "right of possession." These words, of course, hold significant authority as operative legal terms.[190] The language of the law, however, also promotes a certain mindset and value system that views the *ki`i la`au* as a commodity with a fixed price. As statements made by the Providence officials outside of the courtroom setting confirm, these legal terms also advance a "master-narrative" of Hawaiian cultural inferiority and extinction.

The complaint of the City of Providence filed with the federal district court in Rhode Island recites the terms "right of possession," "ownership," and "control."[191] The complaint for replevin filed in Rhode Island state court, through which the City obtained the return of the *ki`i la`au* from Sotheby's auction house, refers to the City as "owner or entitled to the possession of a certain Native Hawaiian sculpture," asserting that the auction house "has not, and never has had, any right, title or interest in the Sculpture."[192] The federal complaint states the commercial value of "the Figure" as "in excess of $250,000."[193] The state complaint requests "damages for the unlawful detention of the Sculpture;"[194] the federal complaint includes a plea for "compensatory damages."[195]

Aside from their role as common law "terms of art," the terms employed by the City of Providence reflect certain views towards the *ki`i la`au* arising from

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[187] *See infra* Part III.B.

[188] *See infra* Part III.C.

[189] *See infra* Part IV.A.

[190] As the Mayor of Providence remarked when he and other Providence officials went to reclaim the *ki`i la`au* from the auction house, "possession is nine-tenths of the law." Saltzman, *supra* note 1, at B1.

[191] Complaint, *supra* note 25, at 2, 6-8.

[192] Replevin Complaint, *supra* note 23, at 3. In both the state and federal complaints, the City refers to the *ki`i la`au* either as the "Sculpture," or the "Figure" (short for "Hawaiian support figure").

[193] Complaint, *supra* note 25, at 5.

[194] Replevin Complaint, *supra* note 23, at 3.

[195] Complaint, *supra* note 25, at 9. Nowhere in its Complaint does the City specify for what injury it seeks compensation.

the cultural norms of society at large. The City defines the *ki`i la`au* as a "Sculpture" or "Figure" to be "owned," "possessed," or "controlled." The City also values the object as a commodity with a set market price, demanding compensation for any losses suffered. The legal terms invoked by the City thus simultaneously reflect and reinforce a specific belief system that categorizes the *ki`i la`au* as personal property.[196] This value system recognizes little cultural or religious worth in the *ki`i la`au* beyond that which translates into dollar amounts.

Statements made by City officials to the press confirm the materialist ethic inherent in their legal claims. In a letter to the *Providence Journal*, the City Superintendent of Parks explains that "the Spear Rest . . . is too valuable to exhibit. . . . Therefore, the decision was made to sell it and use the proceeds to finance much-needed new exhibits at our museum."[197] The Superintendent offers that the decision to sell "was a difficult choice, but a clear one nonetheless."[198] In the City's eyes, the *ki`i la`au* represents an exploitable asset, a commodity, with an instrumental function: "the protection of the rest of our 24,000 cultural artifacts."[199]

The City acknowledges NAGPRA's mandate of cultural property repatriation, but denies its relevance to the *ki`i la`au*. "Clearly, the Spear Rest is not a religious item required by current Hawaiians for religious observation," the Parks Superintendent states in her letter to the *Journal*.[200] "Similarly, it is not a cultural item of such importance that no one person could have owned it individually (it is thought an individual chief owned ours)."[201] The letter goes on to explain the "crisis for the country" that would result from the theft of the Liberty Bell, concluding that "clearly the Spear Rest is not such an item."[202] Instead, the letter avers, the *ki`i la`au* is a "utilitarian" object made to hold fishing spears while lashed to the gunwale of a canoe.[203] The Superintendent attributes its unique appearance to its probable ownership "by a person of high social rank or wealth just as such people today might own fancy things such as paintings and furniture and houses."[204] Finally, the Superintendent does not

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[196] *See generally* Roger W. Mastalir, *supra* note 37 (examining the tension between the "cultural" and "property" aspects of cultural property).

[197] Derrig Letter, *supra* note 119, at 3.

[198] *Id.* at 4.

[199] *Id.*

[200] *Id.* at 1.

[201] *Id.* at 1-2.

[202] *Id.* at 2.

[203] *See id.*

[204] *Id.*

fail to mention that "the Spear Rest has been in Rhode Island for 170 years and at our Museum for 80. It has become part of our culture now, as well."[205]

Additional statements made by other City officials, including the Mayor of Providence himself, echo the cultural insensitivity, even hostility, implied by these remarks. In a letter to one of the lawyers for the Hawaiian groups, a Museum official responds to a written protest to the *ki`i la`au*'s proposed sale by explaining at length the Museum's mission of "heighten[ing] the public's awareness and appreciation for the beauty and diversity of other cultures," and its plans to use the proceeds for an "exhibit" and "companion publication of the objects in our Oceania collection."[206] The letter then describes cooperative projects between the Museum and southern New England tribes, and invites the Hawaiians to "help us in similar ways with our Pacific Gallery plans."[207] Nothing in the letter suggests any understanding on the Museum's part of the irony in justifying to a Native group the sale of that which it considers sacred on the grounds of "cultural awareness."

The public statements by the Mayor of Providence, Vincent A. Cianci, underscore the latent "cultural meanings"[208] of the *ki`i la`au* dispute. In response to the Hawaiians' request that the proposed sale be delayed, the Mayor remarked: "I guess I'm going to object to any pasta recipe or any marinara sauce that they're going to make in Hawai'i."[209] Rejecting the Hawaiian groups' identification of the *ki`i la`au* as a sacred object, he stated in another interview: "It's not a religious object. If it were, I imagine that they would have been kneeling at it when they were here."[210]

Careful examination of the nature and context of the City's claim thus extinguishes the halo of "neutrality," or "truth" surrounding the traditional legal concepts that they invoke. Even apart from the "smoking gun" in the Mayor's bald comments, the language and terms used by the City and

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[205] *Id.* According to Derrig, the *ki`i la`au* is part of "an antiquarian collection" serving as "a unique time capsule of [a] by-gone era of popular collecting fervor." *Id.* The British resort to similar reasoning in rejecting Greek demands for the return of the Parthenon Marbles, claming that the Marbles have more of a connection to British history and culture than to present day Greek culture. *See* John H. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1880, 1915-16 (1985)[hereinafter Merryman, *Elgin Marbles*]

[206] Letter from Museum of Natural History to Edward H. Ayau, Hawaiian lawyer and Hui Malama member (Feb. 22, 1996), at 1-2 (on file with author).

[207] *Id.* at 2.

[208] *See* Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987)(proposing a "cultural meaning" test for identifying unconscious racism in response to the Supreme Court's exclusive focus on "purposeful" racial discrimination).

[209] Bob Kerr, *In This Corner, From Providence, the Funny Mayor*, THE PROVIDENCE JOURNAL-BULLETIN, Jan. 22, 1997, at B1.

[210] Castellucci, *supra* note 9, at C1.

Museum officials locate the law on which they rely in a defined and limited cultural setting. The narratives pervading this cultural setting commodify that which other groups consider sacred or culturally essential, or even more intrusively, appropriate it as "our own culture."[211] These narratives furthermore silence the voices of other groups, interpreting their own culture for them.[212] Finally, the narratives propagated by the City in its legal arguments not only objectify the sacred symbols of other cultures, they objectify the cultures themselves.[213] Native cultures are thus reduced to little *ki`i la`au*: wooden, outmoded, alien, and above all, inferior.

C. The New Paradigm: The Hawaiian Counter-narratives

The opposing narratives developed by the Hawaiian claimants in their legal pleadings, testimony, and public comments further dissolve the image of "impartiality" and "fairness" projected by the dominant society's laws. Describing the *ki`i la`au* in cultural and religious terms, these counter-narratives also draw new baselines against which one can measure the unspoken cultural program advanced by the City. In so doing, they challenge the universal legitimacy and applicability of the dominant society's unspoken norms and cast off the stigmas of cultural inferiority imposed by these norms on Hawaiians. These counter-narratives furthermore elevate uniquely Hawaiian interpretations of "truth" and "justice" founded on community knowledge and experience. They thus connect the *ki`i la`au* dispute with larger discourses on cultural revival and political sovereignty.

The answer filed by the Hawaiian representatives in response to the City's federal suit recasts the discussion on the *ki`i la`au* in terms of religion and culture.[214] "[T]raditionally used in a ceremonial manner by [a] chief to call upon his ancestors to protect and benefit the Hawaiian people that he ruled, [the *ki`i*

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[211] *See supra* text accompanying note 205. Others promote this idea, albeit in more subtle ways. During the House debate on NAGPRA, Congresswoman Mink stressed the importance of preserving Native cultures because they "are a part of the history and heritage of our Nation." 136 CONG. REC. H10991 (daily ed. Oct. 22, 1990). Representative McCain called Native cultural property "the heritage of all American peoples." 149 CONG. REC. S17173 (daily ed. Oct. 26, 1990). Some commentators on international repatriation assert that cultural property is "the cutural heritage of mankind." *See* Merryman, *Public Interest*, *supra* note 37, at 363 (1989)(citation omitted).

[212] *See* Gerald Torres & Kathryn Milun, *Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 630 ("The law does not permit the . . . [Native] story to be particularized and still be legally intelligible.").

[213] *See* Eric K. Yamamoto, *Critical Race Praxis*, 95 MICH. L. REV. 821, 842-44 (1997)(discussing how, through mutual reinforcement, law and society ascribe inferior status to Native groups)[hereinafer Yamamoto, *Praxis*].

[214] *See* Answer, *supra* note 29.

la`au* is] imbued with sacredness."[215] *`Aumakua practice "has never ceased . . . [and is] central to Native Hawaiian culture."[216] No individual could alienate such an object.[217] These statements of course, carry particular weight as the operative statutory language under NAGPRA.[218] Even through these limited legalisms, however, the Hawaiian claimants begin to construct a counter-reality of the *ki`i la`au* as a sacred element of their culture, rather than property.[219]

Public declarations by the Hawaiian claimants merge with the language of the courtroom to further reinforce Hawaiian view of the *ki`i la`au*. An analogy by Kunani Nihipali, head of the *Hui Malama*, between the City's retention of the *ki`i la`au* and "tak[ing] your Declaration of Independence and . . . trying to sell it to another country"[220] invalidates the prevailing metaphor of the *ki`i la`au* as a piece of "furniture."[221] Other observations cast doubt on established social norms and relationships: "No one had the right to trade such an item, not even the possessor," asserts Nihipali.[222] "He was a steward, and the appropriate thing was either to pass it on to the next generation or to see to it that it was left in a burial cave with the last person who used it."[223] In her comments to the press, Linda Kawai'ono Delaney, OHA staff member, deconstructs even the legal categories in the NAGPRA statute invoked by the Hawaiian claimants: "There is no distinction, in the Native Hawaiians' minds, between the spear rest as a sacred object and as an object of cultural patrimony. [The *ki`i la`au* is] an item of great meaning to the identity of the people of Hawai'i."[224] These public statements thus challenge the accuracy

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[215] *Id.* at 6.

[216] *Id. See also* KAME`ELEHIWA, *supra* note 5, at 68 (asserting that *`aumakua* worship continues despite its abandonment in the 19th century as the Hawaiian "state religion").

[217] *See* Answer, *supra* note 29, at 7.

[218] *See supra* notes 86-88 (NAGPRA cultural property definitions).

[219] *See* Strickland, *Human Rights*, *supra* note 125, at 179-80 (stating that NAGPRA recognizes Native communities as "legal, living cultures" and incorporates "native legal concepts" in its definitions). *But see infra* note 224 and accompanying text (limitations of legal definitions).

[220] Saltzman, *supra* note 1, at B1.

[221] *See supra* text accompanying note 204.

[222] Saltzman, *supra* note 1, at B1.

[223] *Id.*

[224] Smith, *supra* note 6, at D1. Delaney's statement thus serves as a reminder that NAGPRA, though favorable to Native interests, remains at best a dominant society approximation of Native reality. Rennard Strickland points out that the relativistic and contextual Native world view does not draw immutable boundaries between "utilitarian" and "sacred" objects: "even the most seemingly mundane and utilitarian object may have deeply religious significance." Strickland, *Human Rights*, *supra* note 125, at 187. Legal categories such as "sacred object" and "cultural patrimony" thus do only partial justice to the Native understanding of all cultural objects as potentially sacred—or even not sacred, at least according to dominant society definition.

and authenticity of popular portrayals of Hawaiian culture with counter-stories developed by Hawaiians themselves.

The testimony of Hawaiian cultural practitioners submitted to the NAGPRA Review Committee provides perhaps the most compelling example of the empowerment of voices previously "unintelligible" to the dominant society's laws. Such testimony, like the statements to the media above, not only recites an alternative version of the "facts" of the dispute, but also "stretch[es] or chang[es] accepted frameworks for organizing reality" implicit in the law.[225] In separate statements to the Committee on the significance of the *ki`i la`au*, Richard Kekumuikawaiokeola Paglinawan[226] and Pualani Kanaka`ole Kanahele[227] flatly reject the City's identification of the *ki`i la`au* as a "fishing spear rack."[228] "The *ki`i la`au* in question is a holder of warrior spears . . . . It is not a spear rack for fishing spears."[229] "The *ki`i la`au* would not be used to hold 'fishing spears' since Hawaiians did not spear fish from a canoe, but rather from a reef or from the shoreline."[230] Far from a utilitarian object, "this *ki`i la`au* is associated with a war god or an ancestral deity who excelled in warfare . . . and is sacred in and of itself because it is imbued with an `aumakua residing within."[231]

In addition to the City's factual allegations, the practitioners also upset the conventional "relationships" and "frameworks" codified in the law of the dominant society.[232] Although Kanahele echoes the museum's assessment that the *ki`i la`au* probably belonged to a "*kaua ali`i*" ("warrior chief"), she asserts that "the relationship between the *kaua ali`i* and the *ki`i la`au* was one of interdependency and responsibility rather than of ownership."[233] The *kaua ali`i* would tend to the *'aumakua* within the *ki`i la`au*; in return, the *'aumakua*

Admittedly, while NAGPRA requires Native claimants to "perform" to its own statutory tune, its legal requirements may cause Native claimants more technical than actual harm. NAGPRA, however, relates to other imposed legal meanings that visit violence to Native peoples on much more than an epistemological level. *See infra* note 265 and accompanying text (government manipulation of Native identities). Some may also object to the "legal" paradigm itself as a cultural and political imposition. *See infra* note 296.

[225] Yamamoto et al., *Cultural Performance*, *supra* note 2, at 22 (citation omitted).

[226] Paglinawan is a master instructor of "Lua," an ancient Hawaiian warrior fighting art.

[227] Kanahele is a renowned and respected *kupuna* ("elder") of the Hawaiian community and founder of Hui Malama.

[228] *See* Testimony of Richard Kekumuikawaiokeola Paglinawan (Oct. 17, 1996), at 1 (on file with author)[hereinafter Paglinawan Testimony]; Statement of Pualani Kanaka`ole Kanahele Regarding the Significance of the *Ki`i La`au* (Oct. 1996), at 1 (on file with author)[hereinafter Kanahele Statement].

[229] Paglinawan Testimony, *supra* note 228, at 1.

[230] Kanahele Statement, *supra* note 228, at 1.

[231] *Id.* at 1-2.

[232] *See* Yamamoto et al., *Cultural Performance*, *supra* note 2, at 22.

[233] Kanahele Statement, *supra* note 228, at 4.

would bestow benefits on "not only the *kaua ali`i*, but all of his people as well."[234] The very idea of the *ki`i la`au* as tradeable goods repels Kanahele: "To treat the *ki`i la`au* in such a manner is harmful to us and our culture because we would have been reduced to buying and selling an ancestor . . . ."[235]

The practitioners' testimony, however, does not simply refute the City's factual claims and strain the boundaries of its legal frameworks. The testimony also locates the otherwise isolated "legal" incident over the *ki`i la`au* within the larger discourse on Native cultural autonomy and political sovereignty.[236] Paglinawan, for example, laments the loss of the "material symbols of our heritage to museums, art collectors," and emphasizes the need for material reminders of "our connectedness to our rich cultural beliefs and practices . . . to carry us forward in the 21st century."[237] Kanahele agrees that allowing the loss of the *ki`i la`au* would amount to "eroding ourselves," concluding with a statement that encapsulates the Hawaiian narratives arising from the present dispute:

> Native Hawaiians, past and present, must always have a place to go to, to have a sense of being needed, of being useful. . . . That is what the *ki`i la`au* represents. Because if we lose these connections and fail to do all within our power to bring them home, then they are truly dead, and we have lost something that can never be regained.[238]

Critical review of the Hawaiian claim thus unearths nascent counter-narratives previously ignored and suppressed by the law.[239] These counter-narratives

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[234] *Id.*

[235] *Id.* at 5.

[236] *See also infra* Part IV (nascent Hawaiian cultural-political narratives).

[237] Paglinawan Testimony, *supra* note 228, at 3.

[238] Kanahele Statement, *supra* note 228, at 5.

[239] Even as they share certain common themes, however, these counter-narratives may convey extremely mixed cultural messages when observed in detail. *See supra* note 2 (discussion of the "Hawaiian" identity). For an example of the agonizingly elusive meaning of "culture," one need look no further than the present controversy, where several prominent Hawaiian voices have spoken out against the attempt to repatriate the *ki`i la`au* in the NAGPRA Review Committee hearings, personal letters to OHA, and comments to the mass media. *See* Walter Wright, *Statue not Sacred, Two Experts Contend*, THE HONOLULU ADVERTISER, June 1, 1997, at A1; *see also* Letter from Herb Kane to Linda Delaney, Office of Hawaiian Affairs (Dec. 12, 1996)(on file with author)[hereinafter Kane Letter]; Anonymous letter to OHA Trustees (Dec. 27, 1996)(on file with author)[hereinafter Anonymous Letter].

Herb Kawainui Kane, a renown local artist and one of the founders and the first captain of the *Hokule'a*, a sailing project that revalidated traditional Hawaiian navigational techniques, argues that the *ki'i la'au* served as a fishing-pole carrier instead of a spear rack and could not have safely fit on a loaded Hawaiian warrior canoe. *See* Wright, *supra* note 239, at A31. He conjectures that the *ki`i la`au*, carved in a secular style and degradingly servile position, was meant probably as a caricature of the owner's enemy instead of an *`aumakua* image and possibly as a "trade item" to be gifted and traded away. *See* Kane Letter, *supra* note 239, at 2.

challenge the prevailing paradigms of the dominant society, revealing how

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According to Kane, some such figures "would have been sacred to a particular family, . . . but you couldn't say that they were sacred to all the people." Wright, *supra* note 239, at A31. An anonymous letter sent to OHA similarly stresses that "[r]eligious images such as a *ki`i `aumakua* were *never* portrayed in a position of servitude." Anonymous Letter, *supra* note 239, at 2 (emphasis in original). The letter speaks of the "numerous documentable instances" of such objects, even sacred ones, being freely alienated by their *ali`i* owners, and accuses the Hawaiian claimants of "usurp[ing] the will of our *ali`i* whose *mana* ("spiritual power") was great and whose power was absolute, . . . [and] insulting the intent of the very ancestors we most respect and remember." *Id.* at 2-3. Rubellite Kawena Johnson, a Hawaiian cultural expert and former Hawaiian history and language instructor at the University of Hawai'i, added a dramatic flair to the Hawaiian dissent with her statement to the media: "What are they going to do with it, hold it up in the air while they dance around in their underwear?" Wright, *supra* note 239, at A1.

This opposition to the *ki`i la`au*'s repatriation raises one reverberating question: why? Kane appears motivated primarily by a desire to protect historical "truth" against perceived distortion by "patriotic and political nuances:" "Without precise definition, the term 'sacred' can be stretched to accommodate the desires of those using it, often with strange results." Kane Letter, *supra* note 239, at 2. To Kane's concern for historical accuracy, the writer of the anonymous letter adds moral indignation at the perceived mercenary attitude of the Hawaiian claimants that supposedly can only end in failure, embarassment and strife because it compromises the "very Hawaiian values we hold most dear. . . . [I]t is not *pololei* [correct], is not *pono* [right, just] . . . ." Anonymous Letter, *supra* note 239, at 6. Both individuals also see practical problems with the ki`i la`au 's repatriation, criticizing the Hawaiian claimants for ignoring the role of Western museums in the preservation of such objects and failing to articulate a plan for its care once returned. *See* Kane Letter, *supra* note 239, at 3; *see also* Anonymous Letter, *supra* note 239, at 4-5.

Critics of these dissenting voices, on the other hand, return the accusations of personal agendas and moral and cultural unfaithfulness. Linda Delaney, for example, responded to Kane and Johnson's "so-called expert testimonies," by declaring that they "should be deeply and abjectly ashamed for betraying Hawaiians and demeaning our deeply held beliefs." Linda Kawai`ono Delaney, *Testimony Against Ki`i `Aumakua a Desecration*, THE HONOLULU ADVERTISER, June 2, 1997, at A31. As seen above, the NAGPRA Review Committee heard both sides of the Hawaiian cultural expert testimony and still ruled that the *ki`i la`au* was a "sacred object." *See supra* note 132.

Whether one is qualified or interested in entering the theoretical quagmire of the cultural "authenticity" debate, one may still note that both sides are largely talking past each other in their arguments. The dissonance among Hawaiian voices, this author submits, stems from the inherent difficulties of defining one's own cultural or moral "truth" even as one must test that reality under the legal formulas supplied by the dominant authority. Either out of self-interest, theoretical unsophistication, or political necessity, both sides conflate the law with Native cultural reality. They thus gloss over the paradoxical yet genuine possibility that the *ki`i la`au*, while perhaps not a central cultural symbol on the level of the "Declaration of Independence," is nevertheless sacred in a way that no analogy to American culture can adequately express. *See supra* note 224 (discussing the theoretical limitations of NAGPRA). Accordingly, as rancorous as the disagreement between the Hawaiian cultural experts may seem, one may attribute it less to mistaken cultural views or lack of personal integrity than to the shortcomings of the NAGPRA discourse itself.

"property" dictates a relationship not only between the *ki`i la`au* and its owner, but also between Hawaiians and the dominant society.[240] Drawing from Hawaiian cultural values and experiential knowledge, these counter-narratives redefine the *ki`i la`au* as "culture," "religion," or "ancestor." They furthermore connect the *ki`i la`au* case to broader issues of cultural autonomy and political sovereignty. The stories told by the Hawaiian claimants in the present dispute thus accomplish far more than a mere rebuttal of the City's factual and legal arguments. They indeed begin to describe a whole new framework of analysis through which one may examine, and possibly resolve, the otherwise intractable controversy over the *ki`i la`au*.

IV. UNEARTHING NATIVE REALITY: FINDING A SOLUTION TO THE *KI`I LA`AU* DISPUTE

The previous parts explored two different dimensions of the *ki`i la`au* dispute, probing the wider significance of the case for both the law of Native cultural property as well as the relationship between Native communities and American society. Part II discussed the friction between the common law and NAGPRA and the potential short circuit between NAGPRA's overall language and intent and its "takings" safety provision. The second part concluded with the observation that, while the *ki`i la`au* dispute does not directly raise the issue, these incongruities may cast a shadow over a large bulk of repatriation claims, including the present case, where the parties dispute the object's classification as a "sacred object" or object of "cultural patrimony."[241] Part III challenged the seemingly inevitable logic of "constitutionally protected property interests," critically reviewing the legal and non-legal justifications of both parties. This analysis reunited the sterilized legal arguments of the parties with their underlying cultural values—whereas the Providence officials valued the *ki`i la`au* as property, the Hawaiian claimants treasured it as deity, cultural patrimony, even family.[242]

While this Comment seeks to dismantle the legal arsenals of both parties, it does not claim to settle the conflict between them. The following part instead describes an alternative framework of analysis that consolidates the emerging counter-narratives of Native Americans and Hawaiians. Examining the debate over the *ki`i la`au* and cultural property through this framework, this part then suggests general outcomes for the present debate and discusses

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[240] *See supra* notes 175-76, 181 (property as a social relation). Regarding prior museum treatment of Native human remains as property, Senator Inouye stated: "The message that this sends to the rest of the world is that Indians are culturally and physically different from and inferior to non-Indians. This is racism." 149 CONG. REC. 17174 (daily ed. Oct. 26, 1990).

[241] *See supra* notes 163-67 and accompanying text.

[242] *See supra* Parts III.B; III.C.

the possible avenues for realizing these outcomes. Far from proposing definite solutions to the present dispute, however, this Comment merely explores the potential for Native communities to determine the proper solutions themselves.[243]

A. Envisioning a "Native Jurisprudence:" A Historical and Cultural Analysis[244]

In its analysis of the legal arguments of the ki`i la`au, this Comment adopts methods of legal critique developed under Legal Realism and Critical Race Theory.[245] The contextual "awakening" inspired by the Realist movement has produced many important insights into the social groundings of the law.[246]

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[243] *See infra* notes 2, 276-78 (recognizing the political dimensions of the cultural discourse and supporting Native groups' right to self-definition).

[244] *See* Frank Pommersheim & Shermann Marshall, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 411 (urging the construction of "an indigenous jurisprudence of vision and cultural integrity"). The question lingers whether one can "reconstruct" a "Native jurisprudence" that not only consolidates 500 Native communities, many with differing claims to federal tribal status or national sovereignty, *see, e.g.*, Noelle Kahanu & Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview*, 17 U. HAW. L. REV. 427 (1995)(expressing reservations with the Indian sovereignty model as applied to the Hawaiian people), but also encompasses the multiple social divisions within each group based on factors such as class, gender, and lineage. *See supra* note 2 (addressing the problem of "Hawaiian" identity). To phrase the question more simply: once one acknowledges the silencing function of stories, is one condemned to silence oneself? *Cf.* Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (criticizing CRT's assertion of a distinct "voice of color" and elevation of race into a "credential"); *see also* Matsuda, *Pragmatism Modified*, *supra* note 2, at 1772-80 (addressing the two related critiques of minority storytelling: "essentialism" and "false-consciousness").

Nothwithstanding this lurking danger of self-contradiction, this Comment approaches the *ki`i la`au* dispute from the basic standpoint that a "Native voice" does exist, thus refraining from the hell-bent criticism that intellectualizes oppression out of existence. *See id.* at 1776 (arguing as an initial premise that principles of self-determination support a group's right to identify itself). Native communities share comparable traditional world views and lifestyles and remarkably similar histories of subordination and current problems of social dislocation. *See* TRASK, *supra* note 2, at 132 (1993)(finding "more similarities than differences" in the histories, cultural heritages, and current problems of Native groups). Despite the diversity both within and across these communities, they all advance the same ideals of racial equality, cultural autonomy, and political self-determination. *Cf.* Alex Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991)(arguing that different Black voices share the same goal of racial equality). This Comment thus embarks on its attempt to describe that "Native voice," recognizing all the while the simultaneously liberating and confining potential of storytelling.

[245] *See supra* Part III.A.

[246] Joseph Singer, analyzing the contributions of realist theories to the modern jurisprudential canon, asserts that "to some extent, we are all realists now." Singer, *Legal Realism*, *supra* note 168, at 467.

Legal Realism, however, has itself come under criticism for merely replacing the social values embedded in the law with, at best, the equally value-laden principle of "common sense,"[247] and at worst, no guiding principles at all.[248] Although Critical Race Theory self-consciously stops short of formula solutions for legal disputes, it comes closer to filling the normative void created by its critique.[249] In the present debate over the *ki`i la`au* and cultural property, CRT lays the analytical foundation on which Native Americans and Hawaiians may begin to construct their own analytical framework for legal critique and social change.[250] CRT thus paves the way towards the develop-

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[247] Joseph W. Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821, 1824 (1990)[hereinafter *Property and Coercion*].

[248] *See* Angela Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 748-49 (1994)(critiquing the "postmodernist" tendencies of Critical Legal Studies, a contemporary school of Legal Realism).

[249] *See* Matsuda, *Pragmatism Modified*, *supra* note 2, at 1767-71 (advocating a pragmatism of liberation that favors the subordinated, advances the first principle of anti-subordination, and embraces the tension between pragmatic method and normative absolutes).

[250] The full extent to which the CRT rubric applies to Native American and Hawaiian claims, however, remains an issue of contention. As critics point out, subjecting Native Americans and Hawaiians to a "race-based" analysis ignores the "political" and "cultural" dimensions of their grievances: "Hawaiians want more than simply a quota of jobs at the fire department. They want their own fire department." Williamson B. C. Chang, *The "Wasteland" in the Western Exploitation of "Race" and the Environment*, 63 U. COLO. L. REV. 849, 862 (1992)[hereinafter Chang, *Wasteland*]; *see also* TRASK, *supra* note 2, at 33 ("Our daily existence in the modern world is thus best described not as a struggle for civil rights but as a struggle against our planned disappearance."). *But see* RENNARD STRICKLAND, TONTO'S REVENGE: REFLECTIONS ON AMERICAN INDIAN CULTURE AND POLICY 13-15 (1997)(perceiving a need for "the next generation in Indian law [to] rise above sovereignty and to forge alliances with others in our society . . . to reach out to others, to the other others . . . .")[hereinafter STRICKLAND, TONTO'S REVENGE].

Having accepted this critique, CRT scholars have now turned to the task of refining CRT to accomodate Native voices. *See* Harris, *supra* note 248, at 775-76 (identifying the inclusion of Native stories and incorporation of other academic disciplines such as "cultural studies" and "post-colonial theory" as potential areas for increased sophistication in CRT); Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 UCLA ASIAN PAC. AM. L.J. 33, 60-65 (1995)(developing a theory of differential racialization to account for unique minority group experiences and inter-minority friction without losing sight of the dominant hegemony). As Angela Harris observes, this synthesis between CRT and indigenous critiques may even lead to the general "reopen[ing] of the dialogue between 'nationalist' and 'civil rights' approaches to racial equality." Harris, *supra* note 248, at 775. *Cf.* Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (describing black "nationalism"); Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CALIF. L. REV. 1401 (1993)(supporting black separatism in educational institutions). Leaving open the question of whether CRT as currently configured fully serves the interests of Native groups, this Comment merely borrows the useful analytical tools developed under CRT in its attempt to describe a distinctly Native analytical framework.

ment of a future "Native jurisprudence."[251]

This Comment draws from the wealth of scholarship, much of it quite recent, on the history of relations between Native communities and American society, the evolution of Native American and Hawaiian law, and the post-colonial push towards self-determination.[252] The alternative Native framework of analysis that emerges from the events and circumstances described in these works is both "informative" and "transformative." It is "informative" in its recognition of past injustices and their lingering effects and present structures of social oppression,[253] as well as its affirmation of Native-centered understandings of history and culture. This framework, however, is also "transformative," calling not only for the vindication of overdue justice claims and the dismantling of current oppressive social structures, but also for the continued future development of Native collective identities.

Surveying the historical context of the *ki`i la`au* dispute, one discovers a consistent pattern of advances made by American society at the expense of Native American and Hawaiian communities.[254] As seen above, Native communities have suffered an unilateral, often involuntary drain of important cultural symbols out of their control.[255] This outflow has supported a larger process of Native cultural suppression, appropriation, and assimilation.[256] History has also witnessed the dispossession of Native societies of their

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[251] The alternative analytical framework developed by Native critics, of course, only begins the reconstruction of the "Native jurisprudence"—a process that only the courts of Native peoples themselves can complete.

[252] *See generally* FRANCIS PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS (1986); WARD CHURCHILL, FROM A NATIVE SON: SELECTED ESSAYS ON INDIGENISM 1985-1995 (1996); KAME'ELEIHIWA, *supra* note 5; TRASK, *supra* note 2.

[253] *See* Yamamoto, *Praxis*, *supra* note 213, at 839-44 (contrasting blatant acts of racial tyranny with subtler, institutional forms of racism). *Compare* HELENA ALLEN, THE BETRAYAL OF LILIUOKALANI (1982)(recounting the specific act of tyranny in the foreign overthrow of the Hawaiian monarchy) *with* LINDA PARKER, NATIVE AMERICAN ESTATE, THE STRUGGLE OVER INDIAN AND HAWAIIAN LANDS 152-64 (1989)(describing the present structural oppression faced by beneficiaries of the Hawaiian Homelands Trust).

[254] This Comment refers the reader to the large body of historical work documenting the frighteningly similar experiences of Native American and Hawaiian communities with Western culture. *See generally* THE AMERICAN INDIAN AND THE UNITED STATES: A DOCUMENTARY HISTORY (Wilcomb E. Washburn comp., 1973); RAY BILLINGTON & MARTIN RIDGE, WESTWARD EXPANSION (5th ed. 1982)(chronicling American expansion under the "frontier thesis"); KAME`ELEHIWA, *supra* note 5; FUCHS, *supra* note 5, at 3-39 (describing the decline of Hawaiian society from Western contact to the overthrow of the Hawaiian kingdom).

[255] *See infra* note 60 and accompanying text.

[256] *See* CHRISTINE BOLT, AMERICAN INDIAN POLICY AND AMERICAN REFORM: CASE STUDIES OF THE CAMPAIGN TO ASSIMILATE THE AMERICAN INDIANS (1987); ELIZABETH BUCK, PARADISE REMADE: THE POLITICS OF CULTURE AND HISTORY IN HAWAII 101-134 (1993)(examining the Western conversion of Hawaiian culture and society).

cultural and spiritual lifeblood—their ancestral lands.[257] Added to these material and cultural losses, and undoubtedly linked to them, Native communities have endured drastic declines in population,[258] as well as health and social problems that persist today.[259] By revealing both the past and present burdens of oppression imposed on Native communities, the Native framework adds depth and color to the monochrome snapshot of majority reality.

The "informative" realignment of history by Native Americans and Hawaiians also unveils the instrumental role played by the law in the conquest and continuing marginalization of Native peoples.[260] In America's formative years, for example, the doctrine of "discovery" invoked by the Supreme Court in the seminal case of *Johnson v. M'Intosh*[261] treated Indians as legal non-entities, thereby justifying the taking of their lands.[262] In other contexts, the Western notion of "property," while implicitly recognizing Native "natural rights" and humanity, has proved no less effective in facilitating widescale transfers of land and resources out of Native control and blocking Native attempts to obtain adequate protection or redress.[263] "Trust relationships"

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[257] *See* IMRE SUTTON, INDIAN LAND TENURE (1975)(presenting a bibliographical overview of Indian land tenure and dispossession); KAME'ELEIHIWA, *supra* note 5 (providing the definitive account of the loss of Hawaiian lands).

[258] *See* RUSSELL THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492 133 (1987)(documenting a decline in Native American population from over five million at the time of Columbus to 250,000 by 1900); DAVID STANNARD, BEFORE THE HORROR: THE POPULATION OF HAWAII ON THE EVE OF WESTERN CONTACT (1989)(estimating a similar decline in the Hawaiian population from a million to 134,925 from 1778 to 1823).

[259] *See* EDUARDO DURAN & BONNIE DURAN, NATIVE AMERICAN POSTCOLONIAL PSYCHOLOGY (1995)(developing a Native theoretical framework and clinical praxis for working with Native clients); NATIVE HAWAIIAN HEALTH TASK FORCE, E OLA MAU: NATIVE HAWAIIAN NEEDS STUDY (1985)(assessing Hawaiian health needs).

[260] *See generally* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Rennard Strickland et al. eds., 1982)[hereinafter COHEN]; ROBERT A. WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT, DISCOURSES OF CONQUEST (1992)(analyzing the competing theoretical justifications for Indian dispossession)[hereinafter WILLIAMS, THE AMERICAN INDIAN]; KAME'ELEIHIWA, *supra* note 5 (revealing the law's role in Hawaiian dispossession).

[261] 21 U.S. (8 Wheat.) 543 (1823).

[262] *See* WILLIAMS, THE AMERICAN INDIAN, *supra* note 260, at 325-28.

[263] *See generally* Singer, *Sovereignty and Property*, *supra* note 181, at 3-8 (noting how courts compromise Indian land rights by alternately framing them in terms of "sovereignty" and "property"); Joseph W. Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481 (1994)(criticizing several court decisions that failed to uphold Indian "property" rights). Under the federal "allotment" policy extending from the Dawes Act of 1887 until the Indian Reorganization Act of 1934, massive amounts of tribal lands left Native control—much of it according to conventional property rationales. *See generally* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995). Within this timespan, Indian land holdings plummetted from 138 million to 48 million acres. *See* COHEN, *supra* note

developed between Native communities and the American government have validated policies of differential treatment working just as often to the detriment of Native Americans and Hawaiians as to their benefit.[264] Legal identities and categories imposed on Native groups have contorted, splintered, and erased Native communities according to the whims of the dominant sovereign.[265] The critical Native lens thus dissolves the image of legal "neutrality," revealing the law as the ideological basis for a history of Native subordination.

The "informative" aspect of the Native framework, however, does not merely paint Native history as a litany of injustices, or describe Native culture

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260, at 138. Of the 90 million acres lost, about 27 million, or two-thirds of the total allotted land, passed through sale from Indian allottees to non-Indians (the remainder was transferred either in outright cessions or sales as "surplus" lands). *See id.* In Hawai'i, the Great Mahele of 1848 and the Kuleana Act of 1850 imported private property concepts to replace the Hawaiians' communal interests in their land, thus paving the way for Western takeover long before the overthrow of the Hawaiian kingdom in 1898. *See* JON CHINEN, THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1858 (1958); KAME'ELEHIWA, *supra* note 5 (providing a detailed history of the Mahele); Maivan Clech Lam, *The Kuleana Act Revisted: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 WASH. L. REV. 233 (1989)(analyzing the historical context of the Kuleana Act).

The seemingly dialectical struggle between Native and Western traditions continues to surface in various property law contexts. In Hawai'i, for example, the state supreme court in *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973), looked to customs of the Hawaiian monarchy in overturning nearly a century of private water ownership. The ensuing legal firestorm lasted nearly two decades. *See* Williamson B. C. Chang, *Unraveling Robinson v. Ariyoshi: Can Courts "Take" Property?*, 2 U. HAW. L. REV. 57 (1979)(criticizing the federal courts' "review" of the state supreme court decision). In *Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n*, 79 Hawai'i 425, 903 P.2d 1246 (1995), *cert. denied*, 116 S. Ct. 1559 (1996), the supreme court upheld the validity of traditional and customary rights of gathering and access, declaring that the "western concept of exclusivity is not universally applicable in Hawai'i." *Id.* at 447, 903 P.2d at 1268. The decision has sparked familiar protests against the "cloud on title" it allegedly creates. *See* D. Kapua Sproat, Comment, *The Backlash Against PASH*, 20 U. HAW. L. REV. (forthcoming 1998).

[264] *Compare* Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams' Algebra*, 30 ARIZ. L. REV. 413 (1988), *with* Robert Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's Learning to Live with the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. 439 (1988). *See also* HAWAII ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS, A BROKEN TRUST: REPORT OF THE HAWAII ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS (1991)(documenting the failure of the Hawaiian Homelands Trust).

[265] *See, e.g.*, Torres & Milun, *supra* note 212 (relating how a court publicly erased the Mashpee Indians from existence by declaring that they were not an "Indian tribe"); DONALD L. FIXICO, TERMINATION AND RELOCAION: FEDERAL INDIAN POLICY, 1945-1960 (1986)(analyzing the assimilation campaign during the "termination" period); TRASK, *supra* note 2, at 134-36 (criticizing the government manipulation of Native identities, specifically the limitation of Hawaiian Homelands Trust beneficiaries to Hawaiians of at least 50% blood quantum)

as "the antithesis of all that is wrong in contemporary U.S. society."[266] Much more than an "oppositional framework" measured solely against the dominant society and its misdeeds and excesses, the Native framework promotes an affirmative account of Native history and culture always available but previously ignored or repressed.[267] As demonstrated in the present *ki`i la`au* case, Native communities use primary sources of traditional knowledge as well as stories rooted in modern everyday experience to challenge both the dominant society's historical data and its methodological reliance on the printed word.[268] Through this process, Native communities negate the majority wisdom—inherited in societal prejudices, media stereotypes, and textbook inaccuracies or omissions—that excuse past wrongs as "destiny" or "enlightenment" and attribute present problems to the Natives themselves.[269] Replacing these previous falsehoods with Native-centered truths, Native storytellers do not dwell in the frame of reference furnished by the dominant society, but transcend its limited boundaries. Whether versed in the ways of old or immersed in contemporary Native life, Native storytellers speak from a frame of reference of their own.

Besides promoting an "informative" retelling of native past and present, emerging Native American and Hawaiian voices also begin to describe a uniquely Native vision for the future. One aspect of this "transformative" vision is "corrective," focusing on redress for overdue justice grievances and material change of existing structures of oppression.[270] Recent years have seen heightened activism in Native communities in various political and legal

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[266] *See* Jo Carrilo, *Surface and Depth: Some Methodological Problems with Bringing Native American-Centered Histories to Light*, 20 N.Y.U. REV. L. & SOC. CHANGE 405, 413-14 (1993)(critiquing overidealized Native accounts).

[267] *See, e.g., supra* Hawaiian-centered descriptions of culture and history in note 40.

[268] *See* Carrilo, *supra* note 266, at 409-11 (challenging both conventional data and method).

[269] RAYMOND W. STEDMAN, SHADOWS OF THE INDIAN: STEREOTYPES IN AMERICAN CULTURE (1982); WILLIAM SAVAGE, INDIAN LIFE: TRANSFORMING AN AMERICAN MYTH 6 (1976)(relating how the dominant society saw the Native American's failure to conform to Western laws as the most telling "evidence" of their less-than-human status); TRASK, *supra* note 2, at 147-57 (challenging Western portrayals of Hawaiian history). As evidenced by the *ki`i la`au* dispute, these societal prejudices today express themselves more in "cultural," rather than "racial" terms, where inferiority is measured by the amount of deviation from the dominant cultural norm. *Cf.* Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1379-80 (1988)(discussing how the dominant society now speaks of "culture," rather than "race" in explaining black "otherness"). *But see* RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE (1994)(employing junk science to return the discourse of exclusion to its traditional language of biology).

[270] *See supra* note 253 (contrasting past wrongs and present oppression).

arenas.[271] This movement towards recognition of Native claims proceeds on two fronts. Native advocates first employ the legal concepts and frameworks of the dominant society. NAGPRA is one such institutional legal mechanism.[272] Supporters of Native rights, however, also invoke norms that, in their view, transcend the laws of the domestic sovereign—norms couched not only in terms of law, but in terms of morality as well.[273] Principles such as "self-determination," "indigenous rights," and "decolonization" do not always translate smoothly into language that internal legal systems recognize.[274] They nevertheless establish alternative standards of justice that,

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[271] *See* STEVEN CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE (1988); DUANE CHAMPAGNE, NATIVE AMERICA: PORTRAIT OF THE PEOPLES 1-50 (1994)(summarizing contemporary Native American political movements); TRASK, *supra* note 2, at 87-110 (describing recent Hawaiian political activism).

[272] Other legal claims pursued by Native advocates include rights to land, water, fishing, hunting, gathering, access, and religious freedom. *See generally* NATIVE HAWAIIAN RIGHTS HANDBOOK (Melody Kapilialoha Mackenzie ed., 1991); STEVEN PEVAR, THE RIGHTS OF INDIANS AND TRIBES: THE BASIC ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS (1992).

[273] Native Americans and Hawaiians arguably possess two different "rights" to self-determination under international law. *Compare* U.N. CHARTER, art. 1; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948)(the universal right to self-determination), *with* United Nations Declaration on the Rights of Indigenous Peoples, U.N. ESCOR, Comm. On Hum. Rts., 11th Sess., Annex I, U.N. Doc. E/CN.4/Sub.2 (1993)(indigenous right to self-governance). As vividly demonstrated by the divergent goals of Hawaiian "sovereignty" advocates, however, international law remains subject to widely varying interpretations. Supporters of separate nation status for Hawaiians draw parallels between Hawai'i and other formerly colonized nations, pointing to the classic attributes of nationhood displayed by the former Hawaiian monarchy. *See, e.g.*, Francis Anthony Boyle, *Restoration of the Independent Nation State of Hawaii Under International Law*, 7 ST. THOMAS L. REV. 723 (1995)(arguing for complete independence). Detractors from Hawaiian separatism, on the other hand, assert that international law, while supportive of self-determination, recognizes only a limited right of secession. *See, e.g.*, Jon M. Van Dyke et al., *Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawaii*, 18 U. HAW. L. REV. 623 (1996)(concluding that indigenous peoples have a right to self-governance, if not full independence). *See generally* Addis, *supra* note 2, at 623-28 (positing that the ad infinitum logic of secession renders it philosophically and institutionally questionable).

Some Hawaiian "indigenous rights" advocates propose models of semi-autonomous government similar to those of Native American tribes. *See, e.g.*, Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective*, 8 ARIZ. J. INT'L & COMP. L. 77 (1991). Others envision the path to Hawaiian self-determination to run through state agencies or private land-based trusts. *See, e.g.*, Greg Barrett, *Two Hawaiian Leaders See Future Based on Enterprise*, THE HONOLULU ADVERTISER, May 11, 1997, at A1 (featuring the leaders of two Hawai'i state agencies established to benefit Hawaiians). The Hawaiian sovereignty movement thus must not only struggle with the conflict between domestic and international authority, but also with the tension within international law itself.

[274] Although the United States Supreme Court has acknowledged that the law of nations "is part of our law," Paquete Habana, 175 U.S. 677, 700 (1900), and other federal courts have cited

as the expressed legislative intent of NAGPRA as "human rights legislation"[275] demonstrates, occasionally inform and influence laws at the domestic level.

In addition to this "corrective" element, the Native vision for the future also includes a "prospective" element encouraging the further cultivation of cultural identities and the ultimate realization of political autonomy. Native scholars of history and culture are documenting the often significant disparities, highlighted in the present dispute over the *ki`i la`au*, between traditional indigenous and Western cultures.[276] At the same time, Native communities are experiencing a cultural renaissance reviving traditional Native practices and values suppressed by former policies of assimilation. The newfound understanding of Native traditions, however, has not only elicited a return the past. It has also inspired Native communities to forge new cultural, even national identities as they enter the post-colonial era.[277] Calls for cultural autonomy thus merge with larger visions of political self-determination and national liberation.[278]

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customary international law principles in various human rights cases, no United States court has ever applied international law in a case involving Native Americans or Hawaiians.

[275] 136 CONG. REC. S17174 (daily ed. Oct. 26, 1990)(statement of Sen. Inouye). Senator Inouye, however, also interpreted NAGPRA within the American legal framework, stating its purpose of protecting the "civil rights of America's first citizens." *Id.* The Heard Museum Report, the collaborative study between the museum, scientific, and Native communities forming the basis of the NAGPRA bill, stated that "respect for Native human rights is the paramount principle that should govern resolution of the issue when a claim is made." H.R. REP. NO. 101-877, at 10-11 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4369-70.

[276] *See* Strickland, *Human Rights*, *supra* note 125, at 181-85 (describing "holistic" Native world views in the sacred object context). *See also* VINE DELORIA, JR., RED EARTH, WHITE LIES: NATIVE AMERICANS AND THE MYTH OF SCIENTIFIC FACT (1995)(challenging Western cultural assumptions and sources of knowledge); *supra* note 40 (Hawaiian-based accounts of traditional culture).

[277] *See, e.g.*, AMERICAN FRIENDS SERVICE COMMITTEE-HAWAII AREA OFFICE, HE ALO A HE ALO (FACE TO FACE): HAWAIIAN VOICES ON SOVEREIGNTY (1993)(collection of work by various individuals involved in the Hawaiian rights movement). By identifying Native "cultural revival" as a form of political expression, this author does not intend to join others in devaluing the Native process of self-definition as political opportunism or ultra-idealism. *See generally* THE INVENTED INDIAN, CULTURAL FICTIONS AND GOVERNMENT POLICIES (James A. Clifton ed., 1990); Jocelyn Linnekin, Children Of The Land, Exchange And Status In A Hawaiian Community 8-13 (1985). Such criticism, though purportedly "scientific" and "apolitical," ignores its own contribution to a political discourse that denies Native groups the right to determine their own identities and name their own realities. Rather than engaging in factually and morally problematic questions of "authenticity," this Comment simply restates the common understanding among Native critics that "all Native cultural resistance is political: it challenges hegemony." TRASK, *supra* note 2, at 54.

[278] In many respects, NAGPRA symbolizes this confluence of cultural rebirth and political resurgence. Many Native advocates consider the repatriation of cultural property as essential to the restoration of Native communities. Sacred cultural objects, as the embodiment of the

Through their counter-narratives and "cultural performances," Native Americans and Hawaiians thus begin to construct their own framework of analysis for the *ki`i la`au* dispute and the larger debate on cultural property. This new framework performs an "informative" function of replacing traditional myths with more detailed and humane historical and cultural accounts. This framework at the same time holds "transformative" potential for the resolution of Native justice claims and the empowerment of Native communities both culturally and politically. Though still in its embryonic stages, the "Native jurisprudence" envisioned by Native Americans and Hawaiians offers some valuable direction for finding one's way out of intractable legal problems such as the present *ki`i la`au* case.

B. Applying the Native Analytical Framework: The Temple Rebuilt

Although this Comment recognizes the full development and application of the Native framework as future collective undertakings for Native communities, it also submits that even the preliminary Native framework sketched above suggests general guidelines for both the present *ki`i la`au* case and the surrounding debate on cultural property. Solutions proposed according to this alternative framework should take into consideration its "informative" aspects: the history of suppression and appropriation of Native cultural objects, symbols and practices, the present social dislocation and alienation caused by these past injustices, and the persistent systemic barriers against Native cultural claims.[279] They should also build upon Native-centered understandings of community and culture rather than recycling majority stereotypes about Native life.[280] Proposed outcomes should furthermore promote the "transformative" vision of the Native framework, compensating Native Americans and Hawaiians for past and present cultural incursions made by the dominant society and removing present structural biases against their repatriation claims.[281] They should also perform an additional "transformative" function of enhancing Native cultural autonomy and

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power that connects the self and community to the universe, serve as critical referents for Native cultural identity, security, and purpose. "Without them there may be no people." Strickland, *Human Rights*, *supra* note 125, at 183. Edward Ayau, Hawaiian lawyer and member of Hui Malama, agrees that the loss of ancestral remains and cultural objects led to a decline in *mana* ("spiritual energy") that debilitated Hawaiian society. *See* Ayau, *supra* note 15, at 216. The repatriation movement restores this *mana*, enabling Hawaiians to "find the level of respect for themselves needed to *ho`ohui* ("unite") in an effort to restore their rightful place in the sun." *Id.*

[279] *See supra* notes 254-65 and accompanying text.

[280] *See supra* notes 266-69 and accompanying text.

[281] *See supra* notes 253, 270-75 and accompanying text.

facilitating the further development of Native cultural identities.[282] In short, the solutions based on the Native analytical framework should implement the framework's central understandings of culture as evolving rather than static, and Native communities as living rather than extinct.[283]

While the alternative rubric described in this Comment establishes certain fixed points for navigating through the present dispute over the *ki`i la`au*, it does not specify a final course or destination. Indeed, any number of possible solutions may effectuate to some degree the understandings, values and beliefs of the new Native framework. These range from incremental "legal" adjustments to sweeping "political" reformations.[284] When measured against the alternative standard of the Native analytical framework, each one of these avenues of change has its merits and faults. In time, Native Americans and Hawaiians, both as individuals and as a group, will determine the proper application of the "Native jurisprudence" that they continue to reconstruct.[285]

Several "legal" or "law-based" solutions may realize the normative principles and outcomes offerred by the Native alternative framework.[286] On a "micro" legal level, such solutions include coining new legal terminology, amending existing procedural or evidentiary rules, or adopting liberal interpretations of constitutional or statutory provisions more faithful to Native stories. Instead of requiring Native groups to present a prima facie case against the museum's right of possession, for example, Congress might create a rebuttable presumption in favor of the possessory rights of the Native groups.[287] Congress might also consider the possibility of extending NAGPRA's effect to private museums and collectors.[288] The courts, on the

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[282] *See supra* notes 276-78 and accompanying text.

[283] *See* Strickland, *Human Rights*, *supra* note 125, at 176 (viewing NAGPRA as a statement that Native culture is "a living spiritual entity—not a remnant museum specimen.").

[284] This part recreates the artificial dichotomy between "law" and "politics" in this section merely for the sake of argument and analysis. *See* C. Bell, *supra* note 59, at 459 (recognizing that "law is not value neutral and that dividing claims to cultural property into 'legal' and 'extralegal' packages is a fallacy").

[285] Edward Ayau asserts that Hawaiians should look to "culture" as the polestar to guide their future direction: "For *kanaka maoli*, guidance lies with traditionalists, who have retained the language and maintained protocol, and *na pule* ("prayers") that provide for communication with the ancestors. Cultural values, not political motivations, offer proper guidance." Ayau, *supra* note 15, at 195. *Cf.* Crenshaw, *supra* note 269, at 1336 (urging the black community to preserve a distinct collective consciousness in order to resist cooptation through legal reform).

[286] *See, e.g.*, Platzman, *supra* note 33, at 549-57. Platzman suggests additional legislation to supplement NAGPRA, including laws that would prohibit or limit additional scientific research by museums and extend the inventory requirement to unassociated sacred cultural objects. *See id.* at 552-55.

[287] *See id.* at 555-57.

[288] Given the intense political wrangling and debate that preceded the passage of NAGPRA in its present form, this solution will probably not materialize for the near future. Before

other hand, could liberally construe both state statutes of limitations and the Fifth Amendment in light of the exceptional circumstances of Native cultural property cases.[289] They might also adopt a stance towards agency action that would maximize favorable enforcement results for Native Americans and Hawaiians.[290]

Changes conducted on the "micro" level may supplement other "macro" level shifts in legal theory and "rights." Our legal system might continue to refine its halting attempts to recognize the notion of communal property, either in the Native context or in general.[291] Existing legal concepts or newly developed theories may contribute to an entirely new language of "cultural rights" to objects such as the *ki`i la`au* freed from the materialist underpinnings of the "property" discourse.[292] Informed by a more honest and realistic

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NAGPRA's passage, however, one Congressman did go on record in support of extending NAGPRA's regulations on new excavations and discoveries to private lands as well. *See* 136 CONG. REC. H10991 (daily ed. Oct. 22, 1990)(statement of Rep. Bennett).

[289] *See* Johnson & Haensly, *supra* note 134, at 133 (speculating that courts may weigh the communal property interests of Native tribes, or "equitable principles," in ruling on the "takings" issue). *See also* Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 153-58 (1993)(advocating a decolonized Indian law in the area of land and land claims freed of statute of limitations and laches defenses and supported by novel, but justifiable interpretations of the Fifth Amendment). One may note that the Supreme Court has already made an exception to the "public use" requirement of the Fifth Amendment, justifying the forced sale of land held by a charitable trust for Hawaiians to private lessees on the basis of the particular "evils" of the land oligopoly in Hawai'i. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241-42 (1984). Could courts apply such a context-specific analysis to the "takings" prohibition in the case of the *ki`i la`au*?

[290] The debate between "principles" of judicial activism and restraint, of course, tends to obscure how judges make value choices even when they decline to interfere with "political" or "discretionary" decisions. *See* Singer, *Legal Realism*, *supra* note 168, at 528-30 (exposing judicial "deference" towards contract rights as a revival of the public versus private distinction).

[291] *See supra* note 37 (debate on cultural and communal property). The United States Supreme Court has previously accepted the concept of communal property in several Indian land cases. *See* United States v. Jim, 409 U.S. 80, 82 (1972)(holding that Indian title rests in the tribe); Journeycake v. Cherokee Nation, 155 U.S. 196, 208-10 (1894)(recognizing Cherokee land as "public domain" or "common property").

[292] *See, e.g.*, Gerstenblith, *supra* note 18, at 646-55 (adopting the "public trust" doctrine as the theoretical basis for cultural property protection); Harding, *supra* note 75, at 768 (finding precedent in the law of human remains for the creation of a "separate category of goods that we view as ends in themselves"). Many "communal property" solutions, of course, leave unresolved the question of who these "communal property" rights belong to—Native communities or the public at large. *See supra* note 37.

Another "macro" level proposal might involve the expansion of the Indian "trust doctrine" to accommodate Native communal property interests specifically. *See, e.g.*, Jeri Beth K. Ezra, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 CATH. U. L. REV. 705 (1989)(arguing that the trust doctrine includes a duty to uphold Native Americans interests in sacred sites). Finally, lest we overlook the obvious, the widescale decolonization

understanding of the "private/public" dichotomy, such "rights talk" would uplift the interests of Native communities in their sacred cultural objects against "public" discourses of conquest framed as "private" ownership rights.[293] Not only Native communities, of course, would benefit from such "macro" legal change. By adopting a more sophisticated view of the law and rights and incorporating important alternative perspectives offered by Native paradigms, our society may very well improve itself in the process.[294]

These "legal" solutions conform to the Native analytical framework to varying degrees. They generally incorporate the framework's "informative" aspects, taking into account Native-based stories of history and culture. They also accomplish certain "transformative" goals of compensation and structural change. Law-based solutions, however, have their limitations. "Micro" legal changes, whether accomplished through technical amendments in definitions and procedure or ad hoc judicial decisionmaking, grant benefits to Native Americans and Hawaiians only indirectly, falling short of producing guaranteed results or consistent principles.[295] Although "macro" level shifts in law, if genuine and lasting, are synonymous with basic political and social transformation, they accordingly depend on the ability of legal decisionmakers to effect, and the willingness of the general public to embrace, such change.[296] Both "micro" and "macro" legal solutions, therefore, suffer from inherent practical difficulties.

Furthermore, on a conceptual level, legal solutions based on critical frameworks flirt with self-contradiction. Based on legal concepts, procedures,

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of all Indian and Hawaiian law offers the most morally and theoretically consistent, if not narrowly tailored, solution to the *ki`i la`au* dispute. *See* Clinton, *supra* note 289, at 109-59 (describing a vision of a decolonized Indian law based on accomodation, respect, and equality).

[293] Our legal jurisprudence could also embrace more "self-conscious" concepts of property in general, in consideration of the public foundations of "private" rights. *See* Singer, *Legal Realism*, *supra* note 168, at 535 ("Only if we can see the role that public power plays in the 'private' sphere, can we judge whether it has been used wisely. . . . We must confront directly our definition of a good society.").

[294] *See* Addis, *supra* note 2, at 650-51 (predicting that the dominant group, through genuine dialogue with minority groups, would discover its own specificity, appreciate the nature of oppression, and engage in a process of mutual correction); Chang, *Wasteland*, *supra* note 250, at 870 (arguing that the Native paradigm, "an underlying archetype in the human psyche," is the key to resolving intractable problems of racism and environmental degradation).

[295] Some commentators doubt the effectiveness of litigation or law-based threats to bring about the change in societal attitudes critical for the success of the repatriation movement. They instead emphasize the importance of enlightened museum policies and cross-cultural dialogue. *See, e.g.*, Boyd & Haas, *supra* note 103, at 253-54 (proposing "institutional policies" developed by museums as a more favorable alternative to the rigid legal standards of NAGPRA).

[296] *See* Clinton, *supra* note 289, at 109 (acknowledging that the present "neo-colonist political and judicial climate" limits the author's proposals for a decolonized Indian law to a vision of possibilities, rather than a prediction of the future).

and dispute resolution methods alien to Native cultures, these solutions risk perpetuating or repeating the injustices they seek to remedy.[297] By casting Native claims as purely "legal" rather than "political" or "moral," these solutions also accept as a basic premise the legitimacy of the dominant order.[298] Law-based avenues of change thus selectively ignore the "informative" and "transformative" aspects of the Native framework—granting token benefits to Native communities, but preserving the cultural and socio-political hierarchy. They confront Native advocates with the threat of assimilation and co-optation with little assurance of genuine results in return.[299]

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[297] *See generally* Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 LAW & INEQ. J. 323 (1997)(critiquing the legal discipline itself as a product of Western culture). Some view the Western "legal" paradigm and the "experiential" understanding of Native societies as fundamentally incompatible. *See, e.g.*, Chang, *Wasteland*, *supra* note 250, at 858 ("[In Native Societies,] rules, treaties and language do not guide conduct. Rather, entering the right state of mind generates proper practice."). *But see* STRICKLAND, TONTO'S REVENGE, *supra* note 250, at 77-84 (holding up the Cherokee experience as an example of the successful adoption of new "legal" traditions without compromising tribal values).

[298] This statement refers principally to domestic "legal" solutions. Even international "law," however, may not fully support what many Native people would consider a "moral" result. *See supra* note 273.

[299] Many legal critics view solutions based on the law or "rights" as fundamentally opposed to genuine social change. *See* Crenshaw, *supra* note 269, at 1366-69 (discussing how critics view legal change as transformative "only to the extent necessary to legitimate those elements of [society] that 'must' remain unchanged"); Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63 (1997)(observing that "human rights" in South Africa encourage political participation but validate the socio-economic status quo). Examining "rights" within the African-American context, Kimberle Crenshaw finds that legal reform, by laying the ideological foundation for continuing racial inequality even as it conceeded formal rights of equality, paved the way not only for the current white backlash but also for "self-blame" and other "self-destructive attitudes" on the part of blacks still trapped in the underclass. *See* Crenshaw, *supra* note 269, at 1383. "Rights" also threaten to erode the unity of the black community as the sources of oppression become more diffuse. *Id.* at 1383-84.

The rights granted in NAGPRA, in slight contrast, tend to affirm an independent Native cultural identity and strengthen Native cultural solidarity. They nevertheless remain vulnerable to future shifts in the political winds. Furthermore, even though the United States and other Western societies have lately recognized Native rights of cultural independence and autonomy, their policies largely substitute former racist hostility with a spirit "paternalistic pluralism" that views Natives as "vanishing species of nonhuman fauna" rather than as true "dialogue partners." *See* Addis, *supra* note 2, at 620-21 (calling for a "critical pluralism" that engages minorities in addition to protecting them).

Even more fundamentally, while Native legal "rights" may advance a few short term goals for Native communities, they still may come with an ideological price. Perhaps more than other legal critics, Native American and Hawaiian oppositionists challenge not only the neutrality of the dominant society's laws, but also the very legitimacy and applicability of those laws. On a political level, Native use of dominant society legalisms conflicts with Native views of the rule of dominant society law as illegal. On a related cultural level, Native rights-talk reduces Native

Beyond the confines of "the law," or at least the law as contemplated by the sovereign power, the Native analytical framework also suggests other solutions that some may term "political" or "extra-legal." Based on various models for Native political restoration, these solutions offer wide-ranging responses to the equally expansive implications of the Native framework.[300] Unlike piecemeal legal changes, they avoid artificial distinctions between issues of cultural identity and political sovereignty. At least conceptually, therefore, "political" solutions more faithfully capture the entire vision of the Native framework. Such solutions do not specifically address the problem of repatriation; they do, however, squarely address Native demands for autonomy.

As proposed solutions swing further to the "political" or "extra-legal" end of the spectrum, however, they encounter at least two difficulties. First, the observation made above regarding the contingency of "macro" legal change on the willingness of dominant society to accept—or the ability of reformists to compel—such change applies with even greater force to solutions advocating wholesale political reorganization.[301] The relatively uncharted terrain faced by such movements and the larger interests at stake lead to rifts not only between Native communities and the dominant society, but also between and within the communities themselves.[302] Second, aside from overall questions of feasibility, "political" approaches, for all their ideological allure, simply do not address the specific, immediate needs of Native communities confronted with the everyday reality of dominant society oppression.[303] As discussed above, the main catalyst for the repatriation movement

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knowledge and experience to lifeless legal terms acceptable to the dominant society. *See* TRASK, *supra* note 2, at 112-13 (equating the assertion of "rights" internal to the dominant society with "mental colonization"). These added dimensions to the minority "catch-22" described by Martha Minow as the "dilemma of difference," *see* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 19-48 (1990), thus heighten the ideological insult of law-based changes. Many Native American and Hawaiian lawyers face the cruel irony that, in pursuing their claims through the "courts of the conqueror," they indirectly acknowledge the loss of their political and cultural independence.

[300] *See supra* note 273 (differing concepts of Native American and Hawaiian sovereignty).

[301] *See supra* note 296 and accompanying text.

[302] Williamson Chang notes the profound implications of the Native paradigm for modern society: "Not only does it challenge the accumulated wealth of the 'haves' (classes and nations) but it is more disturbing as challenging the necessity of accumulation as human activity." Chang, *Wasteland*, *supra* note 250, at 852.

[303] *See* STRICKLAND, TONTO'S REVENGE, *supra* note 250, at 108 (asserting that "public policy, no matter how well intended, is not sufficient protection for the rights of Indians . . . ."). *See also* Crenshaw, *supra* note 269, at 1357-58 (noting that the critical approach towards law, if taken to an extreme, "may have the unintended consequenes of disempowering the racially oppressed while leaving white supremacy basically untouched"). Kimberle Crenshaw identifies the fundamental problem as "how to extract from others that which others are not predisposed

was none other than Congress' establishment of a "legal" basis for Native claims in NAGPRA.[304] Even if "political" solutions succeeded in restoring the sovereignty of Native communities, they would, ironically, still not ensure the repatriation of the *ki`i la`au* and other important cultural objects.[305]

As the foregoing discussion demonstrates, framing solutions to the *ki`i la`au* dispute according to the "legal-political" dialectic can easily conclude in negation, futility and paralysis.[306] Must Native communities surrender their

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to give." *Id.* at 1365. She argues that the language of "rights," enabling oppressed groups to "turn society's 'institutional logic' against itself," often provides the only realistic recourse for disadvantaged minorities unable to wage a full frontal assault on the dominant hegemony. *Id.* at 1366-68 (citing F. PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS (1977)). Comparing the NAACP and the Black Panthers, Professor Crenshaw observes that movements that renounce the institutional logic will likely see defeat before reaching its goals, but also notes that "it is their insurgency that ultimately benefits more moderate groups." *Id.* at 1367 n.140. For examples of the harsh resistance encountered by Native "radical" movements see REX WEYLER, BLOOD OF THE LAND, THE GOVERNMENT AND CORPORATE WAR AGAINST THE AMERICAN INDIAN MOVEMENT (1982); William H. Rodgers, Jr., *The Sense of Justice and the Justice of Sense: Native Hawaiian Sovereignty and the Second "Trial of the Century"*, 71 WASH. L. REV. 379 (1996)(criticizing the trial of Dennis "Bumpy" Kanahele).

[304] *See supra* Part II.B.

[305] As independent political entities, Native communities would forfeit their rights to repatriation under domestic law. Native claimants would again have to resort either to standard, "political" means of international repatriation such as negotiations and treaties, or traditional common law actions of replevin. Political solutions could thus return Native communities to square one with respect to their repatriation claims. *See, e.g.*, Merryman, *Elgin Marbles, supra* note 205 (documenting the continuing dispute between Greece and England over the Parthenon Marbles). *But see* Kastenberg, *supra* note 54 (arguing that traditional common law remedies offer Native claimants a better alternative than statutes based on the double-edged "trust relationship"). For a general overview of the legal landscape of international repatriation, see 3 LYNDELL V. PROTT & P. J. O'KEEFE, LAW AND THE CULTURAL HERITAGE (1984).

Jack Trope and Walter Echo-Hawk, speaking from experience as seasoned Indian law attorneys, assert that repatriation based on the common law, sovereign rights and treaties is "too costly, time consuming, uncertain, and erratic . . . for small, impoverished tribes faced with the problem of having to repatriate large numbers of tribal dead from many different states." Trope & Echo-Hawk, *supra* note 60, at 52. They conclude that "remedial human rights legislation is the superior alternative." *Id.* As a side note, Hui Malama has successfully negotiated three international repatriations of ancestral remains from museums in Canada, Australia, and Switzerland. *See* Ayau, *supra* note 15, at 213-14.

[306] This paradox, far from an idle philosophical matter, is something that many members of disempowered groups must contend with on a daily basis. For example, at a recent symposium organized by a community interest group to discuss the legal ramifications of the recent Hawai'i Supreme Court decision in *Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n*, 79 Hawai'i 425, 903 P.2d 1246 (1995), *see also supra* note 263, several questions from the audience displayed the depth of the cognitive dissonance and moral ambivalence felt by many in the Hawaiian community. One young person pointedly asked an aspiring Hawaiian lawyer on the panel: "How can you swear alleigance to the U.S. and Hawai'i state constitutions?" Another, more elderly individual asked a question that may not have adhered to the

sovereignty claims in order to regain their sacred cultural objects? Can Native communities exercise their rights to repatriation according to the dominant society's laws even as they deny the legitimacy of those laws? Assuming Native sovereignty is a worthwhile, practical objective, does it demand or justify the abandonment of "rights-talk" in the language of the dominant authority? Viewed in their most essential forms, therefore, "legal" and "political" solutions correspond respectively with the mainstream "liberal" and "critical" approaches towards legal rights.[307] The former exalts rights with little appreciation of their token nature and co-opting effect. The latter "trashes" rights but ignores their value in empowering disadvantaged minorites. One breeds self-hatred and false hope; the other brings utter despair. Neither approach fully serves the interests of Native communities hemmed in between the Scylla of assimilation and institutional racism and the Charybdis of naked inequality.

Other solutions to the *ki`i la`au* dispute tread the impossible yet vital middle ground between these "legal" and "political" poles. Critical pragmatism guides these "hybrid" approaches; community identity and experience give them life.[308] One such solution, for example, might entrust Native communities or their representatives with primary authority over the identification and disposition of sacred cultural objects.[309] This authority could be subject to review by federal courts under a highly deferential standard. Another "hybrid" proposal might grant Native communities discretion over the means of dispute resolution or enforcement employed. Native Americans and Hawaiians could accordingly explore the viability of alternative dispute resolution techniques more focused on education and

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topic of the symposium, but certainly struck to the heart of the Hawaiian community's historical and ongoing dilemma: "How can we ever get beyond a world where might makes right?"

[307] *See* Singer, *Legal Realism*, *supra* note 168, at 532-41 (contrasting the "liberal" and "critical" schools of legal thought).

[308] *See* Matsuda, *Pragmatism Modified*, *supra* note 2, at 1771 (describing how critical pragmatism rejects moral relativism and tailors political strategy to "real people and their needs").

[309] *See* Raines, *supra* note 125, at 657 (arguing that tribal courts, instead of federal courts, should have jurisdiction over NAGPRA claims); Strickland, *Human Rights*, *supra* note 125, at 189-91 (proposing that Native societies adopt tribal code systems to resolve issues of fact and interpretation in repatriation cases). Earlier versions of the NAGPRA bill placing the burden of proving rightful possession entirely on the museum, *see* H.R. 5237, 101st. Cong., 2d Sess. 14 (1990), were deemed too onerous on museum interests.

Opponents to such a complete shift of the burden may object that it would lead to "harassment" by opportunistic Native claimants. Such arguments belie a cultural double-standard. Our society has long trusted itself with the control of Native cultural objects by our museums and the unfettered authority of our federal government over Indian affairs. Why should we not entrust Native Americans and Hawaiians with discretion over the disposition of their own cultural objects?

cooperation and more sensitive to specific cultural and historical contexts.[310] Finally, cultural repatriation could serve as just one part of a larger policy of reconciliation possibly involving the return of land and recognition of political autonomy.[311] This particular "hybrid" approach would transcend not only the limited scope of the law, but the narrow field of cultural object repatriation as well.

On one level, these "hybrid" proposals mediate the "legal" and "political" extremes in terms of qualitative degree, falling somewhere in between cosmetic legal changes and seismic political uphevals. The deeper significance of such middle-ground solutions, however, lies less in their actual content than in their outlook and approach. The "hybrid" approach selectively employs the law to secure immediate, essential protections and benefits for Native communities.[312] At the same time, this approach views legal battles as part of a larger struggle not only for the repatriation of Native cultural objects, but also for broader, longer-term goals such as cultural revitalization and political empowerment.[313] "Hybrid" solutions thus strike a delicate balance

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[310] *See, e.g.*, Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145, 215-224 (1996)(suggesting reciprocal consultations, partnerships and alliances, and cross-cultural education to ensure the protection of Native cultural rights). NAGPRA itself combines legal rules with consultations, negotiations, and out-of-court agreements. *See supra* note 85. One commentator further proposes a creation of an alternative forum under NAGPRA to foster discussions between museums and Native groups. *See* Platzman, *supra* note 33, at 556-57. Parties could negotiate mutually beneficial arrangements such as shared use, limited access, or temporary loans. *See id.*

Such alternative dispute resolution methods may allow quick, cost-effective, and creative solutions in many repatriation cases. They are of little use, however, in all-out legal battles such as the present case. Furthermore, despite their emphasis on "cross-cultural understanding," such alternative methods remain vulnerable to the same cultural biases as court litigation. *See generally* Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L. REV. 1055 (1996)(summarizing the minority critique of ADR).

[311] *See* Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 854 (1992)(envisioning "real solutions of Indian greivances . . . involv[ing] some land and recognition of real power.").

[312] *See* Crenshaw, *supra* note 269, at 1370 ("Even though legal ideology absorbs, redefines, and limits the language of protest, [minorities] cannot ignore the power of legal ideology to counter some of the most repressive aspects of racial domination.").

[313] Edward Ayau acknowledges that "NAGPRA is only a vehicle for restoration." Ayau, *supra* note 15, at 195. He views the "cultural restoration" acheived through NAGPRA as an essential precursor to "political restoration," enabling the Hawaiian identity to become "*kupa`a* (firmly set)." *Id.* at 194. "The role of western-educated lawyers is not to direct repatriation, but rather to interpret the language of the law to satisfy *kanaka maoli* cultural/spiritual needs." *Id.* at 195. *See also* Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 701 (finding that the language of rights has galvanized indigenous movements on a global scale).

between utility and ideological purity—in this case, ensuring the return of Native cultural objects while avoiding the legitimation of the dominant authority and ratification of the status quo.[314]

Combining elements of the "legal" and "political" approaches, "hybrid" solutions share the benefits and faults of both. "Purists" or "formalists" may insist that "hybrid" solutions compromise the integrity of the distinct approaches and thus lack any real substance. Whatever these middle-ground approaches lose in consistency and clarity, however, they gain in flexibility.[315] Ultimately, no one proposal emerges as the definitive solution to the *ki`i la`au* dispute and the surrounding "cultural property" debate. This Comment again observes that those charged with the reconstruction of the Native jurisprudence also have the ultimate responsibility for its application.[316] Whatever the final outcome of this process, however, many may very well discover meaning not in the romance of absolutes, but in the everyday "tragicomedy" characterized by one writer as "neither magic nor the abyss."[317] Those at home in this liminal world may appreciate the law for what it is: sometimes helpful, never completely ignorable, and always just a glimpse of the possible.

V. CONCLUSION: STRIKING BOTTOM

The *ki`i la`au* case weaves together disparate strands of law, society, theory and ideology. On a purely legal level, the new NAGPRA statute strains the traditional boundaries set by the common law of property and the Constitution. The legal questions raised by the *ki`i la`au* dispute and NAGPRA, however, also connect to a more expansive discourse between the competing

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[314] The critical legal movement has long exploded the myth of the "law" and "politics" distinction. In this light, almost every kind of solution may qualify as "hybrid." By the same token, the only true "legal" solutions are those that consider the law as a goal in itself, and the only real "political" solutions are those that eschew the law altogether. CRT writers assert that disempowered groups can ill afford to adopt either extreme and must by necessity "inhabit the tension" between the two. *See* Harris, *supra* note 248, at 760; *see also* WILLIAMS, ALCHEMY, *supra* note 177, at 163-65 (Patricia Williams' celebrated and extensively quoted reconstructive vision of rights). More than a few scholars have recognized the parallels between such an exercise and religious or spiritual quest. *See* Harris, *supra* note 248, at 782-83; CORNELL WEST, KEEPING FAITH: PHILOSOPHY AND RACE IN AMERICA (1993); Anthony Cook, *The Spiritual Movement Towards Justice*, 1992 U. ILL. L. REV. 1007 (1992).

[315] *See* Matsuda, *Pragmatism Modified*, *supra* note 2, at 1764 (identifying "multiple consciousness, experimentation, and flexibility" as the advantages of pragmatic methods). Angela Harris similarly views such "flexibility" as a source of strength rather than weakness: "The history of [oppressed] groups—the legacy of the politics of difference—is a primer on how to live, and even thrive, in philosophical contradiction." *See* Harris, *supra* note 248, at 744.

[316] *See supra* note 285 (suggesting "culture" as a normative basis for Native action).

[317] Harris, *supra* note 248, at 785.

narratives of two divergent societies, cultures, and lifestyles. On a conceptual level, therefore, the *ki`i la`au* dispute links the debate on cultural repatriation with the larger ongoing movement towards Native political sovereignty.

The emerging Native American and Hawaiian framework of legal and social analysis described in this Comment suggests certain outcomes for the present case and various avenues through which one may reach them. In proposing its alternative analysis, however, this Comment goes beyond mere criticism of the law as "context-blind." As critics of contextual legal approaches point out, the "call to context" suffers from circularity, leaving unanswered the question of whose context one should consider.[318] This Comment thus questions the rule of law not based on what it is, but what it represents, particularly to Native Americans and Hawaiians deprived by law of their culture, land, even nationhood. This Comment advances the alternative Native viewpoint based not only on principles of "context-sensitivity," "equality" and "democracy," but also on other norms such as anti-subordination and cultural autonomy, political self-determination and national liberation.

Questions of the legitimacy of American legal authority over Hawaiians aside, the dispute over the *ki`i la`au* now sits before a federal district judge halfway around the world from its place of origin. One might argue that the stories told by the Hawaiian representatives, valid as they may be, simply have no currency in a completely separate community that has held and preserved the *ki`i la`au* for over a century.[319] One might thus side with the stories of the viewing public, or the present owners—a perfectly logical result in a land of "equal opportunity" and "the marketplace of ideas."

Hawaiians view the *ki`i la`au* with special reverence.[320] Americans have

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[318] *See* Singer, *Property and Coercion*, *supra* note 247, at 1841 ("Sensitivity to 'context' does not guarantee moral success; it is still necessary to choose whose context will be made to matter."). Toni Massaro agrees that Legal Realism principles of "empathy" or "context-sensitivity" alone fail to produce normative standards for genuine social change. She instead argues for context-*specificity*—an approach valuing "certain specific, different and previously disenfranchised voices" over others. "This is not a call to conversation; it is *convert*-sation." Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2113 (1989)(emphasis in original); *see also* Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987)(arguing that the experience, history, and culture of oppressed peoples may help fill the normative vacuum left by critical scholars).

[319] *See supra* notes 205, 211 and accompanying text.

[320] The question of what Native communities will actually do with repatriated cultural objects arises frequently—often as rhetorical support for the retention of these objects by people who can "properly" care for them. *See* Mastalir, *supra* note 37, at 1061-62 (noting preservation-based arguments against repatriation). The Hawaiians presently do not have a specific plan for the *ki`i la`au*, although storing it for a future Hawaiian museum appears to be a popular option. *See* Lapilio Interview, *supra* note 4. Note that in the case of the Zuni war gods repatriation,

similar sacred symbols that they treasure—not only material objects such as the Liberty Bell, but also institutions such as the Fourth of July and the Constitution. If the American "justice system" is to fulfill the purpose indicated by its name, it must air the stories of traditionally oppressed peoples rather than bury them.[321] Using the timeless analogy of Indian law scholar Felix Cohen, one may indeed observe the *ki`i la`au* case as the coal miner watches the canary for signs of poison gas.[322] The failure of the law to protect the sacred cultural objects of Native Americans and Hawaiians reflects a failure of the vision of our own society. If the Hawaiians stand to lose their *ki`i la`au*, our own *ki`i la`au* may be in jeopardy as well.[323]

VI. EPILOGUE

The *ki`i la`au* is coming home. As the court battle over the object approaches the halfway point of its second year, all indications point to an out-of-court settlement between the Hawaiian groups and the City of Providence.[324] In February 1998, under orders from the Rhode Island federal magistrate, both sides met to mediate the dispute. Although details remain unfinalized, the parties agreed to the repatriation of the *ki`i la`au* to the Hawaiians. The Hawaiian groups will make a donation to the Museum to fund an exhibit in the Museum's Pacific Collection, where more than forty other Hawaiian objects remain. The Hawaiians and the City will each select three representatives to sit on a six-member joint committee overseeing the proposed exhibit. In a provision deemed absolutely critical by the Hawaiian representatives, the agreement will state that the Hawaiians are in no way, shape, or form purchasing the *ki`i la`au* from the City.

As always, the conclusion of the story stirs up as many questions as it puts to rest. The full resolution of the legal issues raised by the City of Providence

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both parties understood that proper cultural practice meant that the objects would be exposed to the elements and allowed to waste away so that their powers could return to the earth. *See* Merenstein, *supra* note 55, at 590.

[321] *See* Crenshaw, *supra* note 269, at 1366 (viewing "rights" as a reaffirmation of a society's basic ideals—a redemption of "some of the rhetorical promises and self-congratulations that seem to thrive in American political discourse").

[322] "Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians . . . reflects the rise and fall of our democratic faith." COHEN, *supra* note 260, at v.

[323] *See* Milner Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 61, *cited in* Singer, *Sovereignty and Property*, *supra* note 181, at 56 ("[I]f our government is different in fact in relation to Native Americans, perhaps it is not what we believe it is in relation to other Americans, including ourselves.").

[324] *See* Telephone Interview with Linda Delaney, Steering & Planning Committee, *Ho`omalu ma Kualoa* (Apr. 1, 1998).

in its lawsuit must await another day. The triumph of regaining the *ki`i la`au* outside of court may also overshadow other concerns. Although the Hawaiians ostensibly did not buy back the *ki`i la`au*, some would question whether, on legal or moral grounds, the museum deserved any kind of compensation. Some might also regret losing the opportunity to use the forum of the federal court to perhaps broadcast a wider public message in favor of Native repatriation rights. For some, inquiry will also turn to the other Hawaiian objects still held by the Museum, not to mention the hundreds of others scattered throughout the globe. In the end, the resolution of the *ki`i la`au* dispute leaves pro-Hawaiian lawyers and activists where they began, continuing that which may never end. The Hawaiians say *kupono*: literally translated as "stand in righteousness," and more commonly understood as "do the right thing."[325]

Isaac Moriwake[326]

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[325] DO THE RIGHT THING (Universal City Studios 1989).

[326] Class of 1998, William S. Richardson School of Law. The author wishes to thank Linda Kawai`ono Delaney, Lani Ma`a Lapilio, and Jack Trope for invaluable help on the details of this case and suggestions and comments on earlier drafts. The author also thanks Professors Denise Antolini, Williamson Chang, and Eric Yamamoto for their guidance and insights. Much appreciation to the editors to the University of Hawai'i Law Review. Endless gratitude to Adria Imada, Sayaka Nakano, Kapua Sproat, and Akua. All mistakes are the author's.

The Backlash Against *PASH*: Legislative Attempts To Restrict Native Hawaiian Rights

I. INTRODUCTION

In 1995, the Hawai'i Supreme Court reaffirmed the preeminence of Hawaiian custom and usage in State law with its decision in *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission* ("*PASH*").[1] In what many view as a landmark decision, the court held that a public interest group with Native Hawaiian members had standing to participate in a county-level contested case hearing because Native Hawaiian interests are distinct from those of the public at large.[2] The court further held that land titles in Hawai'i confirm only a "limited property interest as compared with typical land patents governed by Western concepts of property" so that Native Hawaiians will retain rights with regard to undeveloped land, to pursue traditional activities.[3]

Certain large landowners, developers, and title insurance companies strongly objected to the *PASH* court's clarification of the scope and content of traditional and customary usage and mounted a backlash in a series of bills in the 1997 session of the Hawai'i Legislature. Some of these interests claimed that the court's decision interpreting Hawai'i's constitutional and statutory provisions for Native Hawaiian rights unduly encumbered landowners' private property interests.[4] Specifically, they alleged that the rights of Native Hawaiians to access undeveloped land for various religious, subsistence, or cultural purposes "has led to difficulties in selling, buying, and

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[1] 79 Hawai'i 425, 903 P.2d 1246 (1995), *cert. denied*, 116 S. Ct. 1559 (1996) (Mem.)[hereinafter *PASH*]. This case is discussed in detail in Part II.B, *infra*. The author added 'Okina, or glottal stops, to all Hawaiian words regardless of Bluebook format.

[2] *See id.* at 434, 903 P.2d at 1255 n.10. The term "Native Hawaiian," or *Kanaka Maoli*, as used in the context of this article, refers to individuals able to trace their ancestry to the peoples inhabiting the Hawaiian Islands prior to the arrival of Captain James Cook in 1778, regardless of blood quantum. Both the "N" and the "H" are capitalized (similar to "Native American") to signify that the indigenous people of Hawai'i have a status unique from other inhabitants of these islands.

[3] *See id.* at 447, 903 P.2d at 1268.

[4] *See generally* S. 8: Relating to Land Use, 19th Leg., 1st Reg. Sess. (Haw. 1997) [hereinafter SB 8]; H.R. 1920: Relating to Real Property, 19th Leg., 1st Reg. Sess. (Haw. 1997) [hereinafter HB 1920]. Draft copies, testimony, committee reports, and other information pertaining to bills from the Hawai'i State Legislature's 1997 session are located in the Legislative Reference Bureau Library at the Hawai'i State Capitol.

financing real property in the State of Hawai'i."[5] Those interests also contended that the court's reaffirmation of Native Hawaiian rights created a state of "uncertainty"[6] which led to "an immediate and direct negative impact on employment opportunities, personal income, and the economic and social welfare of all of Hawai'i's citizens."[7]

In the legislative hearings that followed, advocates and practitioners of Native Hawaiian traditions defended their rights on historical and legal grounds. Those countering the backlash explained that the protection of customary practices was and is necessary for the perpetuation of Hawaiian culture and lifestyles in an evolving society.[8] This coalition asserted that the State constitutional and statutory provisions on Native Hawaiian rights had a historical basis in laws of the Hawaiian Kingdom that clearly reflected unique "background principles" of property in Hawai'i.[9]

This polarized disagreement over the content and extent of private property rights and uses in the islands exploded at the beginning of the 1997 legislative session. Political leaders introduced bills in both the Senate and the House of Representatives to regulate the exercise of traditional and customary uses.[10] In the numerous hearings that ensued, all interests furiously debated the legality and limitations of State regulation of traditional and customary rights.

In an attempt to understand the intricacies of this debate, this Comment examines the fundamental differences in Western and Native Hawaiian property concepts and laws in Hawai'i as it relates to certain legislative proposals introduced in reaction to *PASH*. Parts II and III trace the legal development of Native Hawaiian rights from their historical evolution in the Kingdom of Hawai'i to their current codification in Article XII, Section 7 of the Hawai'i Constitution, and Hawai'i Revised Statutes ("HRS") sections 1-1 and 7-1. These sections also detail 137 years of judicial interpretation of these rights, from *Oni v. Meek*[11] in 1858 through *PASH* in 1995. Parts IV, V, and VI analyze the impetus for, and legal merits of, recent legislative attempts to

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[5] Haw. H.R. 1920 at 3.

[6] *Id.*

[7] *Id.*

[8] *See* Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 8-9, 656 P.2d 745, 750 (1982) (recognizing that certain Native Hawaiian rights enable the "legal" practice of traditional activities in contemporary society). *See generally* testimony presented in opposition to SB 8 and HB 1920 for the arguments presented in support of traditional and customary uses.

[9] *See PASH*, 79 Hawai'i at 451, 903 P.2d at 1272. It is important to note that all references to the "Hawaiian Kingdom" relate to Hawai'i under the rule of the Kamehameha and Kalakaua Dynasties (from 1785-1893). Prior to Kamehameha the Great's violent unification of the islands in 1785, *ali'i* (chief or chiefs) independently ruled islands or groupings thereof.

[10] Although this Comment focuses on SB 8 and HB 1920, opponents of traditional and customary uses made other attempts to restrict these rights. *See infra* notes 172, 220.

[11] 2 Haw. 87 (1858). *See* discussion *infra* Part II.D.

regulate and re-define Native Hawaiian rights. This Comment concludes that the protected status of Native Hawaiian rights, as codified by the Legislature and interpreted by Hawai'i's judiciary, reflects unique Hawaiian social and legal relationships to real property. In light of this history, regulatory attempts by the legislature to circumvent its fundamental duty of respecting and accommodating traditional and customary practices violates current laws, undermines judicial integrity, and threatens Hawaiian culture.

II. THE LEGAL EVOLUTION OF NATIVE HAWAIIAN RIGHTS

In an attempt to better understand the backlash against *PASH* and disagreements over concepts of property in Hawai'i, this Comment provides an overview of Native Hawaiian rights. A summation of early Hawaiian land tenure principles, as well as the text and background of two statutory provisions, establishes the basis for early protections of traditional and customary uses in Hawai'i. Due to the myriad of cases interpreting various aspects of Native Hawaiian rights, this Comment also provides those decisions helpful in understanding the transition from early statutory protections to the 1978 constitutional provision.

A. Concepts and Laws Relating to Land Tenure in Eighteenth Century Hawai'i

Hawai'i's concepts and laws relating to land tenure are unique within United States law.[12] Much of this difference is attributable to the islands' distinct cultural and historical background.[13] Hawai'i was an independent nation before the United States invaded the islands in 1893. Although the constitutional monarchy governing the Kingdom at the time of its illegal overthrow had imported principles *similar* to Western property law, those precepts were not a wholesale adoption of foreign law; rather, they were a unique blend of principles that evolved from Hawaiian customs and traditions.[14]

Prior to the documented arrival of Westerners to Hawaiian shores in 1778, the prevalent system of land tenure was an intricate and interdependent arrangement based on land use and control.[15] Native Hawaiians lived in reciprocity with the *'aina* ("land base"), which they believed would sustain

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[12] *See PASH*, 79 Hawai'i at 442-47, 903 P.2d at 1263-68. (distinguishing characteristics of property law in Hawai'i, due to the unique culture of the islands); *In re* Ashford, 50 Haw. 314, 316, 440 P.2d 76, 77 (1968).

[13] *See Ashford*, 50 Haw. at 316, 440 P.2d at 77.

[14] *See PASH*, 79 Hawai'i at 442-47, 903 P.2d at 1262-68.

[15] *See* Maivan Lam, *The Imposition of Anglo-American Land Tenure Law on Hawaiians*, 23 J. LEGAL PLURALISM 103, 103-06 (1985)[hereinafter *Imposition*].

them if properly respected and cared for.[16] The land was not commodified and could not be bought or owned.[17] Under the pre-contact system, the *'aina* was an embodiment of the *akua* (god or gods).[18] As direct descendants of the *akua*, Native Hawaiians were responsible for utilizing the *'aina* in ways that respected that relationship and benefited everyone.[19]

For the most part, the social structure and resource management of the *mokupuni* ("island") divided the *'aina* like pieces of a pie; boundaries followed natural land divisions and stretched from the mountains down to the sea.[20] *Mokupuni* were divided into *moku* ("districts"), which in turn comprised *ahupua'a* ("land units").[21] Each *ahupua'a* was further subdivided into *'ili* ("individual farming parcels").[22]

A socially stratified political system resembling a pyramid managed the various land divisions such that leadership positions increased in number as they decreased in rank.[23] At the top of the pyramid was the *akua*.[24] Below the *akua* was an *ali'i* class, headed by a *mo'i*.[25] The *mo'i* appointed loyal

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[16] *See* LILIKALA KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LA E PONO AI? 23-25 (1991). Native Hawaiian legend explains that the Hawaiian islands are the children of Papa, the Earthmother, and Wakea, the Skyfather. The same legend further explains that the Hawaiian race descended from Wakea and Ho'ohokukalani. *Kanaka Maoli* ("Native Hawaiians") therefore view the *'aina* as an older sibling, and in accord with custom, believe that it is the duty of the elder sibling (the land) to care for and feed the younger sibling (the Hawaiian race), which in turn will respect and care for it. *See* DAVID MALO, HAWAIIAN ANTIQUITIES 241-44 (1961).

[17] *See* Neil M. Levy, *Native Hawaiian Land Rights*, 63 CAL. L. REV. 848, 849 (1975).

[18] *See* KAME'ELEIHIWA, *supra* note 16, at 26.

[19] *See id.* The term "pre-contact" refers to any point in time prior to the arrival of Captain Cook in 1778.

[20] *See id.* at 27-28. *Ahupua'a* ("land districts") often included parts of the shore and/or sea. *Id.*

[21] *See* P. NAHOA LUCAS, A DICTIONARY OF HAWAIIAN LEGAL LAND TERMS 77 (1995) [hereinafter DICTIONARY]. According to Lucas, *moku* could be divided into *kalana* or *okana* (used interchangeably). *See id.* at 47, 81-82. These divisions were used selectively on only certain islands and usually comprised several *ahupua'a*. *See id.*

[22] *See* MALO, *supra* note 16, at 16-18. Although *ahupua'a* were usually further subdivided into *'ili*, there were exceptions, and some *ahupua'a* did not contain *'ili*. LUCAS, DICTIONARY *supra* note 21, at 4. There were also many different types of *'ili*, *i.e.* *'ili ku* ("*'ili* for the *mo'i*, not the *konohiki*"), *'ili kupono* ("independent land division, not considered part of the *ahupua'a*"), *'ili lele* ("parcels of land located in different parts of the *ahupua'a*, usually used for cultivating crops"). *Id.* at 40-41.

[23] Despite the stratification of society, Native Hawaiians viewed each other and the *'aina* as part of one extended family. *See* KAME'ELEIHIWA, *supra* note 16, at 24-25.

[24] *See id.* at 26, 51. The term *akua* is also plural, as Hawaiians recognized more than one god or goddess. Physical embodiments of these *akua* were found in and on the earth (*i.e.*, different kinds or plants or fishes). *See* MALO, *supra* note 16, at 81-87.

[25] *See* Melody K. MacKenzie, *Historical Background in* NATIVE HAWAIIAN RIGHTS HANDBOOK 3-4 (Melody K. MacKenzie ed., 1991). The term *mo'i* describes the highest ranking

followers within the ruling class (*i.e. ali'i 'ai moku, ali'i 'ai ahupua'a, konohiki*) to manage individual *ahupua'a* or *moku*.[26] These *ali'i* directed the *maka'ainana*, a class of resident tenants, in its care of the land.[27]

Pre-contact society was largely communal in the sense that *maka'ainana* cultivated both marine and terrestrial resources of the *ahupua'a* to provide for their communities of relatives, both close and distant.[28] Although individuals were responsible for specific tasks, all members of society shared access to the natural resources necessary for survival.[29] Those who cultivated *kalo* ("taro") shared with others who tended the *lokoi'a* ("fishpond"), as well as those who raised *'uala* ("sweet potato"). Although individuals had their own house plots, they utilized and were responsible for other resources of the *ahupua'a* beyond the boundaries of their *kuleana*.[30] Specifically, *maka'ainana* enjoyed numerous rights, including access to public areas of an *ahupua'a*, lots for cultivating food, shared use of water for wet-land and dry-land crops, fishing, hunting, and gathering rights, as well as the right to erect structures for sleeping, cooking, eating, storage, and camping.[31]

Maka'ainana did not own the land they tended in a "fee simple" sense.[32] Instead, they occupied land managed by an agent of the *mo'i* and paid taxes in the form of goods and/or labor.[33] This relationship was mutually beneficial

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ali'i and may be defined as king, monarch, or sovereign. *Mo'i* often describes *ali'i* of the Kamehameha dynasty (*i.e.*, Kamehameha I, Kamehameha II) and may not have been used until the 1800's. *See* SAMUEL H. ELBERT & MARY KAWENA PUKU'I, HAWAIIAN DICTIONARY 251 (1986).

[26] *See* Maivan Lam, *The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 WASH. L. REV. 233, 239-40 (1989)[hereinafter *Kuleana Act*]. Although *ali'i* managed various land divisions they did not "own" the land in a "fee simple" sense.

[27] *See id.* at 240-41.

[28] *See* MacKenzie, *supra* note 25, at 4.

[29] *See* KAME'ELEIHIWA, *supra* note 16, at 27.

[30] *See* Lam, *Kuleana Act*, *supra* note 26, at 242-44. *Kuleana* is literally translated as "responsibility." The term also describes the plot of land that *maka'ainana* lived on and were responsible for. *See* ELBERT AND PUKU'I, *supra* note 25, at 179.

[31] *See* Lam, *Imposition*, *supra* note 15, at 106. Native Hawaiian oral history and tradition also provide evidence of customary use rights. For example, *hula* practitioners recited *He Kanaenae no Laka*, a forest chant in praise of *Laka* ("goddess of the *hula*"), when gathering grasses, herbs, and other forest greenery. *See* THE ECHO OF OUR SONG: CHANTS & POEMS OF THE HAWAIIANS 42-47 (Alfons L. Korn & Mary Kawena Puku'i eds. & trans., Univ. of Hawai'i Press 1973). Chants also provide documentation of *kahuna* (experts) gathering herbs for medicinal purposes. *See* JUNE GUTMERIS, NA PULE KAHIKO: ANCIENT HAWAIIAN PRAYERS 34 (1989).

[32] *See* Levy, *supra* note 17, at 848-49.

[33] *See* Lam, *Imposition*, *supra* note 15, at 105-06. Despite some similarities, the pre-contact system of land tenure in Hawai'i differs from European feudalism in the sense that the *maka'ainana* were not tied to the land and did not owe military service to the *ali'i*. *See id.*

in the sense that the *mo'i* and his or her agents served as intermediaries for the common people by managing resources and making political decisions on their behalf.[34] In return, the *maka'ainana* provided for the basic needs of the *ali'i*.[35] Although either party could disregard its responsibilities, this was not a common occurrence.[36] If a *konohiki* was cruel or abusive, the *maka'ainana* were free to move to another district.[37] Conversely, an *ali'i* could evict or kill a *maka'ainana* who was not fulfilling his or her tasks.[38] Despite the fact that the *maka'ainana* did not own the land they occupied, they were "fixed residents"[39] and often had more security than the *ali'i*. If a new *ali'i* came to power as a result of natural death or warfare, control of the land was usually redistributed without displacing the *maka'ainana*.[40]

B. The Imposition of Change

Subsequent to Captain Cook's arrival in 1778, Western influences heavily strained the pre-contact system of land tenure, placing an additional demand for goods on the *maka'ainana*. Foreign vessels sought provisions to stock their ships, and by 1810 a growing market for the export of sandalwood also developed.[41] As these demands increased, communities became less able to meet their own needs because *ali'i* pressured the *maka'ainana* to gather sandalwood instead of maintaining the subsistence resources of the *ahupua'a*.[42] The *ali'i*, meanwhile, accumulated growing debts by purchasing merchandise from merchants and traders on credit.[43] Most importantly, newly introduced diseases decimated the Native Hawaiian population; limited contact with bacteria and viruses common elsewhere increased the impact of foreign diseases on Hawaiians.[44]

These factors are important because they created an interdependent facet in the relationship between *maka'ainana* and *ali'i* and discouraged exploitation. *See id.* This distinction is critical when applying feudal land concepts to Hawai'i.

[34] *See* MALO, *supra* note 16, at 52-63.

[35] *See id.*

[36] *See* Lam, *Kuleana Act*, *supra* note 26, at 240-42.

[37] *See id.*

[38] *See* MALO, *supra* note 16, at 57, 61. Likewise, *maka'ainana* could kill or replace cruel or abusive *ali'i*. *See* KAME'ELEIHIWA, *supra* note 16, at 26.

[39] MALO, *supra* note 16, at 61.

[40] *See* KAME'ELEIHIWA, *supra* note 16, at 51-52 (describing the politics of *Kalai'aina*, or "land redistribution").

[41] *See* 1 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 82-86 (1938)[hereinafter KUYKENDALL, HAWAIIAN KINGDOM].

[42] *See* KAME'ELEIHIWA, *supra* note 16, at 140.

[43] *See* KUYKENDALL, HAWAIIAN KINGDOM, *supra* note 41, at 90-91.

[44] *See* KAME'ELEIHIWA, *supra* note 16, at 140-41. Scholars disagree over the population of Hawai'i at the arrival of Captain James Cook. Lt. James King, one of Cook's crew members

While the native population struggled to maintain its health and way of life, foreign traders and merchants tried repeatedly to collect sandalwood debts. Eventually, warships from the note holders' home countries came to induce payment.[45] Foreign demands for land also mounted as newly arrived sailors, merchants, and missionaries sought parcels in lease or fee.[46] *Maka'ainana* were also evicted as *ali'i* traded or lost their lands to foreigners.[47]

In attempt to quell the scramble for land and the disenfranchisement of the *maka'ainana*, Kauikeaouli, the reigning *mo'i* also known as Kamehameha III, promulgated a Declaration of Rights in 1839 and Hawai'i's first Constitution in 1840.[48] The Declaration of Rights purported to protect the interests of all inhabitants of the Hawaiian Kingdom.[49] It provided protection for *maka'ainana* independent of the *ali'i*.[50] The Constitution of 1840 affirmed this guarantee and, with regard to land tenure, declared that the *mo'i* held all of the land in the islands in trust for the *ali'i* and *maka'ainana* and that no land could be conveyed without Kauikeaouli's consent.[51] Despite the promulgation of these laws, the disputes over land continued.

After the British seized control of the Kingdom for six months in 1843, Kauikeaouli, under pressure from his foreign advisors, made another effort to secure the sovereignty of his nation and a land base for his people.[52] In 1845, he created a Board of Commissioners to Quiet Land Titles to delineate the scope and outcome of all land claims.[53] After reviewing the land tenure

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estimated the population as 500,000 (although he later amended that figure to 400,000). *See* DAVID STANNARD, BEFORE THE HORROR: THE POPULATION OF HAWAI'I ON THE EVE OF WESTERN CONTACT 3 (1989). Because of King's limited contact with the islands, especially the heavily populated wetland regions, later scholars utilizing more comprehensive sociological data, conservatively estimated a population of 800,000 to one million. *See id.* at 78. In 1823, a census completed by missionaries recorded 134,925 Native Hawaiians. *See* KAME'ELEIHIWA, *supra* note 16, at 81. By 1893, this figure dropped to roughly 40,000. *See id.* at 20.

[45] *See* KUYKENDALL, HAWAIIAN KINGDOM, *supra* note 41, at 91-92.

[46] *See id.* at 137.

[47] *See* Lam, *Imposition*, *supra* note 15, at 107.

[48] *See* Levy, *supra* note 17, at 851. Kauikeaouli (or Kamehameha III) was a son of Kamehameha I, who consolidated political control over the Hawaiian islands in a single Kingdom in 1785. Kauikeaouli ruled as *mo'i* from 1825-54, transforming the Kingdom into a constitutional monarchy and adopting private property rights in land. KAME'ELEIHIWA, *supra* note 16, at 31, 169-98. *See generally id.* at 205-06 (describing the social conditions surrounding laws passed in the 1840's).

[49] *See* LORRIN A. THURSTON, THE FUNDAMENTAL LAW OF HAWAI'I 1 (1904); *See generally* RALPH S. KUYKENDALL, CONSTITUTIONS OF THE HAWAIIAN KINGDOM: A BRIEF HISTORY AND ANALYSIS 8 (1940)[hereinafter KUYKENDALL, CONSTITUTIONS].

[50] *See* THURSTON, *supra* note 49, at 1.

[51] *See id.* at 3.

[52] *See* KAME'ELEIHIWA, *supra* note 16, at 184-86.

[53] *See* Commission to Quiet Land Titles; Awards, Patents; Etc. art IV, sec. 1, 2 REVISED LAWS OF HAWAI'I 2120 (1925)[hereinafter REV. LAWS].

system, the Commissioners instituted a process for settling all land claims in the Kingdom.[54] Despite the creation of this Commission, few claims were resolved until the interests of the *mo'i*, *ali'i*, and the *maka'ainana* were separated three years later.[55]

After tremendous debate, the *mo'i*, his foreign advisors, and the Privy Council, made a collective decision to institute a system of fee simple ownership whereby the *mo'i* and *ali'i* would receive title to individual parcels.[56] In what became known as the Mahele of 1848, Kauikeaouli first reserved *'aina* for himself.[57] The *ali'i* then quit-claimed their interests in Kauikeaouli's properties, and he relinquished his interest in theirs.[58] *Ali'i* were also required to petition the Land Commission and pay a commutation fee in order to receive a title deed.[59] The *maka'ainana* did not participate directly in the Mahele; instead, Kauikeaouli gave 1.5 million acres to the government "subject always to the rights of native tenants."[60]

Due in part to the continuing displacement of the *maka'ainana* even after the Mahele, Kauikeaouli instituted the Kuleana Act of 1850. Under this Act, *maka'ainana* could receive fee simple title to the lands they occupied and improved without a commutation fee.[61] Section 7 of the Kuleana Act, also provided grantees with rights to gather, access, and obtain water from other parts of the *ahupua'a*.[62] Kauikeaouli wrote and included section 7 due to his concern that a "little bit of land even with allodial title, if they [the people] be

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[54] *See* JON CHINEN, THE GREAT MAHELE: HAWAI'I'S LAND DIVISION OF 1848 9, 12 (1958).

[55] *See id.* at 12.

[56] When Kauikeaouli reorganized the Kingdom into a constitutional monarchy, he made the Privy Council, formerly a council of *ali'i*, part of the executive ministry. The council acted in both an advisory and legislative capacity and consisted of five people: the governors of O'ahu, Maui, Hawai'i, Kaua'i, and one other member appointed by the *mo'i*. *See* KUYKENDALL, HAWAIIAN KINGDOM, *supra* note 41, at 263.

[57] *See* KAME'ELEIHIWA, *supra* note 16, at 210.

[58] *See* CHINEN, *supra* note 54, at 15-16.

[59] *See* Principles Adopted by the Land Commission, 2 REV. LAWS 2136 (1925).

[60] Crown, Government, and Fort Lands, Enumerated Etc.: An Act Relating to the Lands of His Majesty the King and the Government, 2 REV. LAWS 2174 (1925). Because initial land divisions in the Hawaiian Kingdom took place without "settling" the interests of *maka'ainana*, some individuals maintain that *Kanaka Maoli* able to trace their ancestry to subjects of the Hawaiian Kingdom prior to 1893, who did not participate in the Mahele of 1848 or Kuleana Act of 1850 or otherwise compromise their Kingdom citizenship, continue to hold an undivided interest in all land in the State of Hawai'i. Interview with Keanu Sai, Title Abstractor, *Perfect Title Company*, in Honolulu, Haw. (Apr. 9, 1997).

[61] *See* Act of August 6, 1850, 2 REV. LAWS 2141 (1925). The Kuleana Act placed restrictions on the type and amount of land available to *maka'ainana*. *See id.*

[62] *See id.* at 2142.

cut off from all other privileges, would be of very little value."[63] This section thus provided *kuleana* occupants with a legal guarantee of unencumbered access within their *ahupua'a* to utilize resources necessary to make their *kuleana* productive.[64] Although the *konohiki's* permission was initially required before a tenant could exercise these rights, the legislature eliminated this condition during its next session due to "difficulties and complaints" of interference with the free exercise of *maka'ainana* rights.[65]

Despite these and other efforts to preserve the rights of Native Hawaiians and allow continued exercise of traditional and customary practices amidst the rapid changes in Hawaiian society, developing Western influences made ancestral lifestyles increasingly less viable.[66] Many Native Hawaiians, however, incorporated traditional and customary practices into their contemporary lifestyles and continue to perpetuate their culture in various ways. While some Hawaiians remain reliant on these practices for daily subsistence, others pursue traditional practices for purely recreational purposes.

C. Early Statutory Protection of Traditional and Customary Uses by the State of Hawai'i

Two statutory provisions: HRS 1-1 and 7-1 partially enable the continued practice of traditional and customary uses, as discussed in Part I.B above. On the eve of statehood in 1959, the Admission Act made "[a]ll Territorial laws in force in the Territory of Hawai'i at the time of its admission into the Union . . . continue in force in the State of Hawai'i[.]"[67] Because the 1900 Organic Act similarly adopted the laws of the Hawaiian Kingdom as those of the

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[63] Kalipi v. Hawaiian Trust Company, 66 Haw. 1, 7, 656 P.2d 745, 749 (1982)(quoting Privy Council Minutes of July 13, 1850).

[64] *See* Paul N. Lucas, *Access Rights, in* NATIVE HAWAIIAN RIGHTS HANDBOOK 214 (Melody K. MacKenzie, ed. 1991)[hereinafter *Access Rights*].

[65] *See* Act of July 11th, 1851, SESSION LAWS OF 1851 at 98-99. The prelude to the amendment stated in part, "WHEREAS, many difficulties and complaints have arisen, from the bad feeling existing on account of the *konohiki's* forbidding the tenant's on the lands enjoying the benefits that have been by law given them[.]" *Id.*

Maka'ainana received only about 28,658 acres in awards out of 1.5 million, or a fraction of one percent of the total land area of the islands. *See* KAME'ELEIHIWA, *supra* note 16, at 295.

[66] *See Kalipi*, 66 Haw. at 7, 656 P.2d at 749.

[67] The Admission Act, 48 U.S.C., Ch. 3 § 15 (1987). Section 15 of the Admission Act also allowed for the modification or repeal of Territorial laws. *See id.* The Territory adopted both HRS sections 1-1, 7-1 as codified.

Territory,[68] HRS 1-1 and 7-1 actually codify for the State various acts of the legislature of the Hawaiian Kingdom.

Hawai'i Revised Statutes section 1-1 provides that:

> 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.[69]

This section codifies "custom" in Hawai'i, subordinating English and American common law to traditional and customary Hawaiian practices. In addition, it expressly accedes to judicial precedent of the Kingdom of Hawai'i. This substantial deference is due to the defining role that custom played in early Hawaiian law.[70]

The State also provides a second statutory protection for traditional and customary practices. Hawai'i Revised Statutes section 7-1 declares that:

> Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house timber, aho cord, thatch, or ki leaf, from the land on which

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[68] *See* An Act to Provide a Government for the Territory of Hawai'i (Organic Act) §§ 6, 10, 32, Act of Apr. 30, 1900, c. 339, 31 Stat. 141 (2 Supp. R.S. 1141)(1988).

[69] HAW. REV. STAT. § 1-1 (1995)(emphasis added).

[70] Although Polynesian voyagers settled in Hawai'i as early as 700 A.D., custom and usage governed the Kingdom almost exclusively until the promulgation of the Declaration of Rights in 1839. *See* 1 STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III, KING OF THE HAWAIIAN ISLANDS 3 (1845-46). As the transition to a more "Western" system of government continued, lawmakers codified oral traditions and laws in written form. On September 7, 1847, in section IV of *An Act to Organize the Judiciary Department of the Hawaiian Islands*, the Judiciary was free to adopt and apply common law as long as those principles were "not at conflict with the laws and usages of the Kingdom." 2 STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III, KING OF THE HAWAIIAN ISLANDS 5 (1847). When the Kingdom prepared a Civil Code in 1859, section 14 included "received usage" as a source of law. *See* CIVIL CODE ch. 3 § 14 (1859). On November 25, 1892, the Kingdom reorganized the Judiciary, repealing the relevant section in the 1859 Civil Code and adopting language similar to that found today in HAW. REV. STAT. § 1-1. *See* SESSION LAWS ch. LVII, § 5 (1892). The original language, however, referred to the common law and Constitution of the Hawaiian Islands, "or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage[.]" *Id.* As explained above the Organic Act of 1900 made ch. LVII, § 5 applicable to the Territory. *See supra* note 68. When government officials reorganized and compiled the laws of the Territory in 1905, that statute became chapter 1, section 1 of the Revised Laws of Hawai'i. *See* REVISED LAWS OF HAW. ch. 1, § 1 (1905). The deference to Hawaiian usage since the origin of written law in Hawai'i provides a clear rationale for the present subordination of common law in Hawai'i to Hawaiian custom and usage.

> they live, for their own private use, but they shall not have the right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.[71]

Hawai'i Revised Statutes section 7-1 makes section 7 of the Kuleana Act of 1850 applicable in the State of Hawai'i, therefore preserving the rights of *ahupua'a* tenants to gather enumerated items for personal use and to access other portions of the *ahupua'a*.[72] This section also vests *ahupua'a* tenants with rights to adequate water for cultivating crops.

D. Early Judicial Interpretations of Native Hawaiian Rights

Oni v. Meek,[73] decided in 1858, was the first Hawai'i Supreme Court case to review the scope of rights under section 7 of the Kuleana Act, which is now codified as HRS 7-1.[74] Oni brought suit to recover the value of two horses pastured in the uplands of the *ahupua'a* of *Honouliuli*.[75] Dr. Meek held three leases giving him title to the uplands of the *ahupua'a*; he seized and sold Oni's horses while they were on his property.[76] Oni presented two legal bases for his right to pasture: (1) custom; and (2) an 1846 statutory provision-substantially similar to the Kuleana Act-providing tenants a limited right to pasture animals on lands held by the *konohiki* of an *ahupua'a*.[77]

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[71] HAW. REV. STAT. § 7-1 (1995).

[72] Chapter XXXIV, section 1477 of the Civil Code of 1859 included the Kuleana Act of 1850. The actual text of that statute (after the amendment repealing the *konohiki* permission provision) was identical to what is now HRS section 7-1, although the government listed it in various sections of the Revised Laws (*see e.g.*, REV. LAW. 1925 § 576; REV. LAW. 1935 § 1694; REV. LAW. 1945 § 12901; REV. LAW. 1955 § 14-1). Regardless of its location, the legislative intent of the provision was clearly to protect the traditional and customary rights of *maka'ainana* within the private property regime. *See* discussion *supra* Part II.B.

[73] 2 Haw. 87 (1858).

[74] *See* Lucas, *Access Rights*, *supra* note 64, at 214. The Supreme Court of the Kingdom of Hawai'i (as opposed to the Supreme Court of the State of Hawai'i) decided *Oni*. The Supreme Court of the State of Hawai'i since clarified that decision in *Kalipi v. Hawaiian Trust Company*, 66 Haw. 1, 656 P.2d 745 (1982).

[75] *See Oni*, 2 Haw. at 87.

[76] *See id.* The last of a series of leases reserved certain portions of the uplands of Honouliuli. The defendant thus held title to all of the *mauka* ("upper") land in the *ahupua'a*, except that reserved in the last lease. *Id.* at 87-88.

[77] *See id.* at 89-92. The law passed on November 7, 1846, but it was never expressly repealed by the legislature; it provided:

> The rights of the hoa'aina ["tenant"] in the land consist of his own taro patches, and all other places which he himself cultivates for his own use; and if he wish [sic.] to extend

The court rejected both arguments. First, the court ruled that the Kuleana Act of 1850 implicitly repealed earlier statutes governing the same areas of law.[78] Second, the court stated that "the custom contended for is so unreasonable, so uncertain and so repugnant to the spirit of the present laws, that it ought not to be sustained by judicial authority."[79] In dismissing Oni's argument that he received permission from Meek's predecessor-in-interest, the *konohiki*, and was continuing to maintain his rights and duties as a tenant, the court ruled that Oni's fee simple title freed him from any duty to labor as well as "the enjoyment of any right or privilege, and if he performs such labor it is neither by force of law or custom, but in fulfillment of a private contract."[80] The court finally held that the fee simple title claim of a *konohiki*, or lessee thereof, prevailed over all rights except those expressly reserved by section 7 of the Kuleana Act.[81]

Oni construed the Kuleana Act as the exclusive source of rights reserved to *ahupua'a* tenants.[82] The court also relied heavily on Western property concepts, questioning custom as a basis for establishing traditional uses.[83] The Hawai'i Supreme Court later clarified this ruling after Article XII, Section 7 of Hawai'i's Constitution was adopted.[84]

Although *Oni* dealt with the scope of rights provided by HRS 7-1, the court did not consider the issue of access under that statute until 1968.[85] In *Palama*

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his cultivation on unoccupied parts, he has a right to do so. He has, also, rights in the grass land, if there be any under his care, and he may take grass for his own use or for sale, and may also take fuel and timber from the mountains for himself. He may also pasture his horse and cow and other animals on the land, but not in such numbers as to prevent the konohiki from pasturing his. He cannot make an agreement with others for the pasturage of their animals without the consent of his konohiki, and the Minister of the Interior.

Id. at 91-92. The court went on to state that:

[i]t was evidently the intention of the Legislature that whenever, in any case, a tract of land was divided between the several parties in interest, those rights which they had previously held in common, while their interests in land were undivided, should cease to be so held.

Id. at 93.

[78] *See id.* at 94.

[79] *Id.* at 90.

[80] *Id.*

[81] *See id.* at 94-95.

[82] *See id.* at 95-96.

[83] *See id.* at 90-91.

[84] In *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982), the court interpreted *Oni* as rejecting the validity of a particular exercise of custom (as opposed to custom in general). *See id.* at 11, 656 P.2d at 751. The court also noted that *Oni* did not restrict Native Hawaiian Rights to those enumerated in HRS section 7-1. *See id.*

[85] *See* Lucas, *Access Rights*, *supra* note 64, at 215.

v. Sheehan,[86] the Palamas filed a quiet title action to a sixty-acre parcel of land known as "Nomilo Pond" in the *ahupua'a* of Kalaheo, on Kaua'i.[87] The property contained an eighteen-acre fishpond, and the Sheehans claimed fishing rights in the pond and access to a *kuleana* they owned in the same *ahupua'a* based on Hawaiian rights, and necessity.[88]

The trial court denied the Sheehan's fishing claim but granted them access across the Palama's property via an existing right of way.[89] On appeal, the Hawai'i Supreme Court affirmed the grant of access on the basis of both native rights and necessity.[90] The court noted that access was established as a matter of Native Hawaiian right because the Sheehan's predecessors-in-interest used the right of way to travel from their *kuleana* to taro patches located elsewhere in the *ahupua'a*.[91] The court further observed that although a footpath initially provided access, the Palama's predecessor-in-interest expanded the trail to accommodate vehicles.[92] The court thus allowed the Sheehans to use contemporary methods of transportation rather than limiting access to technology available at the time a right of way was established.

The Hawai'i Supreme Court also decided *In re Ashford*[93] in the same year that it handed down *Palama*. The Ashfords petitioned the land court to register title to beach-front parcels on the island of Moloka'i.[94] The Ashfords maintained that the seaward boundaries of the parcels were the mean high water mark.[95] The State alternatively claimed an additional twenty to thirty feet, explaining that the seaward boundary of beach front properties was the line at which vegetation began to grow, "in accordance with tradition, custom, and usage in old Hawai'i."[96]

Noting that Hawai'i's land laws are unique, the court ruled on behalf of the State.[97] The court emphasized the importance of resolving contemporary disputes by considering historical data[98] and explicitly stated that "[p]roperty rights are determined by the law in existence at the time such rights are

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[86] 50 Haw. 298, 440 P.2d 95 (1968).

[87] *See id.* at 298, 440 P.2d at 96.

[88] *See id.*

[89] *See id.* at 299, 440 P.2d at 97. This Comment does not address the issue of fishing rights in *Palama*.

[90] *See id.* at 301, 440 P.2d at 98.

[91] *See id.* at 301, 440 P.2d at 97-98.

[92] *See id.* at 303, 440 P.2d at 99.

[93] 50 Haw. 314, 440 P.2d 76 (1968).

[94] *See id.* at 314, 440 P.2d at 76.

[95] *See id.* at 314, 440 P.2d at 77.

[96] *Id.* at 315, 440 P.2d at 77. The Hawai'i Supreme Court ruled that during the Kingdom, the vegetation or debris line marked the seaward boundary of parcels. *See id.*

[97] *See id.* at 316, 440 P.2d at 77.

[98] *See id.*

vested."[99] The court thus evaluated the legitimacy of current claims, in part, based on the establishment of such a claim in "old Hawai'i."[100]

In 1977, the court reinforced this position in *State of Hawai'i v. Zimring*.[101] In this action, the State sought to quiet title to 7.9 acres of land added to the Zimring's parcel by a 1955 lava flow.[102] The Zimrings opposed the State's claim on the grounds that Hawaiian usage prior to 1892 gave the owner of beach front land title to any additions created by lava flows.[103]

After considering doctrines of Hawaiian custom and usage, the court held that "lava extensions vest when created in the people of Hawai'i, held in public trust by the government for the benefit, use and enjoyment of all the people."[104] The court rejected the Zimrings' attempt to establish a claim via

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[99] *Id.* at 317, 440 P.2d at 78 (citations omitted).

[100] *Id.* at 315, 440 P.2d at 77. In 1973, the court again looked to Hawai'i's history to interpret Native Hawaiian rights in *McBryde Sugar Co. Ltd. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973), *adhered to on reh'g*, 55 Haw. 260, 517 P.2d 26 (1973), *appeal dismissed and cert. denied*, 417 U.S. 962 (1974), and *cert. denied*, Robinson v. Hawai'i 417 U.S. 976 (1974). In *McBryde*, two sugar companies in Hanapepe Valley on the island of Kaua'i were dueling over rights of water use. McBryde contested the amount of water Gay & Robinson diverted and sought a court order to determine the amount of each company's entitlement. After examining Hawaiian laws and customs relative to water management, the court held that the State (with a position analogous to the *mo'i*) had primary responsibility (or "ownership") for all of the water in Hawai'i. *See id.* at 199-200, 504 P.2d at 1345. Although individuals could acquire rights to use water, they could never own it. *See id.* at 200, 504 P.2d at 1345. The court also held that individuals could not transport water out of the watershed. *See id.* Although the decision was consistent with Hawaiian custom and tradition, the sugar companies claimed that the ruling controverted Western property law in Hawai'i and pursued a reversal in both the state and federal court system for almost twenty years. *See* Williamson B.C. Chang, *Unraveling Robinson v. Ariyoshi: Can Courts Take Property?*, 2 U. HAW. L. REV. 57 (1979)(detailing the litigation surrounding the *McBryde* decision in the state and federal courts). *See also* Williamson B.C. Chang, *Reversals of Fortune: The Hawai'i Supreme Court, the Memorandum Opinion, and the Realignment of Political Power in Post-statehood Hawai'i*, 14 U. HAW. L. REV. 17 (1992)(explaining how judges familiar with the culture and history of Hawai'i reinterpreted certain laws after statehood).

[101] 52 Haw. 472, 479 P.2d 202 (1970)[hereinafter *Zimring I*], *rev'd*, 58 Haw. 106, 566 P.2d 725 (1977)[hereinafter *Zimring II*]. The court remanded this case and separate trials were conducted to decide various issues. This summation deals only with the 1977 Hawai'i Supreme Court decision as it relates to traditional and customary usage.

[102] *See Zimring II*, 58 Haw. at 107, 566 P.2d at 727.

[103] *See id.* at 109, 566 P.2d at 728-29. Although the trial court found that "Hawaiian usage prior to 1892 gave the owner of land along the seashore, title to land created by volcanic eruption when the eruption destroyed the pre-existing seashore boundary and formed a new boundary along the sea," *id.* at 110, 566 P.2d at 729, the Hawai'i Supreme Court held that the Zimrings failed to present sufficient evidence to establish the custom. *See id.* at 116, 556 P.2d at 732.

[104] *Id.* at 121, 556 P.2d at 735.

the government's actions (Boundary Commission Report and Royal Patent).[105] Instead, it explained that traditional and customary uses do not hinge on government acceptance, but "must be based on actual practice[.]"[106] The court further observed that customary uses must be established in practice by November 25, 1892.[107]

From 1838 to 1977, the Hawai'i Supreme Court interpreted HRS 1-1 and 7-1 as providing protections for traditional and customary uses, access, water, and gathering. In light of those decisions, current uses will qualify as protected traditional and customary rights if they: 1) were established in practice by 1892; 2) were actually exercised; and 3) have a basis in Hawaiian social and/or legal history. The court also expressed a willingness to incorporate the practice of traditional and customary uses into contemporary settings and to resolve disputes over whether or not a use was protected by looking at Hawaiian history.

III. THE CONSTITUTIONAL PROTECTIONS OF 1978

Despite the courts' recognition of traditional and customary rights, decisions from both the Kingdom of Hawai'i and the first twenty years of statehood limited the scope and content of Native Hawaiian rights. Although the State judiciary interpreted HRS 1-1 and 7-1 more broadly than Kingdom courts, rights of access, gathering, and water were modestly protected.[108] With the passage of a constitutional amendment in 1978, however, the court's affirmation and protection of Native Hawaiian rights increased notably.

A. The Constitutional Amendment

In 1978, the people of Hawai'i amended several provisions of the State Constitution in a Constitutional Convention. One hundred and two delegates, with a wide range of backgrounds and interests, took part in the

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[105] *See id.* at 116-18, 556 P.2d at 732-33. After the Mahele, the Minister of the Interior for the Kingdom of Hawai'i issued Royal Patents for Land Commission Awards "upon payment of commutation by the awardee to the government, usually set at one-third the value of the unimproved land at the time of the award." *Id.* at 111, 556 P.2d at 730. In 1862, a Boundary Commission was statutorily created and empowered to issue reports determining the boundaries of land awarded in the Mahele and Kuleana Act, if the borders were not previously defined. *See id.* at 117-18, 556 P.2d at 733.

[106] *Id.* at 117, 556 P.2d at 733.

[107] *See id.* at 116, 556 P.2d at 732 n.11 (citing *State of Hawai'i v. Zimring*, 52 Haw. at 472, 479 P.2d at 202 (1970)). November 25, 1892, is the date on which the Hawaiian Kingdom passed the predecessor to HRS 1-1. *See supra* note 70.

[108] *See* discussion *supra* Part II.D.

proceedings.[109] Among the delegates existed a "genuine feeling that the Hawaiian culture and people were the host people of this state . . . and as such should be protected above and beyond others."[110] In response to specific concerns about access and gathering rights, delegates made a concerted effort to raise current statutory protections to a constitutional level, thereby making traditional and customary uses an "inviolate right."[111] After being drafted in the Convention, and ratified by Hawai'i's voters, Article XII, Section 7 now mandates that:

> The 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, subject to the right of the State to regulate such rights.[112]

This section places an affirmative duty on the State to respect and preserve traditional and customary rights. Delegates included Article XII, Section 7 to "preserve the small remaining vestiges of a quickly disappearing culture"[113] by recognizing that traditional and customary rights are "personal rights . . . inherently held by Hawaiians and do not come with the land."[114] The legislative history of the Amendment further delineates that, due to recent attempts to prevent practitioners from "following subsistence practices traditionally used by their ancestors,"[115] it was necessary to "provide the State with power to protect these rights and to prevent any interference"[116] with them. Delegates thus granted the State regulatory authority "to prevent possible abuse as well as interference with these rights."[117] Since the adoption of Article XII, Section 7, the Hawai'i Supreme Court's interpretation of this provision significantly expanded the scope of protections for traditional and customary rights.

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[109] Interview with Charlene Hoe, Delegate to the 1978 Constitutional Convention, in Honolulu, Haw. (Mar. 2, 1997).

[110] *Id.*

[111] Telephone Interview with Sheri Broder, Attorney for the Hawaiian Affairs Committee in the 1978 Constitutional Convention (Apr. 22, 1997). Broder also explained that the amendment represented a "community-wide sentiment." *Id.* "People felt it was the time to start the process of beginning to provide justice for Native Hawaiians." *Id.*

[112] HAW. CONST. art. XII § 7.

[113] STAND. COMM. REP. NO. 57, *reprinted in* 1 Proceedings of the Con. Convention of 1978, at 640 (1980).

[114] *Id.* at 639-40.

[115] *Id.* at 639.

[116] *Id.*

[117] *Id.* The State's ability to regulate traditinal and customary uses is limited. *See* discussion *supra* Part V.C.

B. Judicial Interpretation of Native Hawaiian Rights Subsequent To Article XII, Section 7

After the 1978 Constitutional Convention and the ratification of Article XII, Section 7, judicial interpretations of Native Hawaiian rights began to reflect the State's duty to affirm and protect traditional and customary uses. In *Kalipi v. Hawaiian Trust Company*,[118] the plaintiff claimed rights of access and gathering under HRS 1-1 and 7-1, and a reservation in the deeds of title for certain lands on the island of Moloka'i.[119] William Kalipi was a resident of the *ahupua'a* of Keawenui who owned a taro patch in Manawai and a house lot in East Ohia.[120] Although Kalipi was raised and had resided on the East Ohia lot, he was not living there when he filed suit.[121] Yet, he claimed a right to continue his family tradition of accessing the lands of the defendants to gather various natural resources.[122]

On appeal from a verdict in favor of the defendants, the Hawai'i Supreme Court declined to reverse the lower court's decision.[123] Although the court did not address Article XII, Section 7 directly, it acknowledged its constitutional obligation, finding that "it is this expression of policy which must guide our determinations."[124] The court further stated that despite the possibility of conflict, "any argument for the extinguishing of traditional rights based simply upon the possible inconsistency of purported native rights with our modern system of land tenure must fail."[125] The court thus examined the issues involving Native Hawaiian rights with deference to the State's duty to protect customary rights.

After noting that HRS 7-1 conferred rights of access, gathering, and water, the court went on to evaluate Kalipi's gathering rights under that section as one of first impression.[126] After reviewing the historical and legal aspects of the pre-contact system of land tenure, the court stated that section 7 of the Kuleana Act was included for use by the *maka'ainana* to "ensure the utilization and development of their lands."[127] Thus, "lawful occupants of the *ahupua'a* may, for the purposes of practicing Native Hawaiian customs and traditions, enter undeveloped lands within an *ahupua'a* to gather those items

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[118] 66 Haw. 1, 656 P.2d 745 (1982).

[119] *See id.* at 4, 656 P.2d at 747.

[120] *See id.* at 3, 656 P.2d at 747.

[121] *See id.*

[122] *See id.* Some of the items gathered by Kalipi and his family were *ki*, bamboo, *kukui* nuts, *kiawe*, medicinal herbs and ferns. *See id.* at 4, 656 P.2d at 747.

[123] *See id.*

[124] *Id.* at 5, 656 P.2d at 748.

[125] *Id.* at 4, 656 P.2d at 748.

[126] *See id.* at 5, 656 P.2d at 748.

[127] *Id.* at 7, 656 P.2d at 749.

enumerated in the statute."[128] Because Kalipi was not currently living in the *ahupua'a* in which he sought to exercise traditional and customary practices, the court did not enforce his rights.[129] The court finally acknowledged that gathering rights were necessary for the perpetuation of traditional and customary practices and "thus remain, to the extent provided in the statute, available to those who wish to continue those ways."[130]

In assessing Kalipi's claims under HRS 1-1, the court articulated a balancing test whereby the retention of a Hawaiian tradition is determined first by deciding if a custom has continued in a particular area, and second, by balancing the respective interests of the practitioner and harm to the landowner.[131] In promulgating this test, the court rejected the defendant's claims that the only Native Hawaiian rights that remained in existence after the Mahele of 1848 were those specifically identified in HRS 7-1.[132] The court also clarified *Oni* as a rejection of a particular custom, pasturage, as opposed to custom in general.[133] The court thus interpreted HRS 1-1 as "a vehicle for the continued existence of those customary rights which continued to be practiced and which worked no actual harm upon the recognized interests of others."[134]

In 1992, the Hawai'i Supreme Court directly addressed the range of protections provided by Article XII, Section 7, and HRS 7-1 in *Pele Defense Fund v. Paty*.[135] In *Pele*, members of a non-profit corporation ("PDF") formed to perpetuate Hawaiian religion challenged as a breach of trust the State's exchange of 27,800 acres of ceded lands, including the Wao Kele 'O Puna Natural Area Reserve, on the island of Hawai'i, for 25,800 acres in Kahauale'a from Campbell Estate.[136] The members of Pele Defense Fund further claimed that denial of access for gathering and religious purposes by owner Campbell Estate, True Energy Geothermal, Corp., True Geothermal

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[128] *Id.* at 7-8, 656 P.2d at 749. The court defined "lawful occupants" as individuals residing in the *ahupua`a* in which they seek to exercise traditional rights. *Id.* at 8, 656 P.2d at 749. The decision also acknowledged that the State has an interest in regulating gathering activities. *See id.*

[129] *See id.* at 9, 656 P.2d at 750.

[130] *Id.*

[131] *See id.* at 10, 656 P.2d at 751.

[132] *See id.* at 11-12, 656 P.2d at 751-52.

[133] *See id.* at 11, 656 P.2d at 751.

[134] *Id.* at 12, 656 P.2d at 752.

[135] 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied*, 113 S. Ct. 1277 (Mem.)(1993).

[136] *See id.* at 584, 837 P.2d at 1253. The mechanism for admitting Hawai'i as part of the United States, the Admission Act, established a trust for lands owned by the Kingdom of Hawai'i at the time of the overthrow. The Act named the State government administrator of that trust and the Native Hawaiian people one of five beneficiaries. *See id.* at 584-86, 837 P.2d at 1253-54.

Drilling Co., and Mid-Pacific Geothermal Inc. violated Article XII, Section 7.[137]

On appeal from the Third Circuit's judgment in favor of the defendants, the Hawai'i Supreme Court reversed in part and affirmed in part.[138] After ruling that PDF's claim for breach of trust was barred,[139] the court turned its attention to the group's access and gathering rights.[140] The court first granted PDF standing under Article XII, Section 7, due to its purpose of encouraging Hawaiian religion.[141] The court then proceeded to "further explicate" the scope of rights protected by that provision.[142]

After reviewing *Kalipi*, the court noted that although PDF had constitutional and statutory basis for their claims similar to Kalipi, Kalipi had predicated his legal argument on land ownership, while PDF based its claim on custom and usage.[143] In examining the range of protection for customary rights the court reviewed the legislative history of Article XII, Section 7.[144] The court likewise noted that the provision sought "to protect the broadest possible spectrum of native rights"[145] and contemplated the extension of some traditional rights beyond the *ahupua'a*.[146]

Pele acknowledged *Kalipi's* mandate that a reviewing body determine the "precise nature and scope" of rights on a case-by-case basis.[147] After considering the traditional and customary access and gathering practices in Puna, the court held that "Native Hawaiian rights protected by Article XII, Section 7 may extend beyond the *ahupua'a* in which a Native Hawaiian resides where such rights have been customarily and traditionally exercised

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[137] *See id.* at 584-85, 837 P.2d at 1253.

[138] *See id.* at 585, 837 P.2d at 1254. The decision was also remanded back to the Third Circuit to decide whether the landowners should be enjoined from denying PDF access. *See id.* Although proposed findings of fact were submitted by both parties, no decision was made as of November 6, 1998. Telephone Interview with Carl Christenson, Native Hawaiian Legal Corp., Attorneys for Pele Defense Fund (Nov. 6, 1998).

[139] *See Pele*, 73 Haw. at 590, 837 P.2d at 1256. Although the court found that PDF had standing to pursue a claim for breach of trust, it ruled that the statute of limitations, res judicata, and sovereign immunity barred the claim. *See id.*

[140] *See id.* at 613, 837 P.2d at 1268.

[141] *See id.* at 614, 837 P.2d at 1268. The court ruled that PDF had standing to pursue its Article XII, Section 7 claim because: (1) its members included Native Hawaiians injured by their exclusion from the plaintiff's land; (2) such injuries are traceable to alleged violations of "*Kalipi* rights;" and (3) injunctive relief allowing Native Hawaiians to access undeveloped lands would remedy the injuries. *See id.* at 615-16, 837 P.2d at 1269.

[142] *See id.* at 616, 837 P.2d at 1270.

[143] *See id.* at 618-19, 837 P.2d at 1271.

[144] *See id.* at 619-20, 837 P.2d at 1271-72.

[145] *Id.* at 619, 837 P.2d at 1271.

[146] *See id.* at 620, 837 P.2d at 1272.

[147] *See id.* at 619, 837 P.2d at 1271.

in this manner."[148] Although the court's holding in *Pele* was consistent with both traditional and contemporary laws and usage, it significantly expanded the legal protections for customary use rights.

In *Pele*, the court distinguished customary rights based on usage from those based on land ownership.[149] In evaluating use rights, the court examined the establishment of the custom in the context of the immediate community, rather than employing island-wide standards. The court also gave considerable weight to the mandate of Article XII, Section 7, electing to expand the scope of rights provided by *Kalipi* instead of prohibiting an established use.[150]

Most recently, the court re-examined the scope of the statutory and constitutional protection of Native Hawaiian rights in *PASH*.[151] The public interest group PASH and a Native Hawaiian Angel Pilago opposed the application of the Japanese-owned development corporation, Nansay, for a county-level Special Management Area ("SMA") Use Permit to develop a resort complex in the *ahupua'a* of Kohanaiki, on the island of Hawai'i.[152] After holding a public hearing, the Hawai'i County Planning Commission refused to hold a contested case hearing for PASH and Pilago on the grounds that their interests were not "clearly distinguishable from that of the general public."[153] Instead, the Planning Commission denied their request and issued Nansay a SMA permit.[154] PASH challenged this ruling in the Third Circuit Court, which reversed the Commission's decision and remanded the case to the Planning Commission for a contested case hearing.[155] On appeal, the Intermediate Court of Appeals affirmed the circuit court decision with respect to PASH but reversed it with respect to Pilago.[156] After considering Nansay's appeal, the Hawai'i Supreme Court held that: 1) the circuit court had jurisdiction to consider the claims; 2) PASH had standing, so a contested case

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[148] *Id.* at 620, 837 P.2d at 1272. This distinction from *Kalipi* stemmed from the nature of traditional practices in Puna as well as the scope of protection available under Article XII, Section 7. Although the court in *Kalipi* deferred to the policy of XII-7, it based its ruling on both HRS sections 1-1, 7-1. *See Kalipi*, 66 Haw. at 4-12, 656 P.2d at 747-52.

[149] *See Pele*, 73 Haw. at 618-19, 837 P.2d at 1271.

[150] *See id.* at 619, 837 P.2d at 1271.

[151] 79 Hawai'i 425, 903 P.2d 1246 (1995).

[152] *See id.* at 429, 903 P.2d at 1250.

[153] *Id.*

[154] *See id.* at 430, 903 P.2d at 1251.

[155] *See id.*

[156] *See id.* The appeals court reversed with respect to Pilago in spite of his "special" interest as a Native Hawaiian because he did not assert that he or other Hawaiians were engaging in protected activities, and thus failed to show that his interest was "personal." Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 246, 254, 900 P.2d 1313, 1321 (Haw. Ct. App. 1993). *See also PASH*, 79 Hawai'i at 430, 903 P.2d at 1251 (explanation in Hawai'i Supreme Court decision).

hearing should be held; and most importantly 3) Native Hawaiians retain rights to pursue traditional and customary activities, as land patents in Hawai'i confirm only a limited property interest, when compared with Western land patents/concepts of property.[157]

Upon examining Article XII, Section 7, and HRS 1-1 and 7-1, the court observed that neither *Kalipi* or *Pele* precluded further inquiry into the extent that Native Hawaiian rights endured under State law.[158] After considering the practices at hand, the court ruled that Article XII, Section 7 is binding on administrative agencies-in that case, the Hawai'i County Planning Commission- and obligates those agencies to protect traditional and customary rights previously limited to state and county governments.[159]

The court devoted considerable attention to the extent that HRS 1-1 preserved customary practices, noting that *Kalipi* specifically refused to decide the "ultimate scope" of traditional rights under that statute.[160] The court also distinguished the doctrine of custom in Hawai'i in several respects.[161] First, contrary to the "time immemorial" standard used by English and American common law,[162] traditional and customary practices in Hawai'i must be established in practice by November 25, 1892.[163]

Second, the court articulated a three-point test for the doctrine of custom, requiring that a custom be *consistent when measured against other customs*, a practice be *certain in an objective sense*, and a traditional use be *exercised in a reasonable manner*.[164] Defining the reasonable use requirement, the court further explained that the balance leans in favor of establishing a use in the sense that "even if an acceptable rationale cannot be assigned, the custom is still recognized as long as there is no 'good legal reason' against it."[165]

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[157] *See PASH*, 79 Hawai'i at 425, 903 P.2d at 1246. The opinion in *PASH* is extraordinarily detailed. This section will not address all of the specifics of the decision (i.e., CZMA requirement, standing), and instead will focus on the sections relevant to traditional and customary uses under Article XII, Section 7, and HRS sections 1-1, 7-1.

[158] *See id.* at 438, 903 P.2d at 1259.

[159] *See id.* at 437, 903 P.2d at 1258.

[160] *See id.* at 439, 903 P.2d at 1260.

[161] *See id.* at 447-51, 903 P.2d at 1268-72.

[162] The "time immemorial" standard requires that a custom exist as far back as can be remembered. It is also described as "time whereof the memory of man is not to the contrary." BLACKS LAW DICTIONARY 1483 (6th ed. 1990).

[163] *See id.* at 447, 903 P.2d at 1268 (citations omitted). Under English and American common law, a custom "must appear to have existed from time immemorial; to be reasonable, to be certain, and not inconsistent with the laws of the land." Oni v. Meek, 2 Haw. 87, 90 (1858). *See supra* note 70 (development of HRS section 1-1). November 25, 1892 is the date on which the Hawaiian Kingdom passed the predecessor to HRS section 1-1. *See supra* note 70.

[164] *See PASH*, 79 Hawai'i at 447, 903 P.2d at 1268 n.39.

[165] *Id.*

Third, the court declined to limit the exercise of traditional and customary rights to individuals of Native Hawaiian descent. In a footnote, the court refused to decide whether descendants of citizens of the Kingdom of Hawai'i who were not of Native Hawaiian descent could assert rights protected by HRS 1-1.[166] The court also "expressly reserve[d] comment" on whether non-Hawaiian members of an *'ohana* could claim rights under Article XII, Section 7.[167]

In addition to affirming *Kalipi* and *Pele*, *PASH* also highlighted several nuances in traditional and customary rights. The court expressly declined Nansay's invitation to overrule *Pele* and instead reaffirmed the decision, stating that the mandate of Article XII, Section 7, "normally associated with tenancy in an *ahupua'a*, may also apply to the exercise of rights beyond the physical boundaries of that particular *ahupua'a*."[168] The decision also recognized that Native Hawaiians have a unique claim to traditional and customary rights under HRS 1-1 and XII-7.[169] Yet, the court did not view this independent claim as foreclosing non-Hawaiians from exercising protected uses. Finally, the court's decision emphasized the historical basis for traditional and customary rights, the role of background principles of property in evaluating current uses, and the distinction between Hawaiian and English or American custom.

Since the addition of Article XII, Section 7 in 1978, the Hawai'i Supreme Court's decisions increasingly reflect the State's solemn duty to preserve Native Hawaiian rights. This renewed commitment to Hawaiian principles and uses is not an abstract creation. It reflects the judiciary's respect for the populace's effort to acknowledge Hawai'i's unique history by enshrining it in a constitutional provision.

IV. LEGISLATIVE ATTEMPTS TO REGULATE NATIVE HAWAIIAN RIGHTS

The court's interpretation of statutory and constitutional provisions relating to Native Hawaiian rights since *Oni* in 1858 significantly increased the scope of protection for traditional and customary uses. Cases decided since the adoption of Article XII, Section 7 of the Constitution in 1978 also exhibit the court's willingness to fulfill its duty to affirm and protect these rights. Because the United States Supreme Court declined to review *PASH*, the Hawai'i Supreme Court's interpretation of Article XII, Section 7, and of HRS 1-1 and 7-1, is final until it is modified by either the State or Federal Supreme

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[166] *See id.* at 449, 903 P.2d at 1270 n.41.

[167] *See id.*

[168] *Id.* at 448, 903 P.2d at 1269.

[169] *See id.* at 449, 903 P.2d at 1270 ("Customary and traditional rights in these islands flow from Native Hawaiians' preexisting sovereignty.").

Court.[170] Despite this finality, dissidents attempted to limit the continued exercise of Native Hawaiian rights by promoting legislation that would restrict the implementation of the *PASH* decision. In light of the statutory and constitutional protections for traditional and customary practices, this Comment examines the legitimacy of recent regulatory attempts.

Opponents launched a backlash in a series of bills introduced during the 1997 legislative session to dilute the impact of recent court decisions. Legislators focused on the "uncertainty" created by *PASH* and presented bills to "remedy" the situation.[171] Senate Bill 8 ("SB 8") and House Bill 1920 ("HB 1920") spearheaded these attempts to dilute the judiciary's rulings in the legislature.[172]

A. Overview of SB 8

Senator Randy Iwase (D-district 18: Wahiawa, Mililani) pre-filed SB 8 on January 15, 1997. This bill sought to provide private landowners with assurance of property title by instituting a process of determining and registering all traditional and customary uses exercised on a parcel of land.[173] Senate Bill 8 proposed that no legal exercise of traditional or customary practices could occur unless a practitioner was issued a "Certificate of Registration of Native Hawaiian Right."[174] Individuals interested in continuing customary practices would have been required to initiate and complete a process of petitioning for and establishing any traditional and customary uses.

Senate Bill 8 attempted to amend HRS chapter 205, extending the authority of the Land Use Commission ("LUC" or "Commission") to resolve all Native Hawaiian claims.[175] Under SB 8, practitioners would have borne the burden

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[170] The United States Supreme Court denied a petition for writ of certiorari to review *PASH* on April 22, 1996. *See* Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission, 116 S. Ct. 1559 (1996)(Mem.).

[171] *See* HB 1920 (justifying legislative intervention to address the "uncertainty" caused by *PASH*).

[172] *See* SB 8; HB 1920. Senate Bill 8 and HB 1920 were not the only bills introduced during the 1997 legislative session that affected or restricted traditional and customary rights. Senate Bill 668, for example, sought to expand HRS section 7, including protections for traditional and customary gathering rights. This analysis will focus on SB 8 and HB 1920, however, because they represent popular approaches to regulate traditional and customary rights.

[173] *See* SB 8.

[174] *See id.* § 205-B(a), at 4.

[175] *See id.* Hawai'i Revised Statutes section 205 established a nine-member Land Use Commission ("LUC"), appointed by the Governor. *See* HAW. REV. STAT. § 205-1 (1995). The LUC must 1) establish standards for district boundaries (§ 205-2(a)), 2) approve all boundary amendments for parcels larger than 15 acres, *see* §§ 205-3.1(a), 205-4, 3) review special use

of establishing, by a clear preponderance of the evidence, that (1) they were descended from individuals that inhabited the Hawaiian islands prior to 1778 (via a genealogy chart), and (2) that the traditional and customary practice they wished to continue was established on the identified parcel of land prior to November 25, 1892, by the petitioner's ancestors, via documents or records.[176] Senate Bill 8 required supplementation of this information with the petitioner's name, address, list of lineal descendants, and a description of the land on which she or he sought to continue practicing.[177] The bill required that applicants file all information with the LUC.[178]

Senate Bill 8 also specified that the Commission notify a landowner that it received a petition via certified mail or publication, within thirty days of filing.[179] The landowner could respond to the petition and request a contested case hearing within a reasonable period.[180] If the landowner responded accordingly, a contested case hearing would have been held in conformity with the Hawai'i Administrative Procedure Act.[181] If the landowner failed to respond, the Commission could issue a certificate granting the practitioner access "over, across, or upon the undeveloped land"[182] if the use was reasonable and would not "cause hardship to the landowner and pose an unreasonable restriction on the landowner's intended use of the property."[183]

The Commission might, however, impose conditions on the practitioner to prevent "unreasonable activities that may interfere, impede, or hinder the private landowner's use or possession of the undeveloped land."[184] The LUC could also terminate or modify certificates upon the petition of the landowner and a showing that the use "caused hardship" or was an otherwise "unreasonable restriction."[185]

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permits for parcels larger than 15 acres, *see* § 205-6. The commission may also initiate boundary amendments to ensure conformity with the various state and county development and community plans. *See id.* § 205-18.

[176] *See* SB 8 § 205-B(b), at 4-5.

[177] *See id.* § 205-C(b), at 5-6.

[178] *See id.* § 205-A, at 2.

[179] *See id.* § 205-C(c)(1), at 6-7. The LUC must place the advertisement in a newspaper of general circulation for at least two successive weeks on the island on which the undeveloped land is located. *See id.* at 7.

[180] *See id.* § 205-C(c)(2), at 7.

[181] *See id.* The Hawai'i Administrative Procedure Act ("HAPA") establishes minimal procedural requirements for all State and County administrative bodies when promulgating rules or adjudicating contestated cases. *See* HAW. REV. STAT. § 91 (1995 & Supp. 1997). The Act also provides for the judicial review of final agency decisions or orders. *See id.* § 91-14.

[182] SB 8 § 205-C(c)(2), at 7.

[183] *Id.* § 205-D(a), at 8.

[184] *Id.* § 205-B(d), at 5.

[185] *See id.* § 205-D(a), at 8. The modification/termination process resembled the petitioning process, but did not specify whether the landowner or practitioner bore the burden of proof. The

Moreover, the Commission would only consider petitions for parcels of "undeveloped land."[186] Senate Bill 8 limited this definition to property upon which no structure or improvement existed, and no grading, grubbing, or building permit was issued.[187] The bill also classified paths, walkways, and greenways as improvements, thus making parcels where they existed ineligible for traditional and customary uses.[188] If an individual currently exercised traditional or customary uses on lands that did not fall within SB 8's definition of undeveloped land, that usage was not eligible for registration, and therefore could not be legally continued.

After being introduced and having passed its first reading on January 15, 1997, the Speaker referred SB 8 to the Senate Committee on Water, Land, and Hawaiian Affairs.[189] Co-chairs for the Committee, Randy Iwase and Malama Solomon (D-district 1: Kohala, Kawaihae, Honoka'a, Laupahoehoe, Papaikou), scheduled the bill for a hearing on February 4, 1997. Although nearly forty individuals submitted written testimony, an additional twenty arrived at the hearing to present oral testimony.[190] Several classes of high school students also attended and submitted petitions in opposition to SB 8.

Over 90% of the testimony presented at the hearing opposed the bill's passage. Of the individuals supporting SB 8, almost all mentioned the burden the *PASH* decision imposed on Hawai'i's landowners. Interestingly enough, only one large landowner, Estate of James Campbell, presented oral testimony in support of the bill. The remainder of the supporters represented development interests, title insurance firms, and construction companies.

A wide range of interests opposed the bill. Scholars and practitioners from the Native Hawaiian community presented vigorous opposition. Native Hawaiian rights lawyers, environmental lawyers, and law students also attended. Finally, non-Hawaiian citizens concerned about SB 8's negative effects on all of Hawai'i's residents also encouraged the senators to let the bill die in committee.

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modification process also provided for a public hearing with the option of requesting a contested case hearing, if the certificate holder responded within a reasonable time. If a certificate holder failed to respond, the petitioner's rights were deemed modified or terminated. *See id.* § 205-D(c)(1-3), at 9-10.

[186] *See id.* § 205-B(a)(4), at 4. *See also id.* § 205(A), at 3-4.

[187] *See id.* § 205-A, at 3-4.

[188] *See id.* Senate Bill 8's requirements made it extraordinarily difficult to establish a use. For example, although the bill mandated that a practitioner establish continued use of a parcel, the existence of a path made the parcel "developed" and thus ineligible for traditional and customary uses.

[189] STATE OF HAWAI'I LEGISLATIVE REFERENCE BUREAU, 19TH LEGIS. SESS., ALL INFORMATION FOR A BILL (SB 8) 1 (Haw. 1997).

[190] The author witnessed SB 8 and HB 1920's proceedings as a legislative extern and participant in the committee hearings.

Due in part to the significant amount of testimony submitted, the co-chairs deferred action on SB 8. On Tuesday, February 11, 1997, Senator Iwase announced two amendments to the bill in Senate Draft One of SB 8. The first amendment added the Office of Hawaiian Affairs as a party to all contested case hearings in order to help determine what uses were traditional and customary. The second amendment allowed landowners and petitioners to make settlement agreements at any time during the registration process. In a unanimous vote, the Senate Committee on Water, Land, and Hawaiian Affairs passed SB 8 that afternoon, referring the bill to the Senate Committee on Ways and Means.[191]

While the bill was pending in Ways and Means, a new coalition of powerful Hawaiian interests formed in opposition to the bill.[192] Hula practitioners concerned about the impact of regulatory efforts like SB 8 on Hawaiian culture and lifestyles came together as *'Ilio'ulaokalani*.[193] On February 25, 1997, the coalition held a twenty-four-hour vigil at the State Capitol to

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[191] The Senate Committee on Water, Land, and Hawaiian Affairs passed SB 8 with a vote of 4 ayes, and 5 ayes with reservations.

[192] Telephone Interview with Victoria Holt-Takamine, *'Ilio'ulao kalani* (Apr. 24, 1997).

[193] *See id.* *'Ilio'ulaokalani* literally translates as "the Red Dog Of the Heavens." Yet, there are many different levels of translation and the name also refers to a type of cloud formation, "a kind of watch cloud that hovers over and keeps track of things." *Id.* *'Ilio'ulao kalani* is a coalition of *hula halau* ("*hula* schools") and their extended *'ohana* committed to preserving Hawaiian culture and traditions. Telephone Interviews with Victoria Holt-Takamine, *'Ilio'ulaokalani* (Apr. 24, and Aug. 13, 1997)(all information relating to *'Ilio'ulaokalani* was gathered in a series of interviews with Victoria Holt-Takamine). This unification of powerful local interests was created at the start of the 1997 legislative session in response to SB 8 and other legislation affecting Hawaiians and Hawaiian issues. Due in part to a lack of representation by and consideration for traditional and customary practitioners, about a dozen *kumu hula* from around Hawai'i gathered on O'ahu in February of 1997 to discuss several bills that threatened to further restrict Native Hawaiian culture and traditions. The coalition's founding members included island notables like Pua Kanahele, Robert Cazimero, Keali'i Reichel, and Victoria Holt-Takamine.

After the coalition's instrumental role in stopping SB 8, about a dozen "core members" continued to meet on a weekly basis. Realizing *'Ilio'ulaokalani*'s incredible potential to "promote Hawaiian culture and things that are Hawaiian," the coalition began hosting educational forums and continued tracking bills. *Id.* Having started with monetary donations from various *hula halau* and other Hawaiian organizations, the coalition continues to operate via grants and other contributions. *'Ilio'ulaokalani* remains active: it has a mailing list numbering over 1100 individuals and a calendar with events already scheduled for the year 2000. Future plans include fundraising, study groups, and informing and mobilizing voters for upcoming elections.

As *kumu hula* from around the islands keep in contact through *'Ilio'ulaokalani*, more and more groups are turning to the coalition for political and strategic support. In addition to providing direct input on issues, *'Ilio'ulaokalani* now serves as a network for community efforts around the islands. As the coalition supports actions to protect "things Hawaiian," they fulfill the legacy of their name by watching over and keeping track of things. *See id.*

demonstrate dissatisfaction with SB 8, urging the Ways and Means' co-chairs to let the bill die in committee.[194] On Wednesday, after the demonstrators refused to let Senators Iwase and Solomon explain their positions, Solomon killed the bill by dramatically ripping it to pieces in front of the crowd.[195] Some spectators were unimpressed by this display since Solomon voted in favor of SB 8 and was otherwise unwilling to stop the bill while it was in her committee.[196] Despite the fact that the legislature's attempt to enact SB 8 was short-lived, HB 1920 raised the same issues of customary rights.

B. Overview of HB 1920

Representative Calvin Say (D-district 18: St. Louis Heights, Palolo, Kaimuki) introduced HB 1920 on January 24, 1997. The explicit purpose of the bill was to respond to recent Hawai'i Supreme Court decisions that "dramatically affected the nature of real property in Hawai'i."[197] Like SB 8, HB 1920 asserted that the court's affirmation of traditional and customary rights clouded title and limited landowners' ability to use their property.[198] The bill further explained that the present uncertainty of land titles and property rights "poses a serious threat to the State's economic and social well-being."[199] House Bill 1920 sought to exercise the State's authority under Article XII, Section 7 of the state constitution to "clarify and regulate" the practice of traditional and customary uses.[200]

Instead of establishing a registration process, HB 1920 created a declaratory cause of action that could be initiated in circuit court to "determine the nature and extent of customary and traditional practices in land."[201] Both landowners and petitioners were eligible to institute such actions.[202] Finally, any suit brought under HB 1920 would have had preference over all other civil actions.[203]

Petitions filed by practitioners required the same types of evidence as SB 8: 1) name and address; 2) documentation proving that the petitioner descended from individuals inhabiting the Hawaiian islands prior to 1778, via genealogy chart; 3) evidence establishing that the petitioner was lawfully

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[194] *See id.*
[195] *See id.*
[196] *See id.*
[197] HB 1920, Section 1, at 1.
[198] *See id.* Section 1, at 1-4.
[199] *Id.* Section 1, at 2.
[200] *See id.* Section 1, at 3-4.
[201] *See id.* Section 2, § 3, at 6.
[202] *See id.*
[203] *See id.* Section 2, § 3, at 7.

occupying-as opposed to temporarily residing in- an *ahupua'a*; 4) a detailed description of the practice and areas utilized, including tax map parcel, and owner; and 5) written or other evidence showing that the practice "pre-existed and was not terminated by the Mahele of 1848, continued to be exercised as of November 25, 1892, and has been customarily exercised by Native Hawaiians on the land identified."[204] Petitions filed by landowners required: 1) name and address; 2) a specific and detailed description of the land (including tax map parcel/s); and 3) identification of all potential or actual persons eligible to claim a right to exercise traditional and customary practices in the land.[205]

Under HB 1920, after the judge issued a summons, potential claimants as well as known claimants who, after due diligence could not be served, could have been served by publication.[206] The bill required that notice be published in an English language newspaper of general circulation in the circuit where the action was filed, once a week for at least four weeks.[207] House Bill 1920 also required posting a copy of the summons on the land involved in the litigation.[208]

The bill also empowered judges to issue default judgments against all individuals who failed to respond to the summons.[209] Otherwise the judge could schedule trials where either party contested the petition.[210] Individuals claiming traditional and customary practices bore the burden of establishing their claim by a preponderance of the evidence.[211] Practitioners had to affirmatively demonstrate that their practice was "reasonable" and would not result in "actual harm" to other interests, in addition to substantiating the elements of their petition.[212]

At the conclusion of this process, the bills charged the courts with determining the "nature and extent," if any, of customary and traditional practices.[213] House Bill 1920 further authorized courts to issue decrees with

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[204] *See id.* Section 2, § 2-4, at 4-9.

[205] *See id.* Section 2, § 4(b)(1-3), at 8. In all documents provided by both practitioners and landowners HB 1920 also required that, to the best of the person's knowledge, the information provided was true. *See id.* Section 2, § 4(c), at 8-9.

[206] *See id.* Section 2, § 5(b), at 8-9.

[207] *See id.* Section 2, § 5(b), at 9-10.

[208] *See id.* Section 2, § 5(b), at 10.

[209] *See id.* Section 2, § 5(c), at 10.

[210] *See id.* Section 2, § 6, at 10-11.

[211] *See id.* Section 2, § 7, at 11.

[212] *See id.*

[213] *See id.* Section 2, § 8, at 12.

the effect of a final judgment.[214] The court could also impose conditions on existing uses, when the decree was issued, or in the future.[215]

House Bill 1920 additionally made certain types of land unavailable for traditional and customary uses. These lands included: 1) all land zoned urban; 2) physically altered land, or parcels improved by grading, grubbing, landscaping, or agricultural activities; 3) land covered by quiet title; and 4) land registered pursuant to HRS chapter 501.[216]

Finally, HB 1920 relieved State and County agencies of their duty to consider the impact of their actions on traditional and customary rights. Although the bill purported not to affect the proceedings of any agency,[217] the bill provided that agencies fulfilled their obligation to protect traditional and customary uses under Article XII, Section 7 of Hawai'i's Constitution if they exercised authority subject to customs "subsequently established or proceeding under this chapter."[218] The bill explained that if an agency exercised discretionary authorization or granted a permit subject to traditional and customary practices, as established, or being decided under HB 1920, the agency fulfilled its constitutional duty to protect such rights and did not have to independently review the proposals impact on tradition.[219]

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[214] *See id.*

[215] *See id.* House Bill 1920, unlike SB 8, required that landowners demonstrate a cause for modification of existing rights by a preponderance of the evidence.

[216] *See id.* Section 2, § 11, at 14-15. An individual may institute a Quiet Title action, codified as HRS section 669, to establish legal title to parcels of five acres or less, where the person seeking title was in adverse possession for at least twenty years. *See* HAW. REV. STAT. § 669-1 (1995). Hawai'i Revised Statutes section 501 established a Land Court with the "exclusive original jurisdiction of all applications for the registration of title to land and easements or rights in land held and possessed in fee simple within the State[.]" HAW. REV. STAT. § 501-1 (1993). Grubbing is part of the land clearing process to prepare for development and usually involves removing trees, shrubs, or bushes. Telephone interview with Wilford Kiyotoki, Engineer, *City and County of Honolulu Dept. of Public Works* (Jan. 6, 1998).

[217] *See* HB 1920 Section 2, § 10, at 14.

[218] *See id.*

[219] *See id.* If passed, HB 1920 would place all responsibility for settling traditional and customary uses with the circuit courts, allowing agencies to act without independently considering the effect of their actions on Hawaiian traditions (if they acknowledged claims proceeding or settled pursuant to the bill). In light of the Hawai'i Supreme Court's holding in *PASH* that State agencies (as opposed to just the State government) are obligated to uphold Article XII, Section 7, HB 1920 blatantly attempted to circumvent the court's interpretation of the Constitution by removing the affirmative burden placed on State agencies. *See* Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 451, 903 P.2d 1246, 1272 (1995).

Section 2, § 11 of the bill, exempting certain lands from customary rights, also worked against the preservation of traditional and customary rights. House Bill 1920 prohibited the exercise of traditional and customary uses on fully developed land. *See* HB 1920 Section 2, § 11(2), at 15. Therefore, the bill did not sanction customary uses on any parcel where "the

After being introduced and having passed its first reading, the Speaker assigned HB 1920 to the House Committee on Hawaiian Affairs. Chairman Ed Case (D- district 23: Manoa) scheduled a hearing on the bill on Thursday, February 13, 1997. Chairman Case began the hearing by reading Article XII, Section 7 of Hawai'i's Constitution, HRS 1-1, and excerpts from the *PASH* decision. Fifty-seven individuals submitted written testimony for the hearing: about one-third of the testimony favored the bill, while two-thirds opposed it. After receiving testimony, the House Committee on Hawaiian Affairs deferred action on the bill indefinitely, and Chairman Case encouraged those in opposition and in support of the bill to get together and work out a solution.

C. Other Attempts at Regulation

Despite the fact that SB 8 and HB 1920 did not become law through the 1997 legislative session, the backlash against *PASH* continues.[220] After both bills were killed, various interests introduced two resolutions pertaining to the regulation of traditional and customary rights. House Concurrent Resolution 276 and House Resolution 197 ("HCR 276/HR 197") proposed that the Office of Planning of the Department of Business, Economic Development, and Tourism ("DBEDT") facilitate discussions with all interested parties and seek consensus on the appropriate regulation of traditional and customary rights under Article XII, Section 7. Representative Case wrote and introduced HCR 276/HR 197. After being offered, the Hawaiian Affairs Committee heard the resolution and passed it out on March 20, 1997. However, that Committee

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natural state has been physically altered, through activities including farming . . . landscaping, grubbing, dredging, or grading." *Id.* Section 2, § 2, at 5. In addition to the significant reduction in areas available for use, HB 1920, § 10 allowed agencies to make more lands unavailable by issuing new development permits without considering the impact of its action on any Hawaiian traditions not yet "settled" by a circuit court. The bill's agency exemption thus *enabled* the extinguishment of customary uses, seriously contradicting the letter and spirit of Article XII, Section 7 as interpreted by this state's highest court.

[220] The backlash against *PASH* is also taking place outside the legislative arena. For example, the Hawai'i County Planning Commission added several new requirements to the process of requesting contested case hearings. Telephone Interview with Susan Gagorik, Planner for the Hawai'i County Planning Comm. (Apr. 23, 1997). Effective February 17, 1997, individuals interested in a contested case hearing must complete a form (and have it notarized), pay a $100 filing fee, and submit the request seven days before any public hearing on the issue. *See id.* In order to establish standing, the individual must either: 1) have a position distinct from the public at large; 2) be a government agency; 3) have a property interest in or legally reside on the property in question; 4) establish actual or threatened injury from the proposed action; or 5) claim a native Hawaiian gathering right. *See id.* The new requirements are unusual and may decrease efficiency of contested cases as people are forced to request hearings without the informational benefit of a public hearing. Telephone Interview with David Henkin, Attorney, Earthjustice Legal Defense Fund (Apr. 23, 1997).

amended the bill, by including the Department of Land and Natural Resources to assist DBEDT, and by proposing that monthly progress reports be issued to individuals interested in the discussions. The House Committees on Judiciary and Finance also approved the resolution without amendment and it was later adopted by the full House. The resolution finally crossed over to the Senate, but neither Senator Iwase or Solomon scheduled the resolution for a hearing.[221]

On March 14, 1997 Senate Ways and Means Co-Chairs Carol Fukunaga (D-district 12: Tantalus) and Lehua Fernandez-Salling (D- district 7: Lihu'e, Hanapepe, Waimea, Ni'ihau) introduced Senate Concurrent Resolution 230, with identical text to Senate Resolution 114. Resolution 230 sought to fund a study of traditional and customary rights, which would be directed by the William S. Richardson School of Law at the University of Hawai'i at Manoa, in consultation with the community-at-large. The resolution requested the inclusion of *'Ilio'ulaokalani* and student groups representing Native Hawaiian and other local interests. After being introduced, the Speaker referred the resolution to the Senate Committee on Water, Land, and Hawaiian Affairs. Co-Chairs Randy Iwase and Malama Solomon did not schedule the resolution for a hearing, and it died in committee.

Although Article XII, Section 7 allows for some regulation of traditional and customary use rights, the debate over the necessity and compatibility of such regulation with local interests, culture, and law continues.[222] In light of the unsettled nature of this issue, an analysis of SB 8 and HB 1920 provides insight on what elements of regulation, if any, are acceptable and workable.

V. ANALYZING SB 8 AND HB 1920

Although SB 8 and HB 1920 used different methods to regulate Native Hawaiian rights, these bills embodied many of the same concepts and utilized

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[221] The DBEDT took action on HR 197 by appointing fifteen individuals representing Native Hawaiian, environmental, development, title, and State and County interests to a *PASH* study group (current members include: Nathan Aipa, Denise Antolini, Paul Brewbaker, Dan Davidson, David Forman, Virginia Goldstein, Walter Heen, Victoria Holt-Takamine, Davianna McGregor, Frances Mossman, David Pietsch, Hannah Springer, William Tam, Dean Uchida, and Bill Yuen). Telephone interview with Denise Antolini, *PASH* Study Group Member (Sep. 14, 1997). This assembly began meeting on July 25, 1997 and is hoping to: 1) determine if traditional and customary rights are a "problem" and if so, the scope of the problem, and 2) devise a range of dispute resolution models effective in addressing the issue. *See id.* The group began presenting its findings to various communities around the islands beginning in October, 1997. *See id.* The group also submitted findings to the state legislature twenty days before the start of the 1998 session. *See id.*

[222] The State's power to regulate the exercise of traditional and customary rights is limited. *See infra* note 260 and accompanying text.

similar definitions and conditions. The following section analyzes the bills' restriction to Native Hawaiians, restriction to *ahupua'a* tenants, definition of development, and method of proving customary usage before comparing the administrative and judicial adjudication of claims. SB 8 and HB 1920 will be simultaneously examined to determine whether they are: 1) constitutional; 2) in compliance with HRS 1-1 and 7-1; and 3) socially and culturally appropriate.

The three criteria selected for analysis enable a thorough investigation of the bills by considering the effects and implications of federal laws as well as principles unique to Hawai'i. These criteria also factor in the practical effects of current regulatory efforts. Beyond the legal issues, this analysis examines SB 8 and HB 1920 to determine if they are workable, affordable, and appropriate.

A. Restriction to Native Hawaiians

Senate Bill 8 and HB 1920 limited the "legal" exercise of traditional and customary practices to ethnic Hawaiians.[223] Because Article XII, Section 7 of Hawai'i's Constitution protects the rights of "descendants of Native Hawai-

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[223] The restriction to Native Hawaiians predicated SB 8 and HB 1920 on a racial or ethnic distinction subjecting the bills to Equal Protection challenges under the State and Federal Constitutions. The United States Supreme Court ruled that any explicitly race-based state action is subject to strict judicial scrutiny. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). In *Adarand Constructors, Inc. v. Pena,* the Court went further in holding that "all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny." 515 U.S. 200 (1995). The State of Hawai'i would thus have to prove that the bills are "narrowly tailored measures" necessary to achieve a "compelling governmental interest." *Id.*

The State may assert that because Native American groups have a distinct political status, state, or federal governments need only provide a rational as opposed to compelling governmental objective for utilizing a Native American classification. *See* Morton v. Mancari, 417 U.S. 535 (1974)(ruling that reasonable and rationally designed actions targeting a political class are not invidious racial discrimination). Moreover the State may argue that because the Hawai'i Supreme Court recognized that Native Hawaiians have a unique political status, use of this classification is exempt from strict judicial scrutiny. *See* Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327, 640 P.2d 1161 (1982)(analogizing Native Hawaiian status to that of other Native Americans). Despite this rationale, the State must also consider the fact that the Federal District Court in Hawai'i limited the use of Native Hawaiians' political status to efforts of the federal government or state actions under federal law. *See* Nali'ielua v. State of Hawai'i, 795 F. Supp. 1009, 1013 n.4 (D. Haw. 1990)(ruling that legislation granting preference to Native Hawaiians does not constitute invidious racial discrimiation), *aff'd,* 940 F.2d 1535 (9th Cir. 1991)(Mem.). *But see* Stewart Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians,* 106 Yale L.J. 537 (1996)(arguing that the trust relationship between American Indians and the US government does not apply to Native Hawaiians).

ians[,]"[224] this restriction comported with the language of the state constitution. The legislative history of the Amendment and passages in *PASH*, however, contemplate the extension of traditional and customary rights to non-Hawaiians.[225]

Although the text and judicial interpretations of Article XII, Section 7 provide Native Hawaiians with an independent legal basis for traditional and customary rights, the legislative history also expressed the notion that non-Hawaiians may exercise certain customs and uses.[226] While discussing which rights vested in ethnic Hawaiians as opposed to non-Hawaiians, Frenchie De Soto, Chair of the Constitutional Convention's Committee on Hawaiian Affairs, noted that "any right enjoyed by a Native Hawaiian is also truly enjoyed by those who are non-Hawaiian. If you are fortunate enough to marry a Hawaiian, certainly you may follow her right down to the beach."[227] Although Article XII, Section 7 of the Constitution provides special protection for traditional and customary uses exercised by ethnic Hawaiians, it does not foreclose non-Hawaiians from exercising protected uses.[228] Senate Bill 8 and HB 1920's reservation of customary rights for Native Hawaiians therefore incorporated the narrowest possible view of Article XII, Section 7 and opened themselves to constitutional challenge.[229]

Furthermore, neither HRS 1-1 or 7-1 specify that only Native Hawaiians are eligible to claim traditional and customary rights under either statute.[230] For

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[224] *See Ahuna*, 64 Haw. at 327, 640 P.2d at 1161.

[225] *See Hearings on S. 8, Relating to Land Use*, 19th Leg., 1st Reg. Sess. 3 (1997)(testimony of David Lane Henkin, Attorney, Earthjustice Legal Defense Fund)[hereinafter *SB 8 Hearing*]. Henkin explained that "*PASH/Pilago* left the door open to the assertion of traditional and customary rights by 'descendants of citizens of the Kingdom of Hawai'i who *did not* inhabit the Hawaiian islands prior to 1778 or by other non-Hawaiians." *Id.* (emphasis in original). Professor Williamson B.C. Chang confirmed this position noting, "The Hawai'i Supreme Court has not confined the benefits of native Hawaiian rights to native Hawaiians as a race or ethnic group." *See SB 8 Hearing*, *supra* at 1 (testimony of Williamson B.C. Chang, Professor of Native Hawaiian Rights, Univ. of Haw. at Manoa, William S. Richardson Sch. of Law).

[226] *See* COMM. OF THE WHOLE DEBATES, *reprinted in* 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1978 at 436 (1980).

[227] *Id.* In light of the Hawai'i Supreme Court's clarification of Article XII, Section 7 in *PASH*, the class of non-Hawaiian individuals enabled to practice traditional and customary rights is arguably broader than those persons married to Native Hawaiians. *See infra* notes 233-34 and accompanying text.

[228] *See supra* note 225 and accompanying text.

[229] Exactly which individuals are eligible to exercise traditional and customary rights is unclear. Although the class of possible practioners is arguably larger than individuals married to Native Hawaiians, that class is not without limitation. Some Native Hawaiian scholars and practitioners advocated limiting the class to individuals with a minimal level of training and expertise. *See infra* note 253 (statement by Davianna McGregor).

[230] *See* Chang, *supra* note 225, at 1. Professor Chang characterized SB 8's limitation to Native Hawaiians as "a fundamental misreading of the State Supreme Court's interpretation of

example, HRS 1-1 protects *customs* established by Hawaiian usage. Arguably, persons of various ethnic or racial backgrounds could exercise uses protected by that statute, if the custom was established in practice by November 25, 1892.[231]

In 1892, citizens of numerous ethnic and national extractions inhabited the Hawaiian Kingdom. Regardless of their descent, subjects of the Hawaiian Kingdom may therefore have practiced, if not established, usage now considered traditional and customary.[232] In *PASH*, the court declined to limit the exercise of customary rights to Native Hawaiians and refused to decide whether descendants of citizens of the Kingdom of Hawai'i who were not of Native Hawaiian extraction could assert rights under HRS 1-1.[233] The court also "expressly reserved comment" on whether Article XII, Section 7 protected the rights of non-Hawaiian members of an *'ohana*.[234] Senate Bill 8 and HB 1920 therefore created a limitation that the State of Hawai'i's highest court, charged with interpreting the constitution, repeatedly declined to impose.[235]

The practical effects of limiting traditional and customary uses to Native Hawaiians would have severely limited the cultural practices of many island residents.[236] Mixed-race families could no longer legally engage in whole-group outings, as both bills precluded non-Hawaiian members from participat-

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section 1-1 and section 7-1. The Hawai'i Supreme Court has never reserved particular rights only to native Hawaiians." *Id.*

[231] The Hawai'i Supreme Court ruled that a use must be established in practice by November 25, 1892, to be considered traditional and customary. *See* State of Hawai'i v. Zimring, 58 Haw. 106, 116, 566 P.2d 725, 732 n.11 (1977) (citations omitted). *See supra* Part I.D for additional explanation.

[232] For example, on Moloka'i, the hunting of deer introduced during the 1850's is considered traditional and customary by many Native Hawaiians, although it was not practiced in Hawai'i prior to the arrival of Captain Cook in 1778. Telephone Interview with Davianna Pomaika'i McGregor, Associate Professor in Ethnic Studies, Univ. of Haw. at Manoa (Dec. 18, 1997). Second, although feral pigs existed in Hawai'i in pre-contact times, it is questionable whether they were "hunted" in the method commonly practiced today. *Id.*

[233] *See* Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm., 79 Hawai'i 425, 449, 903 P.2d 1246, 1270 n.41 (1995).

[234] *See id.*

[235] *See* Henkin, *supra* note 225, at 3. Citing *PASH*, Henkin noted "to be consistent with the traditional practice of *hanai* and the Aloha Spirit, practitioners who are associated with native Hawaiians by marriage, adoption or other close relationship should enjoy the same protection as those who can trace their genealogies back to 1778." *Id.*

[236] Telephone Interview with Davianna Pomaika'i McGregor, Associate Professor in Ethnic Studies, Univ. of Haw. at Manoa (Apr. 24, 1997). Professor McGregor explained that in many rural communities (*i.e.*, Hana, Maui; Puna, Hawai'i; Moloka'i; Windward O'ahu), "most people are touched by traditional and customary practices in one way or another, even though they don't participate directly." *Id.* Additionally, on neighbor islands, most people (including non-Hawaiians) continue these practices. *See id.*

ing. In addition, local residents who enjoy traditional pastimes like fishing or *lei* making would not have their practices protected as a matter of right.[237] Finally, non-Hawaiians trained in Hawaiian customs, such as the *hula*, could not lawfully gather the items necessary for their continued practice.[238]

Supporters of the bills argued that clear guidelines were necessary for regulation.[239] Their argument seems to suggest that lawmakers need to determine who is entitled to continue customary practices in order to avoid conflict and confrontation between landowners and practitioners.[240] Proponents of the bills may claim that a restriction to ethnic Hawaiians is appropriate because these traditions are rooted in Hawaiian culture. Yet, this line of reasoning fails to consider other methods of preventing the ingenuine exercise of custom, like managing the *use* as opposed to the *user*.

B. Restriction to Ahupua'a Tenants

Senate Bill 8 and HB 1920 also limited the exercise of traditional and customary uses to *ahupua'a* tenants.[241] Although this reservation is arguably

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[237] *See Hearing on HB 1920, Relating to Land Use*, 19th Leg., 1st Reg. Sess. 1 (Haw. 1997) (testimony of Victoria Holt Takamine, *Kumu Hula*, Pua Ali'i Ilima) (noting that some non-Hawaiian practitioners must be allowed to practice as a matter of right or "some of our most valuable retainers and practitioners of Hawaiian culture, along with the knowledge they acquired, would be lost to us") [hereinafter Holt-Takamine, *HB 1920 Testimony*].

[238] *See SB 8 Hearing*, *supra* note 225, at 1 (testimony of Victoria Holt Takamine, *Kumu Hula*, Pua Ali'i Ilima)[hereinafter Holt-Takamine, *SB 8 Testimony*]. Holt-Takamine explained that due to increasing development "many of the areas that provided the materials for native Hawaiian cultural practices are now either eliminated or inaccessible," and practitioners are forced to seek out new gathering places. *See id.* These practitioners would be unable to trace continued use to 1892 and thus ineligible to petition for and register their uses. Holt-Takamine further related the negative impacts SB 8 would have on her *hula halau*, especially non-Hawaiian *hula* students. *See id.*

[239] *See HB 1920 Hearing*, *supra* note 237, at 2 (testimony of David T. Pietsch, Executive Vice President, Title Guaranty of Hawai'i)(noting that clear guidelines and a definition of rights are necessary to alleviate uncertainty).

[240] *See id.* Pietsch expressed an interest in working to establish guidelines for "a defined and efficient system in order to determine and resolve any differences as to the existence, nature and location of such Native Rights . . . . Additionally, the failure to clarify the rights and responsibilities of the native Hawaiians and the land owners will lead to conflict and confrontation between them[.]" *Id.*

[241] Although both bills limited the exercise of traditional and customary practices to *ahupua'a* tenants, HB 1920 used the term "lawful occupants" of an *ahupua'a*. *See* H.R. 1920 Section 2, § 2, at 4. The *Kalipi* decision utilized this phrase in reference to permanent (as opposed to temporary) residents of an *ahupua'a*. This specific term is notable because visitors as well as renters—as opposed to landowners—are arguably ineligible to continue traditional uses if considered temporary residents. *See* Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 8, 656 P.2d 745, 749-50 (1982).

consistent with Article XII, Section 7's phrasing, "tenants of an *ahupua'a*," any complete examination of the limitation must consider the legislative history of the Amendment. The drafters of Article XII, Section 7 sought to "preserve the small remaining vestiges of a quickly disappearing culture"[242] and "did not intend to have the section narrowly construed or ignored by the courts."[243]

The Hawai'i Supreme Court is responsible for interpreting the state constitution.[244] In *Pele*, the court held that "rights protected by Article XII, Section 7 may extend beyond the *ahupua'a* in which a Native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner."[245] Senate Bill 8 and HB 1920, therefore, contradict both the legislative history and the court's interpretation of Article XII, Section 7, which expanded traditional rights to non-resident tenants of an *ahupua'a*.[246]

Additionally, neither HRS 1-1 or 7-1 contain any limitation to *ahupua'a* tenants.[247] As discussed above, HRS 1-1 protects established *uses* independent of residency. Any confusion over this issue was clarified in *Pele*, and later affirmed in *PASH*, when the Hawai'i Supreme Court sanctioned the exercise of traditional and customary rights by non-tenant occupants of an *ahupua'a*.[248] Likewise, HRS 7-1 protects rights of access, gathering, and water, without a residency requirement.[249] House Bill 1920 and SB 8's limitation of traditional and customary rights to *ahupua'a* tenants therefore imposed conditions

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[242] STAND. COMM. REPORT, *reprinted in* 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1978 at 640 (1980).

[243] *Id.* Article XII, Section 7's legislative history clearly exhibits the drafter's intent to recognize and protect traditional and customary uses. In light of this background, the State's ability to use its regulatory authority to unilaterally restrict the exercise of these rights is questionable.

[244] Interview with Jon Van Dyke, Professor of Constitutional Law, Univ. of Haw. at Manoa, William S. Richardson Sch. of Law, in Honolulu, Haw. (Sept. 17, 1997)(explaining that state supreme courts have primary responsibility for interpreting state constitutions). *See generally* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 1.6C (4th ed. 1991)(notes on review of state laws).

[245] Pele Defense Fund v. Paty, 73 Haw. 578, 620, 837 P.2d 1247, 1272 (1992).

[246] *See SB 8 Hearing, supra* note 225, at 3 (testimony of Malia Akutagawa, Native practitioner and lawyer specializing in Native Hawaiian rights). Akutagawa traced the expansion of Native Hawaiian rights from *Kalipi* and *Pele* to *PASH*. *See also* Part II.B *infra*, highlighting the fact that in *PASH* the Court "stated that any Hawaiian shall have a right to exercise traditional and customary practices on lands that are 'less than fully developed' regardless of *ahupua`a* tenancy." *Id.*

[247] *See supra* Part I.C for full text of HRS section 1-1 and section 7-1.

[248] *See Pele*, 73 Haw. at 620, 837 P.2d at 1272.

[249] *See supra* Part I.C for full text of HRS section 7-1.

inconsistent with the text and judicial interpretations of both statutory provisions.[250]

Bill supporters again responded that guidelines were necessary to resolve disagreements over legitimate exercises of customary rights.[251] Furthermore, those supporters heavily relied on the fact that *Kalipi* utilized a residency requirement to prevent abuse of such rights. Specifically, the *Kalipi* decision noted that the "extension of these rights to absentee landlords would be contrary to the intention of the framers in that the right would thereby be spread to those whose only association with the *ahupua'a* may be by virtue of an economic investment."[252] Despite this reasoning, *Pele* clarified *Kalipi* to accommodate the established practices of community access or gathering beyond the boundaries of the *ahupua'a* on the basis of HRS 1-1.[253]

Finally, the social and cultural impacts of a restriction to *ahupua'a* tenants are enormous.[254] The rapid rate of development combined with the tendency to focus urban growth in certain sections of an island resulted in the complete development of some *ahupua'a*, while others remain relatively untouched. Under SB 8 and HB 1920, Native Hawaiians living in fully developed areas like Honolulu were unable to legally exercise *any* traditional and customary rights. Because contemporary *ahupua'a* do not provide all of the products necessary to further subsistence, religious, and cultural practices, many practitioners go outside of their communities to gather necessary products.[255]

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[250] This Comment does not suggest that traditional and customary rights may be exercised in an unlimited fashion. Although the specifics of this issue may not be narrowly construed by the courts, communities may and do impose their own forms of regulation. *See supra* note 229.

[251] *See supra* notes 239-40.

[252] Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 8, 656 P.2d 745, 750 (1982).

[253] *See SB 8 Hearing*, *supra* note 225 (testimony of Davianna Pomaika'i McGregor, Associate Professor in Ethnic Studies, Univ. of Haw. at Manoa, expert witness in *Pele*). Professor McGregor stated that gathering and access rights must be examined in the context of the traditions and customs perpetuated in specific communities. She further explained that in some rural communities, gathering practices span several *ahupua'a* within a *moku*. Professor McGregor finally noted that the scope of gathering rights was expanded in *Pele* because that was the practice in Puna (the district where the case took place). *See id.*

[254] *See HB 1920 Hearing*, *supra* note 237 (testimony of Davianna Pomaika'i McGregor, Associate Professor in Ethnic Studies, Univ. of Haw. at Manoa, Expert witness in *Pele*)[hereinafter McGregor, *HB 1920 testimony*]. Professor McGregor gave extensive oral testimony on the negative impacts of this regulation on native practitioners, noting in her written testimony that "subsistence is a very important sector of Hawai'i's economy. . . . The Moloka'i Subsistence Study found that on Moloka'i, 28% of the diet of all the families comes from subsistence activities, and for Hawaiian families, 38% of their diet comes from subsistence." *Id.* at 3. The impact of not being able to legally continue those practices would be significant both on Moloka'i, and elsewhere in the islands.

[255] *See* Holt-Takamine, *HB 1920 Testimony*, *supra* note 237, at 1 (Holt-Takamine explaining that some resources are only available in certain *ahupua'a*, and that the bills' restriction to *ahupua'a* tenants were both "ridiculous" and contrary to historical practice).

In addition, some communities, as the Hawai'i Supreme Court recognized in *Pele*, traditionally exercised customary rights beyond the boundaries of the *ahupua'a* where they reside.[256] To now utilize the concept of *ahupua'a* to limit the exercise of traditional and customary uses is a legal fiction that misconstrues pre-contact understandings and ways of living.

In addition, many Native Hawaiians moved to urban areas seeking employment or housing.[257] In the event that those individuals go back to the areas they grew up in, or visit family on other islands, they would not be eligible to join family members in customary practices.[258] Senate Bill 8 and HB 1920 did not address or account for these problems.

C. The Definition of "Development"

Senate Bill 8 and HB 1920 restricted the exercise of traditional and customary uses to undeveloped land. Both bills utilized similar definitions, allowing the continuity of custom only on parcels where 1) no structures exist, 2) no improvements were made, and 3) no grading or grubbing occurred.

First, although Article XII, Section 7 authorizes the State to "regulate" traditional and customary uses, the legislative history explains the reasons for and extent of the State's authority. Contrary to the idea that the State may callously regulate any exercise of customary rights, the Amendment was actually added in response to actions by "private landowners, large corporations, ranches, large estates, hotels and government entities,"[259] which interfered with the exercise of traditional and customary rights. In light of those constraints, "reasonable regulation [wa]s necessary to prevent possible abuse *as well as interference* with these rights."[260]

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[256] Telephone Interview with Davianna Pomaika'i McGregor, Associate Professor in Ethnic Studies, Univ. of Haw. at Manoa, expert witness in *Pele* (Dec. 18, 1997). For example in Pelekunu and Wailau on the island of Moloka'i, members of the community went beyond the *ahupua'a* to Kaluako'i in order to catch and prepare fish for the winter months. *See id.*

[257] *See HB 1920 Hearing*, *supra* note 237 (testimony of Kawika Liu, Attorney, Winer and Meheula). Liu highlighted the fact that many Native Hawaiians are exercising traditional and customary practices in "new areas." "[T]he disease and alienation imposed by foreigners has forced the majority of *Kanaka Maoli* to move away from their ancestral lands, and to practice their customs where they find themselves living." *Id.* at 3.

[258] *See SB 8 Hearing*, *supra* note 225, at 1 (testimony of Ilima Morrison, Univ. of Haw. Law Student Class of 1998)(opposing SB 8 in part because "Hawaiians who exercise the right to live in a new *ahupua'a* must give up their full range of rights under State law").

[259] STAND. COMM. REPORT, *reprinted in* 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1978 at 639 (1980).

[260] *Id.* (emphasis added). In light of the legislative history to the amendment, the State's power to regulate traditional and customary uses is arguably limited to (1) protecting landowners against the abuse of rights, and (2) preventing landowners from interfering with the exercise of rights. *See supra* Part III.A.

Opponents of the bills may respond that although the State is empowered to regulate the exercise of Native Hawaiian rights it may do so only to address potential or actual abuse.[261] Because proponents of the bill never conclusively established any such abuse, HB 1920 and SB 8 exceeded the State's regulatory authority.[262] Proponents of the bills might reply that individual entitlements to exercise traditional and customary rights need to be explored because difficulty in securing title insurance and other complications in selling their property amount to abuse.[263]

Second, neither HRS 1-1 or 7-1 restrict the exercise of traditional and customary practices to undeveloped land.[264] The Hawai'i Supreme Court in *Kalipi* expressly acknowledged that the undeveloped land limitation "is not, of course, found within the statute [HRS 7-1]."[265] Yet the court created that

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[261] *See SB 8 Hearing*, *supra* note 225 (testimony of Isaac Moriwake, Univ. of Haw. Law Student Class of 1998)(highlighting the fact that the State power to regulate traditional and customary uses under Article XII, Section 7, should be exercised in a manner consistent with its legislative history).

[262] Several interest groups presenting testimony in opposition to the bills questioned the need for regulation. In their testimony opposing HB 1920, Hawai'i's Thousand Friends questioned the need for regulatory efforts, and instead suggested that title insurance companies take action to mitigate their concerns. "We do not see how these problems get laid at the doorstep of the *PASH* decision. How many 'instances' have occurred and how was it determined that the *PASH* decision is responsible?" *See HB 1920 Hearing*, *supra* note 237, at 1 (testimony of Hawai'i's Thousand Friends, community action group). David Frankel of the Sierra Club likewise questioned the need for regulation in absence of proof of the negative impacts of traditional and customary uses, stating "[s]upporters cannot point to a single case where the *PASH/Kohanaiki* case has prevented a bank from making a loan." *See HB 1920 Hearing*, *supra* note 237, at 1 (testimony of David Kimo Frankel, Sierra Club - Hawai'i Chapter).

[263] Almost all testimony presented in support of the bills mentioned that the "uncertainty" of the *PASH* decision constrained their ability to either develop, sell, obtain title insurance, or secure loan guarantees for their property, and urged regulation of some kind. *See SB 8 Hearing*, *supra* note 225, at 1 (testimony of Kealakekua Dev. Corp., landowner/developer) ("As we have made a substantial long term investment in our land in Hawai'i, it is only fair that private property rights as well as our project plans are protected from the recent *PASH* decision. We are extremely concerned that our investment, future project plans and the ability to get financing are in great jeopardy."); *HB 1920 Hearing*, *supra* note 237, at 1 (testimony of Waikoloa Land Co., developer) ("The recent *PASH* decision has created uncertainty on the part of title companies and lenders and is having a chilling effect on capital investment in real estate in Hawai'i."); *HB 1920 Hearing*, *supra* note 237, at 1 (testimony of Dan Davidson, Executive Director, Land Use Research Foundation) ("There is serious concern among landowners and developers as to their ability to plan, finance, and seek approvals for their projects without such a mechanism."). *See also infra* notes 270-71 and accompanying text.

[264] *See HB 1920 Hearing*, *supra* note 237, at 3 (testimony of Moses Haia, Attorney, Native Hawaiian Advisory Council)(opposing HB 1920, in part, because the extinguishment of rights on "fully developed" land "flies in the face" of Article XII, Section 7 and HRS sections 1-1, 7-1).

[265] Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 8, 656 P.2d 745, 750 (1982).

limitation to avoid conflict between practitioners and landowners.[266] More recently, the court in *PASH* declined the "temptation to place undue emphasis on non-Hawaiian principles of land ownership[,]"[267] electing "not to scrutinize the various gradations in property use that fall between the terms 'undeveloped' and 'fully developed.'"[268] Instead, the court emphasized the need to make determinations on a case-by-case basis.[269]

Opponents of the bills therefore argued that the standardized definitions for "fully developed" and "undeveloped" failed to reflect the court's ruling that those decisions must be made on a case-by-case basis. Bill supporters responded that the absence of a clear definition of "fully developed" clouds title ownership to land.[270] They warned that if landowners are uncertain about whether their parcels are subject to traditional and customary uses this "uncertainty" could discourage investment by parties unfamiliar with the exercise of such uses in Hawai'i.[271]

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[266] *See id.*

[267] Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 450, 903 P.2d 1246, 1271 (1995).

[268] *Id.*

[269] *See id.* at 451, 903 P.2d at 1272.

[270] Much of the testimony in opposition to the bills mentioned that the unresolved nature of traditional and customary rights following *PASH* clouds land title. *See, e.g., HB 1920 Hearing, supra* note 237 (testimony of Gary Oliva, Senior Legal Counsel, Estate of James Campbell). "The *PASH* decision raises issues for all owners of property in Hawai'i . . . . These uncertainties have created title difficulties which will seriously limit efforts to use land for agriculture, development or any significant economic use. It will make it difficult if not impossible in many cases, to insure titles, and to finance or obtain mortgages." *Id.* at 1.

[271] When the Hawai'i Supreme Court issued the *PASH* decision, land title and development interests in the islands voiced sharp criticism. These groups disapproved of the potential "uncertainty" the decision might impose on the land use approval process. Dan Davidson, The *PASH* Decision: it's Potential Impact Upon Hawai'i's Land Use Approvals Process 61 (Dec. 8, 1995)(unpublished manuscript prepared for a Hawai'i Institute for Continuing Legal Education Seminar, on file with author) [hereinafter *Potential Impact*]. Title insurance companies and lenders expressed apprehension that individuals would "use" the rights articulated in *PASH* to impede development, thereby chilling investment in Hawai'i. Telephone interview with John Jubinsky, Title Guaranty of Hawai'i (Aug. 12, 1997); Telephone interview with Ron Schmid, Exec. Vice Pres., Bank of Hawai'i (Aug. 13, 1997). Development interest groups also raised concerns about the decision's impact on tourism, added difficulty in securing title insurance and financing, and negative impacts on investment capital. *See* Davidson, *Potential Impact, supra* at 61.

In the two years since the court issued the decision, these fears failed to manifest on the grandiose scale predicted. Lenders and title insurance companies explain that Hawai'i's current "economic doldrums" created a period of low development. *See* Jubinsky, *supra* this note. *See also* Schmid, *supra* this note. Therefore, they claim the true effect of the decision has not yet been realized. *See id.*

For the most part, title insurance companies deal with the application of the *PASH* decision on a case-by-case basis, except with regard to residential or developed land, which are not

Finally, the social and cultural impacts of using the proposed definition of development are extensive.[272] If land is considered "developed" when grading, grubbing, or building permits are issued or walkways exist, many areas where traditional and customary uses are now exercised, without harm, will become legally unavailable. Instead of targeting problematic uses, SB 8 and HB 1920 summarily eliminate all uses in a given area, regardless of effect. As explained in the section above, this limitation also disproportionately impacted practitioners living in urban areas.

D. Proving Traditional and Customary Usage

The methods SB 8 and HB 1920 employed to establish a traditional and

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clearly subject to traditional and customary rights. *See* Jubinsky, *supra* this note. Although *PASH* rights are viewed as a potential cloud on title, individuals continue to request insurance in spite of the possibility of future traditional and customary claims. *See id.* Title insurance companies must therefore examine each application for potential claims and weigh the likelihood that they will be exercised.

In addition, title insurance companies generally deal with traditional and customary rights as an exception to title. *See id.* Thus, insurance is provided, but any claims arising under traditional and customary rights are excluded from coverage. *See id.* Although insurance is available, the possibility of future customary claims is a disincentive to many buyers and lenders. *See id.* As one title insurance executive remarked, the *PASH* decision does not affect the ability to insure, "the question is will lenders lend and will buyers buy?" David Pietsch, Executive Vice President, Title Guaranty of Hawai'i, Address at Hawai'i Developers Council forum on Perfect Title (Jul. 24, 1997).

In roughly twenty-five or thirty insurance applications reviewed by Title Guaranty with respect to the *PASH* decision at the time of this interview, only four or five were rejected, about ten or twelve were endorsed, and the remainder have not been concluded. *See* Jubinsky, *supra* this note. While state-wide statistics are not available, Title Guaranty's experience represents the general condition of the title industry.

Ron Schmid, Executive Vice President of Bank of Hawai'i, explained that his company has not denied any loans for residential properties due to *PASH*. *See* Ron Schmid, Executive Vice President, Bank of Hawai'i, Address at Hawai'i Developers Council forum on Perfect Title (Jul. 24, 1997). After stating that "*PASH* has not had a dramatic effect," he noted that with regard to commercial property, Bank of Hawai'i has not had many opportunities to review the issue due to a declining interest in development. *See id.*

Why potential investors have refused to invest in Hawai'i is yet unestablished and could be associated with any number of variables. The absence of a comprehensive study on this issue fails to support or deny the speculation that the *PASH* decision is responsible for Hawai'i's decline in investment appeal. Until such documentation is available, development interests will continue to seek some method to resolve the "substantial uncertainty" about customary rights, while practitioners search out ways to continue their traditions.

[272] *See* Akutagawa, *supra* note 246, at 4 (opposing the definition because it "serves to hinder Hawaiian custom to the point of extinguishing it").

customary use are difficult to reconcile with Article XII, Section 7.[273] The requirement of identifying rights with respect to a specific parcel of land conflicts with the legislative history of the constitutional provision classifying traditional and customary uses as "personal" rights.[274] Like the freedom of speech and other fundamental rights, "[r]ather than being attached to the land, these rights are inherently held by Hawaiians and do not come with the land."[275] Because the legislature did not require all residents to register their inherent rights, SB 8 and HB 1920 singled out Native Hawaiians and imposed special hardships on them as a class.[276]

The requirement of tracing actual use to 1892 is also a questionable interpretation of HRS 1-1.[277] Although the Hawai'i Supreme Court determined that a custom must be established by 1892 in order to ensure protection, it did not contemplate or require documentation of the use in question to that date.[278] It is therefore legally consistent with HRS 1-1 to prove that a custom was generally established in practice prior to 1892 without being site-specific.

Due in part to the way Hawaiian society incorporated Western concepts of private property, the Hawai'i Supreme Court recognized that the right "to exercise traditional and customary practices remains intact notwithstanding arguable abandonment of a particular site."[279] In addition, the court established a three-point test for the doctrine of custom in Hawai'i requiring that: 1) a custom be *consistent* when measured against other Hawaiian customs; 2) a practice be *certain* in an objective sense; and that 3) a traditional use be exercised in a *reasonable* manner.[280] Defining the reasonable use requirement, the court further explained that the balance leans in favor of establishing a use in the sense that "even if an acceptable rationale cannot be assigned, the custom is still recognized as long as there is no 'good legal reason' against it."[281] Senate Bill 8 and HB 1920's requirements for establishing a traditional

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[273] *See* Chang, *supra* note 225, at 1 (characterizing the registration and demonstration requirements as a "fundamental misunderstanding of native Hawaiian rights").

[274] *See* STAND. COMM. REPORT, *reprinted in* 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1978 at 639 (1980).

[275] *Id.*

[276] *See* Chang, *supra* note 225, at 1-2 (pointing out that "[l]egislation that is openly directed at burdening a specific race or ethnic group has always been the most invidious in American history," subjecting the legislation to equal protection challenges).

[277] *See* Akutagawa, *supra* note 246, at 4 (opposing SB 8, in part because the definition of traditional and customary as pre-dating 1892 was "legally improper and inconsistent with judicial analysis").

[278] *See* State of Hawai'i v. Zimring, 58 Haw. 106, 116, 566 P.2d 725, 732 n.11 (1977).

[279] Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 450, 903 P.2d 1246, 1271 (1995).

[280] *See id.* at 447, 903 P.2d at 1268 n.39 (emphasis added).

[281] *Id.*

use, namely tracing site specific use to 1892, fail to comport with the three-point test and are therefore inconsistent with the current law.[282]

The social and cultural impacts of establishing that a use was traditional and customary only added to the difficulty of the proposed process. Native Hawaiian culture is based on oral traditions. Yet, use of the Hawaiian language was discouraged from the 1800's into the twentieth century, and many Hawaiians are now unable to speak their native tongue.[283] Due in part to this loss of language, few Native Hawaiians can trace their genealogy to 1778.[284] In addition, because the traditions were oral, few if any maintained the written documentation which the bills would have required. This lack of written documentation, when combined with the loss of language, creates a situation in which many Hawaiians cannot make use of the few written sources that remain available.

Due in large part to development, many families moved from their original *kuleana*, if they ever received one, and cannot establish use of a specific parcel to 1892. In pre-contact society, *maka'ainana* were "free to leave and take up residence in another *ahupua'a*, thereby transferring their vested rights, such as fishing, to a new area."[285] The continuous use and residency requirements imposed by SB 8 and HB 1920 are thus inconsistent with both Hawaiian history and the legislative intent of Article XII, Section 7, which classifies customary rights as "personal." Native Hawaiian rights are firmly rooted in Hawai'i's culture and history.[286] Legislators did not invent Article XII, Section 7 and HRS 1-1 and 7-1 on the eve of statehood or in the Constitutional Convention. These principles are the direct result of background principles of property law in these islands.[287] Current interpretations

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[282] *See* Akutagawa, *supra* note 246, at 2-3 (Akutagawa argued that SB 8 was "inconsistent with judicial precedents and statutory and constitutional guarantees," and asserted that it failed to comport with *Kalipi*, *Pele*, and *PASH*).

[283] Missionaries heavily promoted the use of English: adopting it as the language of instruction, closing Hawaiian language schools, and eventually adopting English as the only official language in 1896. *See* HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I 21, 81 (1993).

[284] Many Native Hawaiians who testified in opposition to the bills explained that they would not be able to provide proof of their Hawaiian descent prior to 1778. *See SB 8 Hearing*, *supra* note 225 (testimony Victoria Holt-Takamine, *Kumu Hula*, Pua Ali'i Ilima noting that she, like many others, cannot trace her geneaology to 1778).

[285] STAND. COMM. REPORT, *reprinted in* 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1978 at 640 (1980).

[286] *See HB 1920 Hearing*, *supra* note 237 (testimony of Hayden Aluli, Native Hawaiian rights attorney). Alului traced the evolution of Hawaiian rights from the institution of private property in Hawai'i—the Mahele of 1848—to the present day. *See id.* at 3-9.

[287] *See* COMM. OF THE WHOLE DEBATES, *reprinted in* 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1978 at 436 (1980)("The rights we wish to protect are listed statutorily. These traditional and customary rights did not fall out of heaven into our

must respect and reflect that unique history.

Supporters of SB 8 and HB 1920 responded that the expeditious resolution of claims requires objective criteria.[288] In light of the many unresolved issues in *PASH*, they argued for guidelines "which w[ould] permit those Native Hawaiians who rightfully possess these rights and all landowners to have a defined and efficient system in order to determine and resolve any differences as to the existence, nature and location of such Native Hawaiian Rights."[289] Arguably, some criterion are necessary to determine whether a use is customary, such as establishing continued usage on a specific site. But, according to proponents, this process of determination assumed that traditional and customary rights would not be available in the same extent as pre-contact society.[290] Those arguments are difficult to justify, however, in light of both legislative intent and judicial interpretation: the protection of traditional and customary rights is "necessary to insure the survival of those who in 1851, sought to live in accordance with the ancient ways. They thus remain, to the extent provided in the statute, available to those who wish to continue those ways."[291]

E. Comparing Administrative and Judicial Adjudication of Claims

1. SB 8's administrative resolution of claims

While SB 8 and HB 1920 employed many of the same concepts, their methods of regulation differed. Senate Bill 8 proposed that the Land Use Commission resolve Native Hawaiian claims and issue certificates if it were to determine that an applicant established a traditional and customary use.[292] Meanwhile, individuals could not legally exercise customary practices without

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laps while we were having committee deliberations."); *See HB 1920 Hearing*, *supra* note 237, at 2 (testimony of Alan Murakami, Attorney, Native Hawaiian Legal Corp., testifing that traditional and customary rights themselves "existed both before and after the creation of Hawai'i's system of private property in 1848").

[288] *See also HB 1920 Hearing*, *supra* note 237, at 2, (testimony of Robin Sagadraca, President, Hawai'i Land Title Association, explaining that guidelines should be developed to aid in the determination of whether a use is protected).

[289] Pietsch, *supra* note 239, at 2.

[290] *See also HB 1920 Hearing*, *supra* note 237 at 1 (testimony of Thos Rohr, President, Hawai'i Resort Developers Conference, noting that it is necessary to include "specific exclusions for lands to which claims are not appropriate").

[291] Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 439, 903 P.2d 1246, 1260 (1995)(quoting Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 8-9, 656 P.2d 745, 749-50 (1982)(citation omitted)).

[292] *See* SB 8 § 205B(a), at 4.

such a certificate.[293] The imposition of that condition would immediately alter the status and practice of traditional and customary rights, thus subjecting SB 8 to due process challenges.

Both the state and federal constitutions prohibit government bodies from denying citizens life, liberty, or property without due process of the law.[294] These provisions provide substantive guarantees that individuals will not be deprived of an interest without the opportunity to present a defense.[295] Procedural protections are also mandated to ensure that rights will not be unfairly divested.[296] The inability to legally exercise traditional and customary uses until a hearing is held, and the extinguishment of rights if a practitioner did not respond to or complete the claims process, would thus violate due process.[297]

In addition, the procedure for determining and registering traditional and customary rights did not provide adequate assurances that those rights would not be unjustly extinguished. In *Mathews*, the United States Supreme Court articulated a three-part test to determine the constitutional sufficiency of a process.[298] To satisfy this test, claimants must determine: 1) if private interests are at stake; 2) the risk of erroneous decisions compared with the probable value of additional safeguards; and 3) the scope of the government's interest.[299] Because the traditional and customary rights of Native Hawaiians are targeted by SB 8, the first element of the test is satisfied. Moreover, the Land Commission does not have sufficient expertise to consider the intricate legal and social principles necessary to determine whether a use is protected, which creates a significant risk of erroneous decisions, and satisfies the second prong of the *Mathews* test.[300] Although the government has an interest in protecting and regulating customary rights, the *possible* effect of recent court decisions did not create a government interest sufficient to justify the

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[293] *See id.*

[294] *See* U.S. CONST. amend. V; HAW. CONST. art. I, § 5.

[295] *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

[296] *See* Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

[297] *See Goldberg*, 397 U.S. at 261 (privileges may be terminated only after a hearing on the merits of a claim). Several individuals presenting testimony in opposition to SB 8 cautioned the Committee about due process violations. *See* Henkin, *supra* note 225, at 1 (opposing SB 8 due in part to due process concerns).

[298] *See Mathews*, 424 U.S. at 335.

[299] *See id.*

[300] *See also SB 8 Hearing*, *supra* note 225 (testimony of Esther Ueda, Chair, Hawai'i Land Use Comm.). Ueda presented oral testimony in opposition to SB 8 specifically stating that the Commission lacked both the resources and expertise to adjudicate contested case hearings on traditional and customary rights.

enormous fiscal and administrative burdens of the proposed process.[301] Since Native Hawaiians risk losing their traditional and customary rights permanently, a fair and expedited process is absolutely necessary.[302] Senate Bill 8's substantive and procedural inadequacies thus make it constitutionally unacceptable.[303]

In addition to due process, the Federal and State Constitutions also prohibit the taking of property without just compensation.[304] Property is considered "taken" if it is permanently and physically occupied by the government or regulated to a point where the landowner is deprived of all economically beneficial use of that parcel.[305] Landowners in Hawai'i may therefore argue that State protections for traditional and customary practices are equivalent to a regulatory taking.

In evaluating the takings argument, several factors must be considered. First, the right of practitioners to reasonably access and/or gather on a specific parcel of undeveloped land does not deprive an owner of "all economically beneficial use."[306] The Hawai'i Supreme Court first stated in *Kalipi*, and again noted in *PASH*, that "Article XII, Section 7 does not require the preservation"[307] of lands where traditional and customary practices occur. Since the protection of traditional and customary uses by the state constitution does not require that lands remain undeveloped, landowners cannot establish that Article XII, Section 7 deprives them of all beneficial use.[308]

Second, the United States Supreme Court recognized two situations that will never amount to a regulatory taking: 1) the regulation of nuisances; and 2) regulations that were "part of a state's background principles of real property."[309] Traditional and customary uses are the genesis of Hawai'i's

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[301] Despite the perceived impact of the *PASH* decision, testimony in opposition to SB 8 and HB 1920 failed to present statistics or studies conclusively establishing negative impacts resulting from the decision.

[302] *See* Henkin, *supra* note 225, at 1 (expressing concern that the procedure proposed to reconcile traditional and customary rights would result in depriving practitioners of their constitutional rights).

[303] *See id.*

[304] *See* U.S. CONST. amend. V; HAW. CONST. art. I, § 20.

[305] *See* David L. Callies, *After Lucas and Dolan: An Introductory Essay in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS 3-25 (David Callies ed., 1996).

[306] *See generally id.*

[307] Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 451, 903 P.2d 1246, 1272 (1995).

[308] *See* Chang, *supra* note 225, at 2-3 (testifying that traditional and customary rights could not amount to a regulatory taking).

[309] Callies, *supra* note 305, at 5.

background principles of real property.[310] Hawai'i Revised Statutes 1-1 and 7-1, and Article XII, Section 7 simply reflect concepts of pre-contact land tenure, codified by the Kingdom, Provisional Government, Territory, and now by the State of Hawai'i. Traditional and customary usage is not merely a background principle, it supersedes other Western principles of property in Hawai'i.[311] In holding that the recognition of traditional and customary rights did not constitute a judicial taking, the court in *PASH* explained that a takings claim placed "undue reliance on western understanding of property law that are not universally applicable in Hawai'i."[312] Finally, should the Land Use Commission modify or terminate traditional and customary practices, it would have to establish that such action was necessary to further a compelling state interest, or compensate practitioners for taking their traditional and customary rights.[313]

Article XII, Section 7 requires the State to reaffirm and protect "all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes[.]"[314] While this provision allows limited regulation,[315] "the State does not have the unfettered discretion to regulate the rights of *ahupua'a* tenants out of existence."[316] Because SB 8's definition of undeveloped land extinguished a practitioner's ability to continue practices on certain types of property, it blatantly contradicted the court's mandate of protection. In addition, the authorization of the Land Commission to terminate certain traditional and customary uses was equally inconsistent with the constitutional mandate.

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[310] *See* Chang, *supra* note 225, at 2 ("Hawai'i law has always incorporated traditional and customary law . . . . Thus, there is no question that the incorporation of Hawaiian values in the property law of this State has been the fundamental basis for the interpretation of property law.").

[311] *See* HAW. REV. STAT. § 1-1 (subordinating English and American common law to traditional and customary usage).

[312] *PASH*, 79 Hawai'i at 451, 903 P.2d at 1272.

[313] *See Relating to Land Use: Hearing on SB 8 Before the Senate Comm. on Water, Land and Hawaiian Affairs*, 19th Legis., 1st Reg. Sess. 9 (Haw. 1997)(testimony of Hayden Alului, Native Hawaiian rights attorney). Alului analogized traditional and customary rights to property interests, arguing that "[i]n its purported attempt to 'regulate' these native tenant and native Hawaiian rights, it [the legislative proposal] actually takes them by relegating them to mere privileges and/or licenses. And that is an unconstitutional taking." *Id.* There is currently an ongoing discussion on the status of traditional and customary rights. Neither the court nor the community decided whether to categorize these rights as "personal" or "property."

[314] HAW. CONST. art. XII, § 7.

[315] *See supra* notes 259-60 and accompanying text.

[316] *PASH*, 79 Hawai'i at 451, 903 P.2d at 1272.

The social and cultural impacts of SB 8's method of regulating traditional and customary uses were also administratively burdensome and expensive.[317] The fiscal and logistical burdens of administering the registration process are colossal if *every* Native Hawaiian registered *every* right that she or he exercises with respect to *every* piece of property affected. If each Hawaiian petitioned for five or ten uses, the Commission would have to adjudicate hundreds of thousands of contested case hearings. Should either the practitioner or landowner have had to appeal the Commission's decision to the courts through the Hawai'i Administrative Procedure Act,[318] this process of gaining "assurance of title" would be even more arduous.

It was also questionable whether the Land Commission was the proper body to adjudicate claims.[319] One of the Commission's directives is to "preserve, protect and encourage the development of land . . . for . . . uses for which they are best suited."[320] Since SB 8 limited Native Hawaiian rights to undeveloped land, the registration and preservation of those rights would pose a serious conflict of interest for a Commission directed with facilitating development. At the February 4 hearing, Esther Ueda, Chair of the LUC, testified in opposition to SB 8, explaining that the Commission lacked the budget and expertise to adjudicate traditional claims.[321]

Finally, the need to register all customary rights is questionable.[322] Not all landowners view traditional and customary rights as an encumbrance on title or wish to know what, if any, uses practitioners are exercising on their property. Instead of assuming the time and expense of the registration process proposed by SB 8, it is more appropriate to place the burden of establishing the non-existence of traditional and customary uses on landowners seeking such clarification.

2. *HB 1920's judicial resolution of claims*

House Bill 1920's creation of a judicial cause of action as opposed to a registration scheme, subjected it to the same constitutional challenges as SB

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[317] *See* Holt-Takamine, *SB 8 Testimony*, *supra* note 238, at 1 (cautioning about excessive burden and expense).

[318] *See supra* note 181 for a description of HRS section 91.

[319] *See SB 8 Hearing*, *supra* note 225, at 2, (testimony of Denise Antolini, Casey Jarman, and Malia Akutagawa, Univ. of Haw. Envtl. Ctr., questioning the propriety of the Commission to adjudicate customary claims).

[320] Perry v. Planning Comm'n of County of Hawai'i, 62 Haw. 666, 674-75, 619 P.2d 95, 102 (1980)(citing section 1 of Act 187: findings and declaration of purpose).

[321] *See* Ueda, *supra* note 300.

[322] *See HN 1920 Hearing*, *supra* note 237, at 2 (testimony of Kina'u Boyd Kamali'i, Native Hawaiian)(remarking that "legislative efforts to limit, restrict, or regulate the *PASH* ruling are premature and ill-advised").

8. Because HB 1920 empowered judges to issue decrees modifying and/or extinguishing traditional and customary practices if practitioners did not respond to newspaper notices, the bill contained due process violations similar to SB 8. However, the fact that HB 1920 charged circuit courts, as opposed to the Land Commission, with determining whether or not a right existed may have provided sufficient procedural safeguards to absolve the bill from procedural due process challenges. Nonetheless, the ability of the courts to modify or terminate rights could trigger the same takings claims discussed in relation to SB 8.[323]

Despite some similarities between the bills, this analysis must consider additional social impacts created by HB 1920.[324] Because Native Hawaiians have the lowest socio-economic status of all ethnic groups in the state, most lacking even the financial resources to initiate and/or pursue a court action, HB 1920 disadvantaged Native Hawaiian petitioners and landowners of lower socio-economic status, and would have resulted in claims being settled by individuals who could afford to pursue traditional and customary rights as opposed to those who were entitled to them.

Senate Bill 8 and HB 1920's attempt to regulate the exercise of traditional and customary uses under Article XII, Section 7 was both legally and socially insufficient. Although the bills ostensibly sought to protect the exercise of traditional and customary rights while providing additional security for landowners, they resulted in the reduction or elimination of rights with negligible benefits. In light of the fact that the legislative backlash against *PASH* is likely to resume in future sessions, and that significant human and financial resources are necessary to pursue case-by-case determinations, an examination of two other bills introduced during the 1997 session provide examples of amenable alternatives.

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[323] The creation of a cause of action with such widespread application would also add to the already existing backlog in the courts. *See supra* text accompanying note 317.

[324] *See* McGregor, *HB 1920 Testimony*, *supra* note 254, at 3. Professor McGregor also expressed concern that many Hawaiians who continue to exercise traditional customs would not complete the claims process and therefore would be disadvantaged:

> Those persons who have continued to exercise Hawaiian custom and practices live on the margins of our society . . . . They continued to live in rural areas, fishing, hunting, gathering, and cultivating as their ancestors before them. They are mistrustful of outsiders. Many do not regularly read the paper. Some may not have telephones. This whole process would repeat the injustice of the Mahele back in 1848-50 when 72 percent of those eligible to be granted a land award failed to even petition for the lands upon which they lived and cultivated.

Id.

VI. EQUITABLE REGULATORY EFFORTS

Senate Bill 454 ("SB 454") and House Bill 1536 ("HB 1536") attempted to reconcile traditional and customary rights with contemporary land use through a public access provision and cultural impact statement. Instead of creating a system for defining and regulating current uses, both bills attempted to preserve existing rights where the status or use of land was about to be altered via State approval.

Senate Bill 454 proposed an amendment to HRS section 198-D, Hawai'i's statewide trail and access system.[325] Hawai'i Revised Statutes section 198-D pertains to *Na Ala Hele*, a statewide board to manage all trails and accesses in the islands.[326] The State Department of Land and Natural Resources is charged with coordinating and implementing the system, including acquiring both the property and easements necessary for public access.[327]

Senate Bill 454 proposed the addition of a new chapter conditioning any State or county-level land use approval on the provision of public access.[328] Before amendments to district boundaries, development or community plans, zoning changes, permits, or use approvals could be granted, the agency would have had to "ensure that public access by right-of-way or easement was provided free and unimpeded to the shoreline, mountain, or other recreational, cultural, or natural resource."[329] Public notice of the access and parking would also have been required.[330]

Senate Bill 454 provided a pragmatic approach to ensure access for both traditional and nontraditional uses. It complied with constitutional and statutory mandates while avoiding due process and equal protection challenges. By protecting uses as opposed to individuals, SB 454 also respected the Hawai'i Supreme Court's interpretation of HRS 1-1 without imposing standards on issues where the court reserved judgment, for example, the issue of which individuals are eligible to exercise protected uses under that statute.

This approach was also socially practical and less costly because it incorporated the access provision into an already existing system of review. Instead of requiring the registration or adjudication of all uses upon risk of extinguishment, this bill guaranteed public access when a landowner sought to change the current designation or use of a parcel. Such limited application allowed cooperative understandings between landowners and practitioners to

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[325] HAW. REV. STAT. § 198D-2 (1995).

[326] *See id.*

[327] *See id. See also id.* § 198D(8)-(9).

[328] *See* S. 454: Relating to Land Use, 19th Leg., 1st Reg. Sess. (Haw. 1997).

[329] *Id.* Section 2(a)-(b).

[330] *See id.* Section 2(a).

remain intact and focused a community's time and resources on changes in existing relationships.

Finally, SB 454 was culturally appropriate because it declined to impose undue restrictions on the individuals entitled to continue traditional practices and the areas available for use. By protecting established "uses" as opposed to "users," this proposal provided the flexibility necessary for the continued evolution of Hawaiian culture in an evolving society.

A second alternative for protecting traditional and customary uses was the incorporation of cultural impacts into environmental assessments ("EA") and environmental impact statements ("EIS"). Hawai'i Revised Statutes section 343 provides a system of review to ensure that environmental concerns are adequately considered in agency decision making.[331] House Bill 1536 sought to amend HRS section 343 by adding Native Hawaiian culture and resources as a criteria for evaluating the social and environmental impacts of proposed actions requiring state or county approval, adoption, or funding.[332]

Hawai'i Revised Statutes section 343 requires state and county agencies to prepare an EA for proposed uses of state or county lands or funds, or uses proposed in conservation districts, shoreline areas, historic sites and other designated areas, with some exceptions.[333] If, after making a written evaluation of the projected impacts of the use, an agency finds that the proposed action "may have a significant effect on the environment" the agency must prepare an EIS.[334] If the agency finds that the proposal will not have a significant impact on the environment, an EIS is not required.[335]

An EIS is a comprehensive assessment of the environmental, social, and economic impacts of a proposed action, including methods to mitigate any adverse effects.[336] Because acceptance of a final EIS is necessary for agency

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[331] HAW. REV. STAT. § 343-1 (1995).

[332] *See* H.R. 1536: Relating to Native Hawaiian Cultural Impact Statements, 19th Leg., 1st Reg. Sess. (Haw. 1997). The Senate counterpart to HB 1536 was SB 1218. *See also* HAW. REV. STAT. § 343-5.

[333] HAW. REV. STAT. § 343-5(a)-(b). This section requires environmental assessments for a proposed (1) use of state or county lands or funds (with some exceptions), (2) use of land in a conservation district designated by HRS section 205, (3) use within a shoreline area, (4) use in a historic site, (5) use within the Waikiki area of O'ahu, (6) amendments to existing county general plans resulting in designations other than agriculture, conservation or preservation, (7) reclassification of conservation land, or (8) construction or modification of helicopter facilities. *Id.* § 343-5(a). The public is allowed to review and comment on both a draft and final EA or EIS. *See id.* § 343-5(b).

[334] *Id.* § 343-5(b). Although the agency responsible for approving, adopting, or funding a proposed use must complete the EA or EIS, the applicant usually completes the evaluations and submits them to the agency for approval. Telephone Interview with Jan Thirugnanam, Planner, Office of Environmental Quality Control (Oct. 3, 1997).

[335] *See id.* § 343-5(c).

[336] *See id.* § 343-2. Hawai'i Revised Statutes section 343-2 defines an EIS as an informational document which discloses the "environmental effects of a proposed action, effects

funding or approval,[337] the criteria used in evaluating a proposed use directly impacts an agency's approval or rejection of that application. If the legislature had adopted HB 1536, agencies would have been required to consider the impacts of all actions requiring an EA or EIS on Hawaiian culture and resources as part of the environmental review process.

House Bill 1536 would have been effective in preserving both customary uses and the resources necessary to continue those practices. This bill therefore comported with Article XII, Section 7 and HRS 1-1's protection of custom. House Bill 1536 was also socially appropriate in the sense that it incorporated an examination of protected uses into an existing process structured to assess the social and environmental effects of proposed actions. Like SB 454, HB 1536 initiated review only at the behest of a landowner seeking to change an existing use or designation. This provision allowed for some community self-regulation while ensuring protection of traditional and customary uses. Finally, HB 1536 was culturally appropriate because it protected established uses without imposing undue restrictions on the practitioner's ethnicity and residency.[338]

Both SB 454 and HB 1536 presented workable alternatives for complying with the State's statutory and constitutional protections for traditional and customary uses. They are not perfect solutions, as communities will ultimately have to come together and address the needs and concerns of both practitioners and landowners in their own contexts. Senate Bill 454 and HB 1536 do, however, represent alternative legislative methods of addressing issues relating to traditional and customary rights while minimizing social and cultural impacts and without circumventing years of carefully developed judicial precedent.

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of a proposed action on the economic and social welfare of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects." *Id.* An EIS must also comply with rules adopted by the State Office of Environmental Quality Control *See* HAW. ADMIN. R. § 11-200 (1996) *See also* HAW. REV. STAT. § 343-2. An EIS is much more detailed than an EA.

[337] *See id.* § 343-5(c).

[338] After the Hawai'i Supreme Court decided *PASH*, the Office of Environmental Quality Control ("OEQC") an agency responsible for overseeing administration of HRS section 343, promulgated draft rules including provisions for cultural impact statements similar to those proposed by HB 1536. Telephone Interview with Jan Thirugnanam, Planner, OEQC (Oct. 3, 1997). However, Governor Ben Cayetano refused to approve the draft rules on the grounds that the legislature was the appropriate body to address the issue. *See id.* After the legislature failed to take action on the issue for the second year in a row, OEQC decided to take advisory action and released a guideline for assessing cultural impacts in September, 1997. *See id.* The OEQC accepted public comments on the draft guidelines until October 8, 1997, and was expected to release the final guidelines shortly thereafter. *See id.*

VII. CONCLUSION

The regulatory efforts presented in SB 8 and HB 1920 fell short of the legal standards established by Article XII, Section 7 of the State Constitution, and HRS 1-1 and 7-1. Legislative attempts to clarify and regulate traditional and customary uses through both bills substantially deviated from both the historical background and contemporary practice of those rights. In addition, the bills application of private property concepts did not adequately consider Hawai'i's unique history or its concepts relating to land tenure and property ownership.

Both bills viewed traditional and customary rights as an encumbrance on title. This characterization was unjustified in light of the Hawai'i Supreme Court's ruling that the "issuance of a Hawaiian land patent confirmed a limited property interest as compared with typical land patents governed by Western concepts of property."[339] The court's conclusion that the "Western concept of exclusivity is not universally applicable in Hawai'i"[340] further diminished the legitimacy of any State objective in promulgating SB 8 or HB 1920.

Because a landowner's ability to exclude others from its property was never firmly established in Hawai'i, SB 8 and HB 1920 attempted to address an issue that Hawai'i's courts and legislature had already resolved. Although access for traditional and customary uses may conflict with some landowner's misconceptions of what their rights are, such contentions are based on personal and intellectual philosophies, not on legal rights.

Instead of regulating traditional and customary uses, a more effective approach to calming the backlash may be to educate landowners about what certificates of title in Hawai'i actually convey. This is not to suggest that traditional and customary uses are beyond all regulation, or that landowners are unjustified in feeling upset if they are mistaken. This Comment merely proposes that title holders recognize the established limitations to land patents in Hawai'i, and stop fueling the backlash against *PASH*.

D. Kapua Sproat[341]

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[339] Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 447, 903 P.2d 1246, 1268 (1995).

[340] *Id.*

[341] Class of 1998, William S. Richardson School of Law. *Mahalo nui* to Kahikukala Hoe, for his unwavering support and *aloha* as well as assistance with translations, research, and editing. *Mahalo no ho'i* to Isaac Moriwake, N. Lehua Kinilau, Brian Nakamura, and Denise Antolini for editorial and ideological support. Any errors are the author's alone.

Familial Violence and the American Criminal Justice System

I. INTRODUCTION

On Monday, January 27, 1997, Saldy Marzan allegedly shot and killed his wife, Arlene, while their two children cowered in a nearby room.[1] Arlene was only one of over four million wives, girlfriends, mothers, sisters and daughters injured or killed last year through acts of familial violence,[2] the physical, sexual or psychological abuse or injury of a family or household member.[3] Tragically, like so many other abused women's deaths, Arlene Marzan's death could and should have been prevented by the American criminal justice

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[1] *See* Sandra Oshiro, *Answers Sought in Wife's Shooting*, HONOLULU ADVERTISER, Jan. 29, 1997, at A1 [hereinafter Oshiro, *Answers Sought*]. To the best of the author's knowledge, at the time of publishing this case is still pending, hence the use of the term "alleged" in the text.

[2] *See* FAMILY VIOLENCE PREVENTION FUND, DOMESTIC VIOLENCE IS A SERIOUS, WIDESPREAD SOCIAL PROBLEM IN AMERICA: THE FACTS 1 (1994)(citing THE COMMONWEALTH FUND, FIRST COMPREHENSIVE HEALTH SURVEY OF AMERICAN WOMEN 3 (1993)).

[3] Acts of domestic violence are prohibited under HAW. REV. STAT. § 709-906 (1995), which states, in part:

> (1) It shall be unlawful for any person . . . to physically abuse a family or household member, or to refuse compliance with the lawful order of a police officer under subsection (4) . . . . For the purposes of this section, "family or household member" means spouses or former spouses, parents, children, and persons jointly residing or formerly residing in the same dwelling unit.
>
> . . . .
>
> (4) Any police officer may, with or without a warrant, take the following course of action where the officer has reasonable grounds to believe that there was recent physical abuse or harm inflicted by one person upon a family or household member, whether or not such physical abuse or harm occurred in the officer's presence[.]
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> . . . .
>
> (5) Abuse of a family or household member, and refusal to comply with the lawful order of a police officer under subsection (4) are misdemeanors and the person shall be sentenced as follows:
>
> (a) For the first offense the person shall serve a minimum jail sentence of forty-eight hours; and
>
> (b) For a second offense and any other subsequent offense which occurs within one year of the previous offense the person shall be termed a "repeat offender" and serve a minimum jail sentence of thirty days.
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> (6) Whenever a court sentences a person pursuant to [subsection] (5), it shall also require that the offender undergo any available domestic violence treatment and counseling programs ordered by the court. However, the court may suspend any portion of a jail sentence, except for the mandatory sentences under [subsection] (5)(a) and (5)(b), upon the condition that the defendant remain arrest-free and conviction-free or complete court ordered counseling.

Id.; *see* discussion *infra* Part III.

system. Officers of the Honolulu Police Department had arrested Saldy Marzan for physically battering his wife six times prior to the day he allegedly murdered his wife and mother of their two children.[4] Additionally, two family court domestic abuse protective orders[5] failed to stop Marzan from entering his estranged wife's home and shooting her with a gun he was legally prohibited from possessing.[6] Ironically, Arlene Marzan did everything she was supposed do to protect herself under the laws and procedures of the Federal and State of Hawai'i criminal justice system. She called police to report abuse and have the abuser arrested and used the Family Court of the State of Hawai'i to obtain civil orders of protection which prohibited the abuser from possessing weapons, and she was still murdered. Her tragedy poignantly illustrates that the American Criminal justice system's response to familial or domestic violence, although improving, remains ineffectual in protecting women and children from death and abuse.[7]

This article focuses on two Federal and two State of Hawai'i laws as merely a representative "sample" of the many varied and flawed criminal justice

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[4] *See* Oshiro, *Answers Sought*, *supra* note 1, at A1.

[5] Temporary restraining orders are issued pursuant to HAW. REV. STAT. § 586-4(a) (1995), which states, in part, that:

> Upon petition to a family court judge, a temporary restraining order may be granted without notice to restrain either or both parties from contacting, threatening, or physically abusing each other . . . . The order may be granted to any person who, at the time such order is granted, is a family or household member as defined in section 586-1 or who filed a petition on behalf of a family or household member. The order shall enjoin the respondent or person to be restrained from performing any combination of the following acts:
>
> (1) Contacting, threatening or physically abusing the petitioner(s);
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> (2) Contacting, threatening or physically abusing any person(s) residing at the petitioner(s)'s residence;
>
> (3) Telephoning the petitioner(s);
>
> (4) Entering or visiting the petitioner(s)'s residence; or
>
> (5) Contacting, threatening or physically abusing the petitioner(s) at work.
>
> A person convicted under this section shall undergo treatment or counseling and serve a mandatory minimum jail sentence of forty-eight hours for a first conviction and a mandatory minimum jail sentence of thirty days for the second and any subsequent conviction.

Id.

[6] *See* Sandra Oshiro, *Court Toughens Policies*, HONOLULU ADVERTISER, Feb. 27, 1997, at A1 [hereinafter Oshiro, *Toughens Policies*]. The court ordered Marzan to turn over any and all weapons or firearms in his possession over five separate times and yet he still allegedly shot and killed his wife. *See id.*

[7] *See* Oshiro, *Answers Sought*, *supra* note 1, at A1. Although Arlene Marzan used Hawai'i's criminal justice system to protect her from her abusive husband when she sought and obtained police aid and family court domestic abuse protection orders, she was brutally murdered near her children and in her own home. *See id.*

system responses to the phenomenon of familial violence.[8] This sample includes an examination of the following: The Violence Against Women Act of 1994 ("VAWA"),[9] representing the federal government's recognition of familial violence and the need for interstate enforcement of out-of-state civil protection orders;[10] a 1997 amendment to the Gun Control Act of 1968 ("GCA"),[11] representing the federal response to the high number of abusers and federal firearms licensees using guns to abuse and kill their family members; a 1996 amendment to the Hawai'i Revised Statutes ("HRS") section 571-46 ("Act 198"),[12] demonstrating the State of Hawai'i's commitment to protecting children in violent homes from further and future abuse;[13] and

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[8] Over the past twenty years, both the federal and state legislatures have enacted significant legislation to protect women. Said legislation is too voluminous to attempt to list here.

[9] 18 U.S.C. § 2265 (1994). The act states:

> (a) Full faith and credit. Any protection order issued that is consistent with subsection (b) of this section by the court of one State or Indian tribe (the issuing State or Indian tribe) shall be accorded full faith and credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or tribe. (b) Protection order. A protection order issued by a State or tribal court is consistent with this subsection if
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> (1) such court has jurisdiction over the parties and matter under the law of such State or Indian tribe; and (2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process.

Id.

[10] *See* S. REP. No. 103-138, at 38 (1993).

[11] *See* 18 U.S.C. § 922 (Supp. 1997), stating that it is a crime for any person:

> (9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Id.

[12] HAW. REV. STAT. § 571-46 (Supp. 1996). Act 198 states:

> In the actions for divorce, separation, annulment, separate maintenance, or any other proceeding where there is at issue a dispute as to the custody of a minor child, the court [at] . . . any time during the minority of the child, may make an order for the custody of the minor child as may seem necessary or proper. In awarding the custody, the court shall be guided by the following standards, considerations, and procedures:
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> . . . .
>
> (9) In every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that family violence has been committed by a parent raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence.

Id.

[13] *See* Act 198, § 1, 18th Leg., Reg. Sess. (1996)(stating the legislature's finding that the problems of domestic violence do not end when the abuser is legally separated or divorced from his victim, but rather that the violence often escalates, and that child custody and visitation

recent Hawai'i Supreme Court ("HSCT") and Hawai'i Intermediate Court of Appeals ("ICA") decisions regarding the Hawai'i Rules of Evidence ("HRE") on the admission of hearsay statements and character evidence, in familial violence cases.[14] These evidentiary rule decisions further reveal Hawai'i's commitment to convicting familial abusers.

This Comment examines the problem of domestic violence, focusing upon the players involved in the problem (the abusers, the victims, the children and the criminal justice system), the unique dynamics perpetuating it, and the myths which surround both abusers and victims. Additionally, this Comment conducts a detailed critique of a sample of current laws and their less than effective enforcement. Finally, it recommends solutions: solutions concerning the improved enforcement of existing laws to better protect family members from abuse. Increased enforcement of America's criminal justice systems' laws means increased protection for women and children—a goal which should be paramount for a supposedly enlightened society such as ours.

To provide a framework from which to understand the severity of the problem, Part II of this Comment describes the familial violence problem and its scope in both America and Hawai'i. The Comment depicts the national trend regarding the increasing frequency and severity of domestic or familial violence incidents also is discussed. Part III discusses the dynamics of the familial violence phenomenon. Admitting that there is a problem is not equivalent to understanding and solving that problem. Thus, Part III outlines the causes and patterns associated with familial violence and attempts to dispel the myths and fallacies which surround familial violence and permeate throughout our society. Part IV describes the devastating effects of domestic violence on the victims and their children, and how such violence creates a

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become new arenas for continuing abuse).

[14] *See, e.g.*, State v. Clark, 83 Hawai'i 289, 926 P.2d 194 (1996)(holding that prior inconsistent statements and prior bad acts are admissible as evidence if they meet certain requirements); State v. Moore, 82 Hawai'i 202, 921 P.2d 122 (1996)(holding that the statement of the defendant's wife to a police officer identifying defendant as the perpetrator was admissible under the prior inconsistent statement exception to the hearsay rule and did not violate the defendant's right of confrontation); State v. Eastman, 81 Hawai'i 131, 913 P.2d 57 (1996)(holding that the evidence supported the trial court's finding that defendant physically abused his wife, that the victim's voluntary statement form on which defendant's wife made statements was admissible under the prior inconsistent statement exception to the hearsay rule, and that the evidence supported a finding that the defendant acted with the minimum requisite culpable state of mind, recklessness); State v. Canady, 80 Hawai'i 469, 911 P.2d 104 (App. 1996)(holding that for prior inconsistent statements to be exempt from hearsay objection and therefore admissible, the declarant must be subject to cross-examination concerning the subject matter of the prior statement and that the statement of the victim to the police officer was thus not admissible as a prior inconsistent statement after the victim testified she could not remember speaking to the officer and could not be cross-examined regarding the statement).

generation of potential violent criminals. Part V discusses the American justice systems' historical and current responses to the phenomenon of familial violence discussed in the preceding sections, including the systems' shortcomings. Part VI suggests improvements to the current justice system in the State of Hawai'i, to better protect the families of both our nation and our state.

II. FAMILIAL VIOLENCE IN AMERICA AND HAWAI'I

A. Scope of the Familial Violence Problem

The scope of familial violence in America is enormous.[15] It is the leading cause of injury to women in the United States of America.[16] This article

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[15] *See, e.g.*, HAWAI'I STATE COMMISSION ON THE STATUS OF WOMEN, DOMESTIC VIOLENCE REPORT 23 (1993); LEAGUE OF WOMEN VOTERS, REPORT DOMESTIC VIOLENCE FAMILY COURT MONITORING PROJECT 1 (1996); EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 9 (1990); MARY P. KOSS ET AL., NO SAFE HAVEN: MALE VIOLENCE AGAINST WOMEN AT HOME, AT WORK, AND IN THE COMMUNITY 43 (1994); LAWRENCE W. SHERMAN, POLICING DOMESTIC VIOLENCE EXPERIMENTS AND DILEMMAS 1 (1992); MICHAEL STEINMAN, WOMAN BATTERING: POLICY RESPONSES 1 (1991); RICHARD A. STORDEUR & RICHARD STILLE, ENDING MEN'S VIOLENCE AGAINST THEIR PARTNERS ONE ROAD TO PEACE 21 (1989); The Harvard Law Review Association, *New State and Federal Responses to Domestic Violence*, 106 HARV. L. REV. 1528, 1528-29 (1993); Jenny Rivera, *Puerto Rico's Domestic Violence Prevention and Intervention Law and the United States Violence Against Women Act of 1994: The Limitations of Legislative Responses*, 5 COLUM. J. GENDER & L. 78 (1995); Birgit Schmidt Am Busch, *Domestic Violence and Title III of the Violence Against Women Act of 1993: A Feminist Critique*, 6 HASTINGS WOMEN'S L.J. 1, 3 (1995); Roberta L. Valente, *Addressing Domestic Violence: The Role of the Family Law Practitioner*, 29 FAM. L.Q. 187 (1995); Keirsten L. Walsh, *Safe and Sound at Last? Federalized Anti-Stalking Legislation in the United States and Canada*, 14 DICK. J. INT'L L. 373, 377 (1996).

[16] *See* Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Caselaw*, 21 HOFSTRA L. REV. 801, 807-09 (1993)[hereinafter Klein & Orloff]. Catherine F. Klein and Leslye E. Orloff summarize the shocking statistics succinctly:

> An estimated four million American women are battered each year by their husbands or partners .... An estimated fifty percent of all American women are battered at some time in their lives. According to one national survey, violence will occur at least once in twenty-eight percent of all marriages .... [O]ne of every eight husbands carries out one or more acts of physical aggression against his wife each year. Repeated severe violence occurs in one out of every fourteen marriages. In a survey of American college students, twenty-one to thirty percent reported at least one occurrence of physical assault with a dating partner. Even these figures are likely to be low. Most national estimates are obtained from surveys which have typically excluded the very poor, those who do not speak English fluently, those whose lives are especially chaotic, military families, and persons who are hospitalized, homeless, institutionalized, or incarcerated. Therefore, some have estimated that the number of women battered each year is closer to six million.

recognizes that familial violence victims include men as well as women, but strictly focuses on and refers to battered women[17] because "[a]pproximately ninety-five percent of all adult domestic violence victims are women"[18] and "the vast majority of . . . perpetrators are male."[19] Such violence against women cuts across all economic, cultural, religious, geographic, educational and vocational lines.[20] Familial violence is not a problem restricted to any one socio-economic group or area. Rather, it is a problem which directly or indirectly affects us all.

Nationally, familial violence is a social problem of epidemic proportions.[21] Moreover, society's response to the problem has been appalling in its gender bias, as "our criminal laws and evidentiary rules carry with them gender-biased views originating at a time when women's lives were devalued and the typical male perspective on domestic femicide was that the victim provoked her husband by her words and deeds."[22] Cultural attitudes and beliefs reinforced by gender-biased laws which justify and condone familial violence result in more than twenty-five percent of American couples experiencing one or more incidents of violence.[23] Repeated severe violence occurs in one of

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Id.

[17] *See* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 267-70 (1985).

[18] *Id.*; *see also* Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 367 n.47 (1996); Klein & Orloff, *supra* note 16, at 808.

[19] KOSS ET AL., *supra* note 15, at 19.

[20] *See* Klein & Orloff, *supra* note 16, at 807.

[21] *See* Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection From Domestic Violence in the Americas*, 34 HARV. INT'L L.J. 507, 520 (1993)(citing The Violence Against Women Act of 1991: The Civil Rights Remedy: A National Call for Protection Against Violent Gender-Based Discrimination, S. REP. NO. 102-197, at 37 (1991)). As Culliton states:

> "Epidemic" is the term used by Senator Joseph Biden, Chair of the Senate Judiciary Committee as a sponsor of the Violence Against Women Act. Senator Biden also commented as follows:
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> > Every 15 seconds, a woman is battered . . . . Last year, more women were beaten than were married . . . . [A]s figures have skyrocketed, our attention has waned . . . . Our society has, up until now, chosen not to appreciate the significance of these figures. We have systematically underestimated the problem, in seriousness, in scope, and intensity.

Id. at 521 n.62.

[22] Myrna Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463, 1465 (1996). The Senate Judiciary found that gender bias in the courts makes for a criminal justice system that tolerates and perpetuates violence against women. *See* Culliton, *supra* note 21, at 521.

[23] *See* STATE JUSTICE INSTITUTE, CONFERENCE, COURTS AND COMMUNITIES: CONFRONTING VIOLENCE IN THE FAMILY 1 (1993).

every fourteen marriages.[24] The American criminal justice system's historically biased response to familial violence is discussed in Part V. The problem is so widespread that domestic violence is the leading cause of injury among women seeking treatment at hospital emergency rooms, accounting for more injuries than all auto accidents, muggings and rapes combined;[25] familial violence is the reported cause of one-fifth of all medical visits by women and one-third of all emergency room visits by women in the United States each year.[26] Finally, of all the female homicide victims each year, close to a third are murdered by their husbands or boyfriends.[27] These statistics clearly prove familial violence threatens women and children nationwide.

Indeed, Hawai'i is more severely afflicted with familial violence than the nation is. At least twenty percent of all women in Hawai'i have been victims of domestic violence.[28] In 1994 there were over seven thousand incidents of abuse of a household member reported throughout the State of Hawai'i and over three thousand arrests.[29] During the ten year period from 1985 to 1994, while the national percentage of domestic homicides was fifteen percent, the percentage in Hawai'i was close to thirty percent.[30] Thus, Hawai'i struggles more with the problem of familial violence than the rest of the United States.

Why? Some possible explanations for Hawai'i's higher incidents of familial violence are, as follows:

> First, Hawai'i as a state is not only isolated from the rest of the nation but also has many isolated rural areas within each county. One of the problems which affect battered women is the lack of opportunity to flee safely and quickly. Leaving one island to move to another island or to the mainland can be

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[24] *See id.*

[25] *See id.*

[26] *See id.* at 2.

[27] *See* Raeder, *supra* note 22, at 1468.

[28] *See* LEAGUE OF WOMEN VOTERS, *supra* note 15, at 1.

[29] *See* Laurie Arial Tochiki & Irene Vasey, *The Complexity of Domestic Violence*, HAW. B.J., Oct. 1996, at 7 [hereinafter Tochiki & Vasey]. In their article, which explains the phenomenon of familial violence in Hawai'i, the statistics once again prove the problematically large scope of violence against Hawai'i's family members:

> In 1994 there were 7,853 incidents of abuse of household member reported statewide, and 3,729 arrests. These numbers do not include reported incidents of felony assault, terroristic threatening, or murder. On Oahu, in 1994, 1,490 people contacted the Adult Services Branch of the Family Court for assistance in obtaining a Temporary Restraining Order. It is estimated that over 49,000 women in the state of Hawai'i between the ages of 18 and 64 are victims of domestic violence. 138 of the 469 homicides in Hawai'i (29%) between 1985 and 1994 involved victims who were either the killer's family member, roommate, spouse or lover.

Id.

[30] *See* LEAGUE OF WOMEN VOTERS, *supra* note 15, at 1.

prohibitively expensive. Second, the lack of affordable housing and child care prevents women from permanently escaping familial violence.[31]

B. Familial Violence Defined

Realizing that familial violence is a national and local problem remains different from understanding the legal definition of familial violence. Only the legal definition prohibits abusive conduct. Familial violence is defined in the family law statute, HRS section 571-2, as:

> [T]he occurrence of one or more of the following acts by a family or household member, but does not include acts of self-defense:
> (1) Attempting to cause or causing physical harm to another family or household member;
> (2) Placing a family or household member in fear of physical harm; or
> (3) Causing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress . . . .[32]

This definition should be the polestar in analyzing any familial violence issue.

C. Legal Tools to Fight Domestic Violence

America's criminal justice system has realized that legally recognizing and defining familial violence is not enough. Thus, the criminal justice system adopted legal "tools" such as civil protection orders to combat the violent and abusive acts prohibited by HRS section 586-1 and other statutes like it.[33] In Hawai'i such civil protection orders are called domestic abuse protective orders or temporary restraining orders, depending on the time period of the order.[34] A protective order may be issued not only for actual physical harm but also for acts which cause fear of an imminent injury.[35] Such an order can restrain an abuser from contacting, threatening, or physically abusing the battered woman or other family members.[36] Additionally, the court may order counseling and/or a psychiatric evaluation of the abuser.[37]

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[31] *See* HAWAI'I STATE COMMISSION ON THE STATUS OF WOMEN, *supra* note 15, at 4.

[32] HAW. REV. STAT. § 571-2 (1996); *see also supra* note 3 (defining the crime of the abuse of a family or household member).

[33] *See* Klein & Orloff, *supra* note 16, at 812-14.

[34] *See* HAW. REV. STAT. ch. 586 (1995).

[35] *See* HAW. REV. STAT. § 586-4 (1995). This section states that threatening physical abuse is prohibited. *See id.*

[36] *See id.*

[37] *See* HAW. REV. STAT. § 586-5.5 (1995).

Notwithstanding the fact that the problem of familial violence is widespread today "it appears that family violence is on the rise."[38] Scholars state that "a telling indication of the increase in family violence are murder statistics, for the simple reason that homicides produce corpses-hard to hide and easy to count."[39] The domestic violence murder rate has in fact increased in recent years in thirty-five states.[40] Thus, there is a trend towards more violence and more intense violence in America's families.

III. DYNAMICS OF FAMILIAL VIOLENCE

Admitting that there is a serious and widespread familial violence problem in America does not provide solutions which protect women and children from abuse, nor does it prevent the spawning of yet another generation of abusers. Any attempt to solve the problem, however, requires an understanding of the relevant causes and dynamic patterns of familial violence.

Familial violence is a pattern of coercive behavior, including physical, sexual, economic, and emotional abuse by one family or household member against another family or household member.[41] This violent abuse is a mechanism for the abuser to gain power within that familial relationship.[42] The violence is simply a means to effectuate and retain power and control,[43] it is not the primary goal.[44] The "goal" of this "abuse is to help one person achieve and maintain power and control over the other."[45] Such "essential dynamics of domestic violence are consistent across these relationships and across cultural, ethnic, demographic, religious and economic lines."[46] Indeed, familial violence results in a permanent imbalance of power which is maintained by these controlling patterns of behavior.[47]

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[38] Tochiki & Vasey, *supra* note 29, at 8.

[39] *Id.*

[40] *See* Culliton, *supra* note 21, at 521.

[41] *See* Karla M. Digirolamo, *Domestic Violence and the Law Symposium: Myths and Misconceptions About Domestic Violence*, 16 PACE L. REV. 41, 44 (1995); Klein & Orloff, *supra* note 16, at 848; KOSS ET AL., *supra* note 15, at 42.

[42] *See* Tochiki & Vasey, *supra* note 29, at 8; *see also* Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1049 (1991); Buzawa & Buzawa, *supra* note 15, at 10 (emphasizing that violence may be used to win power for family dominance or perversely to achieve self respect).

[43] *See* STATE JUSTICE INSTITUTE, *supra* note 23, at 23.

[44] *See* Raeder, *supra* note 22, at 1479.

[45] Digirolamo, *supra* note 41, at 44.

[46] *Id.*

[47] *See* Digirolamo, *supra* note 41, at 45; *see also* Marie De Sanctis, *supra* note 18, at 364 (describing the familial violence used to control and ultimately kill actress Dominique Dunne, who attempted to leave to free herself from her husband's control).

This focus on control is a result of predictable patterns of behavior on the part of both abuser and victim, as most abusers and victims conform to a unique pattern of psychological control and dependence.[48] Indeed, the majority of abusers are emotionally dependent, controlling, insecure, and view attempts to leave them as a rejection of their dominance.[49] The victims appear dependent as well, only they exhibit their dependence in different ways; victims that escape "nearly always returned to the abuser several times before they [were] able to terminate the relationship."[50] This inability to leave permanently may be explained by theories of learned helplessness[51] and the cycle of violence.[52] In addition, victims often suffer "the low self-esteem, isolation, and denial of both aggressor and victim, the learned helplessness of the battered woman, and the Jekyll-and-Hyde personality of the batterer."[53] It is not surprising, therefore, that violence often occurs when the victim finally attempts to leave her abuser; most spousal homicides occur following marital separation or divorce.[54]

Even though victims' experiences and abusers' battering actions may vary drastically from case to case, they are similar in many important, fundamental ways.[55] Batterers "engage in physical abuse, and perform acts designed to jeopardize their partner's physical integrity and well-being."[56] Batterers

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[48] *See* Raeder, *supra* note 22, at 1479. Abusers are both controlling and emotionally dependent. *See id.* at 1477-82. They are usually possessive and jealous and view attempts to leave them as rejection of their control and dominance. *See id.* As such, violence is used to gain power in the relationship and not for the sake of violence itself. *See id.*

[49] *See id.*

[50] Waits, *supra* note 17, at 280.

[51] *See id.* at 280 (citing M. SELIGMAN, HELPLESSNESS: ON DEPRESSION, DEVELOPMENT AND DEATH, 21-44 (1975)). Waits states:

> [L]earned helplessness [was] . . . first developed in experiments on animals. When given electric shocks at random, animals will at first try to control their environment and stop the negative reinforcement. Once they realize that they cannot control the punishment, they become passive and compliant. Over time, their perception of their own helplessness becomes so strong that eventually they will not try to escape from the "torture chamber" even if there is a readily available means of escape and they are guided along the escape route. Only after they are repeatedly shown the way out do they start to respond voluntarily again.

Id.

[52] *See infra* notes 67-73 and accompanying text.

[53] Waits, *supra* note 17, at 297.

[54] *See* Raeder, *supra* note 22, at 1479.

[55] *See* Digirolamo, *supra* note 41, at 45; *see* KOSS ET AL., *supra* note 15, at 19-38 (discussing the perpetrators' attributes, socialization for violence, sex and power motives, gender schemas and other cognitive-behavior factors as common, repeating reasons behind familial abuse and abusive schemes in the home).

[56] Digirolama, *supra* note 41, at 45. Women are routinely assaulted. *See id.* Medications or health care may be withheld. *See id.* They may be forced to use alcohol or other drugs. *See*

further control their partners through economic abuse, using financial dependence as a means of control.[57] Society further increases the batterer's control as family and friends often refuse to accept the existence of the violence.[58]

So what causes men to batter and women to stay with their batterers? There are no simple answers. In the early twentieth century "theories posited that women secretly enjoyed the beatings they received because masochism was critical to the psychology of normal women."[59] However, recent theories reject masochism and suggest instead that the woman's behavior is influenced by a complex set of factors, "including the severity of abuse and the unavailability of external resources to help women leave their abusers."[60]

Historically, researchers argued that men battered because of:

> uncontrollable sexual urges or drunkenness. Today, researchers agree that there is no one reason men batter, just as there is not one type of batterer. The behavior of batterers ranges from sociopathic—where the batterer is highly abusive to his wife and children and likely to be violent outside of the family—to sporadic, where the abuse is "minimal." While it is difficult to generalize about batterers, they frequently exhibit characteristics such as extreme jealousy . . . an addiction to the battering relationship . . . . [B]attering becomes more frequent and severe over time[,] violence increases after separation[,] and the abuser will try to retaliate against the victim for leaving.[61]

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id. They are beaten and sexually abused, raped, sodomized, and forced to prostitute themselves. *See id. See also* Klein & Orloff, *supra* note 16, at 849-76 (delineating the wide range of criminal acts, sexual assault and marital rape, interference with personal liberty, threats, attempts to harm, harassing behaviors, emotional abuse, property damage and stalking used by batterers to control their victims).

[57] *See* Digirolamo, *supra* note 41, at 45-46. Abusers use such control tactics in order to make their victims financially dependent. *See id.* Regardless of how wealthy or poor the abused women are, they are often equally dependent on partners who control every aspect of money for both necessary and luxury goods alike. *See id.* Even women with independent incomes often must turn control of their money to their abusers, who then make the financial decisions. *See id. See also* Cahn, *supra* note 42, at 1051; Waits, *supra* note 17, at 280.

[58] *See* Cahn, *supra* note 42, at 1051; *see also* Tochiki & Vasey, *supra* note 29, at 9.

[59] Cahn, *supra* note 42, at 1051; KOSS ET AL., *supra* note 15, at 8. One of the myths surrounding domestic violence is that some women are masochistic, seeking out violent men. *See* KOSS ET AL., *supra* note 15, at 8.

[60] Cahn, *supra* note 42, at 1049; *see also* KOSS ET AL., *supra* note 15, at 16 (stating that violence against women takes place in a social and cultural context). Koss also states that in order to understand domestic violence, one must understand the multiple levels of influences which determine the violent expression. *See* KOSS ET AL., *supra* note 15, at 16. Such violence has its roots in sociocultural constructions of gender and sexuality, specifically male entitlement and social and political inequality for women. *See id.* Thus, cultural norms, myths, sexual scripts and social roles link various forms of violence and deny relief to victims. *See id.*

[61] Cahn, *supra* note 42, at 1053.

Thus, there are a variety of theories which attempt to explain why men batter. Causal theories range from focusing on the individual abuser to our patriarchal society.[62] The "empiricist perspective" identifies the man's anger at his partner as the cause of the violence.[63] Alternatively, the "feminist perspective" views a male-dominated society as the underlying cause.[64] The "truth" probably lies somewhere in the middle.

Whatever the "true" cause of the violence, it is widely accepted that the dynamic of familial violence is cyclical.[65] A recent study on battered women proposed a model of wife assault termed the "cycle of violence."[66] Indeed, physical abuse of a family or household member is almost never a single, isolated event.[67] Abuse is "part of a continuum that typically begins with the undermining of self-esteem, escalating verbal assaults and attempts to isolate a victim from friends and family. Then there is a battering cycle that tends to occur in predictable patterns of increasing tension, a battering incident, followed by calm, sometimes sorrowful respite."[68] This cycle of violence "follows three distinct phases: tension building, the acute battering incident, and kindness and contrite, loving behavior."[69] The three-phase cycle[70] escalates over time and, if left unchecked, ultimately may end in the death of the victim.[71]

Considering the horrors associated with the cycle of violence, why do the victims remain with their batterers?[72] Two dominant theories explain why

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[62] *See id.* at 1054.

[63] *See id.*

[64] *See* Cahn, *supra* note 42, at 1053. Society's expectation of male dominance and tolerance of violence against women perpetuate battering. Batterers learn to use violence and the power it entails through their individual experiences, their families, and society. *See id.*

[65] *See, e.g.*, Marie De Sanctis, *supra* note 18, at 369; Cahn, *supra* note 42, at 1050; Waits, *supra* note 17, at 280 (stating that the phenomenon of repeated departure and reconciliation in a domestic violence relationship is explained by both the victim's learned helplessness and by the inherent dependence and hope created by the battering cycle); Klein & Orloff, *supra* note 16, at 848.

[66] STORDEUR & STILLE, *supra* note 15, at 29.

[67] *See* STATE JUSTICE INSTITUTE, *supra* note 23, at 23.

[68] LEAGUE OF WOMEN VOTERS, *supra* note 15, at 1.

[69] STORDEUR & STILLE, *supra* note 15, at 29; *see also* Waits, *supra* note 17, at 291; Marie De Sanctis, *supra* note 18, at 368.

[70] *See* STATE JUSTICE INSTITUTE, *supra* note 23, at 23 (1993)(citing S. STEINMETZ, THE CYCLE OF VIOLENCE: ASSERTIVE, AGGRESSIVE, AND ABUSIVE FAMILY INTERACTION (1977)). Repeated abuse usually occurs in a three-phase cycle. *See id.* During the initial phase, tension increases and the abuser may begin to threaten the victim or indicate anger. *See id.* The second phase is a violent incident triggered by seemingly trivial events. *See id.* The final phase is reconciliation; the abuser becomes contrite, promising never to be violent again. *See id.*

[71] *See id.*

[72] *See* Waits, *supra* note 17, at 279. Powerful psychological and social forces often bind the abusive couple together. *See id.* These forces include the cyclical nature of battering and

women do not leave: both social and economic forces that are external to the woman prevent her from leaving the abusive relationship; and the battered woman's developmental problems predispose the woman to accept battering.[73]

The majority of women do not leave because of "strong social and economic factors that discourage women from leaving the abuser."[74] The majority of victims are "financially dependent on their husband, facing severe hardship if they leave."[75] Basic necessities like housing, transportation and child care often may be unaffordable or unavailable to the victim.[76] Moreover there are generally not enough shelters to house the fleeing victims.[77] In the State of Hawai'i, for example, although there are six emergency shelters for domestic violence victims, one Oahu shelter closed due to insufficient funding while the other shelters turned away 390 families.[78] Further, most women do not want to leave the abusive situation without taking their children, yet many shelters will not accept women with children.[79] Additionally, extended family

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the fact that both parties blame the victim and not the perpetrator for the violence. *See id.* As a result of these forces, abused women have great difficulty taking any action, either legal or personal, against their partners. *See id.* Further, batterers, using both fear and manipulation, know how to deter their victims from leaving them and are especially adept at persuading or coercing their partners, if they have left, to return and give the relationship another try. *See id.*

[73] *See* DOMESTIC VIOLENCE CLEARINGHOUSE AND LEGAL HOTLINE, DVA PACKET/RESOURCES § 4.19 (1983)(copy on file with author); DOMESTIC VIOLENCE CLEARINGHOUSE AND LEGAL HOTLINE, WHY WOMEN STAY (1983)(copy on file with author); Cahn, *supra* note 42, at 1049-50.

[74] Waits, *supra* note 17, at 296 (emphasizing that economic dependence on their husbands is an important reason why victims stay); Cahn, *supra* note 42, at 1049-50 (noting that the lack of shelters and support organizations such as family, government and friends explains why women stay).

[75] Tochiki & Vasey, *supra* note 29, at 9.

[76] *See* Waits, *supra* note 17, at 296.

[77] *See Cahn, supra* note 42, at 1049-50; *see also* DOMESTIC VIOLENCE CLEARINGHOUSE AND LEGAL HOTLINE, WIFE ABUSE: THE FACTS (stating that although there are over 500 shelters in the country offering emergency refuge and services to battered women and their children, reported estimates are that such shelters provide only one quarter million beds annually for several millions of victims who need them)(copy on file with author).

[78] *See* DOMESTIC VIOLENCE CLEARINGHOUSE AND LEGAL HOTLINE, WIFE ABUSE: WOMAN ABUSE: A CRISIS IN HAWAII (copy on file with author).

[79] *See* Cahn, *supra* note 42, at 1049-50. *But cf.* DOMESTIC VIOLENCE CLEARINGHOUSE AND LEGAL HOTLINE, RESOURCE MATERIALS (copy on file with author)(stating that this is not the case in the State of Hawai'i, as a fairly broad range of services is provided to the abused; such services are provided by Students & Advocates for Victims of Domestic Violence, Domestic Violence Clearinghouse and Legal Hotline, Child and Family Service Domestic Violence Programs, Americorps Domestic Violence Project, Parents and Children Together and Family Peace Center, to name a few).

resources might be nonexistent.[80] Thus, the woman often stays in the abusive relationship because of either the real or the perceived lack of alternatives.

Developmental problems related to a childhood of abuse may explain why some battered women do not leave. Victims' abused backgrounds "may make [battered women] likely to seek, and to remain in, an abusive relationship."[81] These victims may "need" the abuse on some disturbed psychological level.[82]

The causes and dynamics of familial violence briefly examined above reveal the complex social and cultural "roots" of the familial violence problem. Understanding these causes will facilitate finding a potential solution. However, the effects of familial violence on both the victims and society discussed below demonstrate the imperative and immediate need for a solution.

IV. EFFECTS OF FAMILIAL VIOLENCE

The American criminal justice system must address the familial violence problem because of the devastating effects of familial violence on the women, children and the community. The effects on the mostly women victims are obvious because familial violence is like any other assault, rape or murder.[83] The only real difference with familial violence is that the batterer, rapist, or murderer is someone who one supposedly loves, and who supposedly loves one back. Women are injured and killed as a result of familial violence every single day.[84]

The effects of domestic violence on children are almost as obvious. Children are victims of familial violence just as their parents are. Children, however, are subject to both observing and experiencing violence.[85] Such exposure to abuse "affects children cognitively, emotionally, and physically."[86] It is proven that children in families with incidents of violence may be mentally and physically injured and traumatized.[87] They fear for their

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[80] *See* Tochiki & Vasey, *supra* note 29, at 9. Often family members may be tired of getting involved in the domestic violence situation. *See id.* They may be afraid to shelter the victim for fear of their own safety. *See id.* They may just not be aware of the problem, particularly if the perpetrator has isolated the victim from her family. *See id.*

[81] Cahn, *supra* note 42, at 1051.

[82] *See id.*

[83] *See* Waits, *supra* note 17, at 298.

[84] *See supra* notes 58-60 and accompanying text.

[85] *See* STATE JUSTICE INSTITUTE, *supra* note 23, at 27-28 (demonstrating that such dual threats compound the injuries sustained by children in abusive homes); *see also* Steinman, *supra* note 15, at 238; Digirolamo, *supra* note 41, at 48.

[86] Cahn, *supra* note 42, at 1055; *see generally* Steinman, *supra* note 15, at 237-43.

[87] *See* STATE JUSTICE INSTITUTE, *supra* note 23, at 27-28 (stating that such injuries and trauma may be incurred from either observing or experiencing violence); *see* Cahn, *supra* note

mother and their own helplessness in protecting her.[88] The children are more likely to be violent themselves.[89] Children of abusive relationships seem more likely to experience physical harm from both parents than children of relationships where abuse is not present.[90]

The devastating effects on these innocent children are well documented.[91] The immediate impact on the child manifests itself in disorders such as stuttering, anxiety, fear, sleep, and school problems.[92] The long term effects are even more troubling:

> Violence witnessed at home is often repeated later in life. Violent parental conflict has been found in twenty to forty percent of the families of chronically violent adolescents. Seventy-five percent of boys who witness parental abuse have demonstrable behavioral problems. A comparison of delinquent and non-delinquent youth found that a history of family violence or abuse was the most significant difference between the two groups. Child and adult victims of abuse are more likely to commit violent acts outside the family than those not abused. Abused children are arrested by the police four times more often than non-abused children.[93]

Many abused children become criminals, inflicting high social costs upon society,[94] as one of the primary conditions leading to criminal behavior is "serious parental conflict."[95] The Sheldon and Glueck Harvard studies conducted in the 1950's "found that one-third of delinquent boys in their sample came from homes with spouse abuse."[96] Another study "observed that the incidence of delinquent behavior was higher in intact homes characterized by a high degree of conflict and neglect."[97] Indeed, most police already know what social scientists are now discovering: violence and extreme conflict in

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42, at 1055-58 (detailing the psychological and physical problems and injuries associated with witnessing or experiencing such familial violence).

[88] *See* Cahn, *supra* note 42, at 1055-58 (stating that seeing one parent attack another traumatizes the child).

[89] *See id.* at 1059.

[90] *See id.* at 1055.

[91] *See id.*; *see also* Steinman, *supra* note 15, at 237-55; Cahn, *supra* note 42, at 1055; Waits, *supra* note 17, at 299; Digirolamo, *supra* note 41, at 48; Klein & Orloff, *supra* note 16, at 954.

[92] *See generally* Steinman, *supra* note 15; Cahn, *supra* note 42; Waits, *supra* note 17; Digirolamo, *supra* note 41; Klein & Orloff, *supra* note 16.

[93] STATE JUSTICE INSTITUTE, *supra* note 23, at 28.

[94] *See id.*; *see also* Steinman, *supra* note 15, at 237-55.

[95] Patrick Fagan, *The Real Root Causes of Violent Crime: The Breakdown of Marriage, Family, and Community*, 1026 THE HERITAGE FOUND. BACKGROUNDER 37, 50 (1995); Steinman, *supra* note 15, at 237-55.

[96] *Id.*

[97] *Id.*; Steinman, *supra* note 15, at 237-55.

the home results in an angry, violent child who engages in delinquent behavior in society.[98]

Another known condition leading to criminal behavior is physical, emotional, or sexual abuse of children by their parent(s).[99] There is an overwhelmingly strong positive correlation between parent-child violence and violence on the part of the child.[100] "Violence begets violence."[101] Familial violence and abuse results in criminal behavior in the children abused and perpetuates the cycle of violence for another generation. Thus, the consequences of familial violence reach far beyond the abuser and the victim into the realm of society in general, and affect generations of young Americans in particular.

Indeed, society might be the biggest victim of familial violence. Attorney General Janet Reno states:

> I maintain that as the children of America watch family violence occur in their own homes, when they watch people who supposedly love each other be brutal to each other, they're going to accept it as a way of life, and I think that's one of the reasons that youth violence is probably the greatest crime problem in America today.[102]

In addition, it has been observed that familial violence:

> exacts an enormous toll in costs to the health care, social services and criminal justice systems, in lost productivity in the work place, and in the emotional, physical, academic, and behavioral damage inflicted on the children who grow up amidst this everyday violence. These are costs we can no longer afford to bear; nor can we morally justify inaction.[103]

Domestic violence has long term effects which society cannot afford to ignore, morally, economically and socially. The effects of domestic violence carry into every aspect of our society, and the community as a whole must take action to address this problem and create solutions. With the scope of the familial violence problem defined, the unique causes and dynamics of familial violence explained, and the effects of such violence described, this Comment

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[98] Interview with Detective Bernie Cambell, Honolulu Police Department Family Violence Unit, in Honolulu, Haw. (Feb. 27, 1997)(notes on file with author).

[99] *See* Fagan, *supra* note 95, at 53-54; Steinman, *supra* note 15, at 240.

[100] *See* Fagan, *supra* note 95, at 53-54.

[101] *Id.* at 55.

[102] Tochiki & Vasey, *supra* note 29, at 10 (quoting the Honorable Janet Reno, Attorney General of the United States, Address to the Courts and Communities: Confronting Violence in the Family Conference, National Council of Juvenile and Family Court Judges, San Francisco, Cal. (Mar. 25-28, 1993)).

[103] Digirolamo, *supra* note 41, at 48.

now outlines the current state of the law and how those laws can be better implemented and enforced to increase the protection of women and children in our society.

V. THE AMERICAN CRIMINAL JUSTICE SYSTEM'S RESPONSE TO FAMILIAL VIOLENCE

The American criminal justice system's response to familial violence has continually failed and even today cannot effectively protect women. Historically, men had the right as well as the duty to beat their wives as long as the stick used to abuse was thinner than a man's thumb, hence the phrase, "the rule of thumb."[104] Indeed, evidence shows that violence has perpetually been inflicted on women and children since the beginning of time.[105] Initial efforts to curb such violence centered on protecting children.[106] Because the prevailing view was that wife-beating resulted from enviromental stress, lack of education or lack of mental hygiene, it was not until the Progressive Era in the early 1940's that wife beating was considered a form of family violence.[107] In fact during the Depression, male violence had been radically de-emphasized as a grave family problem, and society had sympathized with the poor unemployed husband.[108]

As time passed, however, society's views regarding women changed, and such sympathy for the "poor husband" waned considerably. Due to the women's movement during the late 1960's through the 1970's, the American

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[104] *See* League OF WOMEN VOTERS, *supra* note 15, at 4. In his commentaries on the Laws of England, William Blackstone described husbands' rights to moderately chastise their wives in order to enforce obedience. *See id.* The common law measured moderate chastisement according to the "rule of thumb," which permitted a husband to discipline his wife by beating her, so long as the stick used was no thicker than his thumb. *Id.* That legal practice reflected society's acceptance of wife beating as a lawful and perhaps desirable, or at least necessary practice. *See id.*; Schmidt Am Busch, *supra* note 15, at 3.

[105] *See* Harvard Law Review Association, *supra* note 15, at 1528 (reporting that until the late nineteenth century wife beating was a legally protected and socially condoned practice); *see also* Schmidt Am Busch, *supra* note 15, at 3-4.

[106] *See* Schmidt Am Busch, *supra* note 15, at 3.

[107] *See id.*

[108] *See* Schmidt Am Busch, *supra* note 15, at 4. Violence was rationalized as the unfortunate result of stress. *See id.* In times of economic hardship, women were expected to make sacrifices and reconcile with their husbands. *See id.* Throughout the 1940's and 1950's wife beating was perceived as a private problem. *See id.* Husbands blamed their wives for causing their abuse. *See* Schmidt Am Busch, *supra* note 15, at 4. Abused women were considered to be neurotic. *See id.* They were perceived to have failed to accept their own femininity; they were frustrated as the result of their frigidity. *See id.*

criminal justice system finally responded to the crime of familial violence.[109] The movement "challenged the ideology of [the] public and private sphere[s]"[110] while questioning the traditional family values which had perpetuated violence against women.[111] It was not until the early 1990's, however, that any federal bills regarding domestic violence were introduced in Congress.[112] Indeed, it was not until 1994 that the VAWA was actually even codified into law.[113]

The recent changes in the laws for women from the 1960's to the present represent progress. However, the historic existence of gender bias within American law contributes to and reinforces familial violence in America today.[114] Familial violence remains a growing problem,[115] but increased awareness and understanding of its devastating effects has prompted stronger criminal justice responses by both the federal and state governments. Some of the most important responses include: Civil Protection Orders; The VAWA; The GCA; Act 198; and the HRE decisions from the appellate courts of the State of Hawai'i. Each response will now be discussed in turn.

A. Civil Protection Orders Which Protect Women

The civil protection order is the primary weapon in the fight against familial violence; it is the front line in the war against the abuse of women.[116] Civil

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[109] *See* Klein & Orloff, *supra* note 16, at 810; *see also* Schmidt Am Busch, *supra* note 15, at 5.

[110] Schmidt Am Busch, *supra* note 14, at 5.

[111] *See id.*

[112] *See id.* at 5.

[113] *See id.* (demonstrating that although the women's movement of the 1960's brought the problem of woman abuse to the attention of the public, no significant legislation was passed until some twenty or thirty years later); *see also* 18 U.S.C. § 2265 (1994), *supra* note 9 and accompanying text.

[114] *See* Schmidt Am Busch, *supra* note 15, at 5.

[115] *See* discussion *supra* Part II.

[116] *See* BLACK'S LAW DICTIONARY 1223 (6th ed. 1990). Black's law dictionary defines a "protection order" as an:

> Order issued by a court in domestic violence or abuse cases to, for example, protect spouse from physical harm by other spouse or child from abuse by parent(s). Such order may be granted immediately by court in cases where immediate and present danger of violence or abuse is shown. Such emergency orders are granted in ex parte type proceedings and are temporary in duration pending full hearing by court with all involved parties present.

Id.; *see also* Klein & Orloff, *supra* note 16, at 811 (stating that civil protection orders serve as important tools for protecting victims of domestic violence from their abusers and therefore, protective orders can be effective methods to eliminate or reduce incidents of domestic abuse); Margaret Martin Barry, *Protective Order Enforcement: Another Pirouette*, 6 HASTINGS WOMEN'S L.J. 339, 348 (1995)(noting that the single most important legal antidote to domestic

protection orders are injunctive legal remedies, "proscribing future assault or threat of assault" and other violent or harassment type behaviors.[117] Said orders may prohibit the alleged abuser from contacting, threatening or physically abusing the victim.[118] Additionally, the orders can provide for a wide variety of civil remedies such as orders determining custody, deciding support issues, demanding that the abuser vacate the residence, to stay away from the victim's residence, to stay away from the victim's place of employment and may include the payment of the victim's abuse related attorney's fees.[119] A battered woman's initial requirement for invoking criminal justice system protection is the civil protection order.[120] Such court orders assist women victims by removing the abuser, forbidding contact with the victim and granting custody and child support in favor of the victim.[121]

The majority of states, including the State of Hawai'i,[122] grant civil protective orders to spouses and former spouses; family members such as parents, siblings, aunts, uncles, etc.; children; parents of a child in common; unmarried persons of different genders living as spouses; and intimate partners of the same gender.[123] Some states even afford coverage of protection orders to dating partners and adolescents.[124]

Why are these orders so important? These civil protection orders are vital to the family and household members who petition for them because of their broad and discretionary scope.[125] For example, courts nationwide often issue the following orders:

> [1] Orders to refrain from other physical or psychological abuse or even to restrict any contact with an alleged victim; [2] Orders to vacate a domicile . . . or to allow . . . exclusive use of certain personal property; . . . [3] Orders to enter

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violence, which is used today by all fifty states, is the civil protection order); *see also* Interview with Cori A. Kekina, Law Clerk to Senior Judge Michael A. Town of the Family Court of the First Circuit, in Honolulu, Haw. (Feb. 14, 1997)(stating that civil protection orders are the first and one of the most important steps in breaking the cycle of violence)(notes on file with author).

[117] Barry, *supra* note 116, at 348.

[118] *See* HAW. REV. STAT. § 586-4(a)(1)-(4) (1995).

[119] *See* HAW. REV. STAT. § 586-5.5 (1995); *see also* Barry, *supra* note 116, at 348; Klein & Orloff, *supra* note 16, at 1031-34.

[120] *See* DOMESTIC VIOLENCE CLEARINGHOUSE AND LEGAL HOTLINE, THE TEMPORARY RESTRAINING ORDER PROCESS IN THE FIRST CIRCUIT: A REPORT BY THE DOMESTIC VIOLENCE CLEARINGHOUSE AND LEGAL HOTLINE ON POLICIES AND PROCEDURES 1 (1992).

[121] *See* Andrea Brenneke, *Civil Rights for Women: Axiomatic & Ignored*, 11 LAW & INEQUITY 1, 32-33 (1992).

[122] *See* HAW. REV. STAT. § 586-1 (1995)(defining the scope of civil protection orders to include spouses or former spouses, parents, children, persons related by consanguinity and persons jointly residing or formerly residing in the same dwelling unit).

[123] *See* Klein & Orloff, *supra* note 16, at 814-37.

[124] *See id.*

[125] *See* BUZAWA & BUZAWA, *supra* note 15, at 113.

> counseling; [4] Orders to pay support, restitution, or attorney fees; [5] Orders granting temporary custody of minors to the victim; and [6] Orders limiting visitation rights to minor children.[126]

The broad scope of the civil protection order remedy allows judges to fashion the appropriate form of legal remedy to domestic violence cases, which have common themes and yet uncommon fact patterns.

Although protection orders seemingly protect women, "the most serious limitation of civil protection orders is widespread lack of enforcement."[127] Prior to 1994, and the enactment of the VAWA, state court issued orders of protection were enforceable only within the issuing state. The majority of states, in conflict with Article IV, section 1 of the United States Constitution, did not afford full faith and credit to foreign protection orders.[128] For example, a battered woman in Hawai'i who obtained an order of protection against her abusive husband could not flee to California and enforce the Hawai'i order against her husband, if he followed her to California. Such policies in many states left a severe gap in the protection afforded to women. Specifically, a victim fleeing her abuser could not leave the boundaries of her state without losing the heightened protection derived from such an order.[129] States in which fleeing victims sought refuge historically refused to enforce the victims' protective orders because most states ignored the full faith and credit clause of the United States Constitution.[130] Most states refused to enact any full faith and credit legislation expressly validating such foreign orders of protection.[131] Without full faith and credit statutes, the states were limited to protecting women from only those acts of domestic violence which took place within their jurisdiction.[132] Therefore, the victim who is forced to flee or move to escape her crazed and violent spouse had no special legal protection against her batterer.[133] The victim would be left with no legal protection against a batterer who may be stalking her to re-assert his control through kidnapping, violence or murder.[134]

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[126] *Id.* at 113-14.

[127] Brenneke, *supra* note 121, at 33.

[128] *See* Catherine F. Klein, *Full Faith and Credit: Interstate Enforcement of Protection Orders Under the Violence Against Women Act*, 29 Fam. L.Q. 253, 254 (1995).

[129] *See id.* at 254-56.

[130] *See id.* at 270 n.9; *see also* U.S. CONST. art. IV, § 1 (stating that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state).

[131] *See* Klein, *supra* note 128, at 253-54.

[132] *See id.* at 253-54.

[133] *See id.* at 253-56.

[134] *See id.* at 253-54. Previously, to receive the protection of the victims' protective orders in the enforcing or foreign state, victims had to petition that state's court for a new protection order, leaving potential gaps in the protection of women. *See id.*

Prior to VAWA, and absent any full faith and credit statute, any attempt to seek the protection of a refuge state through a new order of protection required the petitioning of the refuge state court.[135] Constitutional due process, it was argued, required that the batterer be served notice of the new protection proceedings.[136] However, the notice served contained the victim's new address in the refuge state.[137] The irony is clear: a fleeing victim, whose domestic situation was so abusive and threatening that she had to leave her home and escape to another state, was required to reveal her location to the one person from whom she was attempting to flee.[138] A woman fleeing her male batterer by crossing state lines takes extremely dangerous risks.[139] Indeed, many incidents of spousal abuse or murder occur during the victim's attempt to leave her abuser.[140] Thus, the majority of domestic violence victims who cross state lines to escape their abusers relinquish the legal protection afforded by protective orders just when those orders may be most important to the victims' survival.[141]

B. The VAWA and Protecting Women

To fill this gap in the protection of domestic violence victims[142] and to "deter, punish, and rehabilitate batterers in order to prevent abuse",[143] on

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[135] *See* Klein, *supra* note 128, at 259. The petitioning requirement is flawed. *See id.* Petitioning the refuge state court for a new order of protection requires notice to be sent to the respondent/batterer. *See id.* Such notice reveals the location of the victim, endangering the victim's safety. *See id.*

[136] *See id.* To satisfy due process requirements, the batterer had to be served with notice regarding pending protection proceedings. *See id.*

[137] *See id.* Service of notice reveals the victim's whereabouts, endangering the victim. *See id.*

[138] *See* Victoria Lutz & Cara Bonomolo, *How New York Should Implement the Federal Full Faith and Credit Guarantee for Out-of-State Orders of Protection*, 16 PACE L. REV. 9, 9-13 (1995)[hereinafter Lutz & Bonomolo].

[139] *See id.* at 13 (stating that in eighty percent of the states in this country, a woman who crossed state lines to flee her abusive partner voided her own protective order).

[140] *See* LEAGUE OF WOMEN VOTERS, *supra* note 15, at 2.

[141] *See* Lutz & Bonomolo, *supra* note 138, at 13-14.

[142] *See, e.g.*, Schmidt Am Busch, *supra* note 15, at 4-5. Title II of the VAWA represents the federal government's recognition that domestic violence is a national issue. *See id.* at 5. Title II protects women fleeing their abusers through mandating that protective court orders issued by one state are valid in the forty-nine other states. *See id.* With Title II women do not lose protection crossing state lines. *See id.*; *see also* Lutz & Bonomolo, *supra* note 138, at 12 (stating that the purpose of the VAWA is to respond both to the underlying attitude that familial violence is somehow less serious than other crimes and to the resulting failure of the criminal justice system to address such violence).

[143] Harvard Law Review Association, *supra* note 15, at 1544.

September 13, 1994, President Clinton signed the VAWA into law[144] as a section of the Omnibus Crime Bill of 1994.[145] The VAWA is "one of the Crime Bill's largest crime-prevention programs, providing $1.6 billion to confront the national problem of gender-based violence."[146] The statute mandates new federal crimes, increased penalties for crimes against women and full faith and credit for foreign orders of protection.[147] The VAWA contains five titles concerning violence against women:

> Title I, Safe Streets for Women, increases sentences for repeat offenders who commit crimes against women. Title II, Safe Homes for Women, focuses on crimes of domestic violence. Title III, Civil Rights for Women, creates the first civil rights remedy for violent gender-based discrimination. Title IV, Safe Campuses, grants funds to be spent on problems faced by women on the nation's college campuses. Title V, Equal Justice for Women in the Court provides training for state and federal judges to combat widespread gender bias in the courts.[148]

The titles of the United States Code quoted above are indicative of the problems they are supposed to solve. The relevant section of the VAWA mandating interstate enforcement of foreign protection orders states, in part:

> (a) Full Faith and Credit.—Any protection order issued that is consistent with subsection (b) of this section by the court of one State or Indian tribe (the issuing State or Indian tribe) shall be accorded full faith and credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or tribe.
> (b) Protection Order.—A protection order issued by a State or tribal court is consistent with this subsection if—
> (1) such court has jurisdiction over the parties and matter under the law of such State or Indian tribe; and
> (2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process.[149]

Title II of the VAWA increases protection to the women of America through its full faith and credit mandate regarding protection orders,[150] yet the

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[144] *See* Lutz & Bonomolo, *supra* note 138, at 12.

[145] *See id.*

[146] Klein, *supra* note 128, at 253.

[147] *See generally* Pamela Paziotopoulos, *Violence Against Women Act: Federal Relief for State Prosecutors*, 30 PROSECUTOR 20 (1996).

[148] Klein, *supra* note 128, at 253.

[149] 18 U.S.C. § 2265 (1994).

[150] *See* Lutz & Bonomolo, *supra* note 138, at 10-12; Klein, *supra* note 128, at 253; Harvard Law Review Association, *supra* note 15, at 1544.

states have resisted enforcement and implementation.[151] States have prosecuted very few cases under the 1994 law.[152] Hawai'i has prosecuted no cases under the VAWA.[153] Only a handful of states have VAWA implementation programs[154] and Hawai'i merely possesses an interim plan for registration of foreign protection orders and protection of women fleeing abuse.[155] Hawai'i's plan remains insufficient to enforce and implement Title II of the VAWA.[156]

The states are able to resist enforcement and implementation because the VAWA instructs the states to use their own discretion in implementing its full faith and credit mandate.[157] Consequently, the existing procedures and requirements for protection vary from state to state. Prior to Title II of the VAWA, merely seven jurisdictions afforded full faith and credit to foreign protection orders.[158] With only a tiny minority of states enforcing and implementing the VAWA, the act's vast powers and moneys remain unused, unexplored and wasted. Therefore, the VAWA is not being implemented and enforced effectively.[159]

C. The GCA and Preventing Domestic Homicide

Both orders of protection and the VAWA seek to protect women by setting injunctive, prohibitive limits on abusers' behavior, and then severely punishing the abusers if they break those limits. In contrast to prohibiting abuser conduct, the amended GCA ("the Act") seeks to protect women by taking away the most dangerous weapon used by abusers in domestic violence: guns.[160] Firearms are the most common weapon involved in killings resulting from familial violence.[161] Mindful that a firearm killed Arlene Marzan,[162] it

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[151] *See* Lutz & Bonomolo, *supra* note 138, at 10-12.

[152] *See* Paziotopoulos, *supra* note 147, at 23-25. Fewer than ten cases throughout the nation have been prosecuted under VAWA. *See id.*

[153] *See* Interview with Eliott Enoki, Assistant U.S. Attorney, in Honolulu, Haw. (Feb. 19, 1997)(notes on file with author).

[154] *See* Lutz & Bonomolo, *supra* note 138, at 10.

[155] *See* Interim Plan to Implement VAWA (copy on file with author).

[156] *See id.* The Interim Plan to Implement VAWA does enforce foreign orders "as is" pursuant to the VAWA, however the plan is not formal, remains out of the public view and must be disseminated to law enforcement statewide for effective results. *See id.*

[157] *See* Klein, *supra* note 128, at 257.

[158] *See id.* at 254 n.8.

[159] *See generally* Paziotopoulos, *supra* note 147, at 28-30.

[160] *See* LEAGUE OF WOMEN VOTERS, *supra* note 15, at 3.

[161] *See id.*

[162] *See* Oshiro, *Answer's Sought*, *supra* note 1, at A1.

is clear that guns need to be taken out of abusers' hands to avoid senseless deaths.

To combat the widespread and lethal use of firearms in familial violence, the federal criminal justice system recently enacted the Omnibus Consolidated Appropriations Act of 1997 "OCAA." The OCAA amended the Act to make it unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any federal firearm licensee knowing or having reasonable cause to believe that such federal firearm licensee has been convicted of a misdemeanor crime of domestic violence.[163]

The Amended Act mandates that all federal firearm licensees, such as police and military officers, surrender their firearms if said officers had been convicted of a misdemeanor crime of domestic violence.[164] The Act contains two amendments to the 1968 GCA which affect federal firearms licensees,[165] one of which directly protects female victims of abuse from death by firearms. The relevant amendment prohibits familial violence perpetrators from possessing firearms or ammunition.[166] This denies batterers their most commonly used instrument of abuse and eventually will save lives.[167] The Act, "make[s] it unlawful for any person convicted of a 'misdemeanor crime of domestic violence' to ship, transport, possess, or receive firearms or ammunition."[168] The Act also makes it "unlawful to sell firearms or ammunition to any recipient knowing or having reasonable cause to believe that the person has been convicted of such a misdemeanor."[169] This illustrates the federal government's zero tolerance of domestic homicide and continued commitment to fighting violence against women.

The definitions of key terms in the Act also demonstrate the federal government's commitment to eliminating domestic violence. As defined in the Act, a "'misdemeanor crime of domestic violence' means an offense that:"

> (i) is a misdemeanor under Federal or State law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is

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[163] *See* 18 U.S.C. § 922(g)(9) (Supp. 1997).

[164] *See id.*

[165] *See id.*; *see also* Letter from John W. Magaw, *supra* note 165.

[166] *See* Letter from John W. Magaw, *supra* note 165.

[167] *See* LEAGUE OF WOMEN VOTERS, *supra* note 15, at 3.

[168] 18 U.S.C. § 922(g)(9) (Supp. 1997); *see* Letter from John W. Magaw, *supra* note 165 (quoting 18 U.S.C. § 922 (Supp. 1997)).

[169] 18 U.S.C. § 922(g)(4) (Supp. 1997).

> cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.][170]

This definition includes all misdemeanors involving the use or attempted use of physical force committed by one of the defined parties.[171] This broad definition easily disqualifies all federal firearm licensees who have been convicted of even a misdemeanor crime of domestic violence.

Although the definition of a "misdemeanor crime of domestic violence" creates a broad scope under the Act, the law's retroactive character further expands the scope of the Act and the federal government's commitment. The Act's prohibition applies to all persons convicted of such misdemeanors at any time, even if the conviction occurred prior to the law's effective date of September 30, 1996. Thus, as of the effective date, persons included under the broad reach of the statute may no longer legally possess a firearm or ammunition.[172]

In contrast to the statute's strict prohibitions above, the Act employs a self-reporting enforcement mechanism: any persons convicted of a misdemeanor are asked to turn over to the court any firearms in their possession.[173] There is no formal law enforcement mechanism beyond the voluntary surrender of firearms by affected parties included under the Act.[174] Clearly, a potential problem with such voluntary enforcement measures is that convicted spouse abusers will not surrender their firearms as directed. This is especially troubling considering the substantial benefits afforded to women under the Act; the Act directly saves victims' lives by taking guns out of the hands of potential murderers. There is, therefore, a serious potential for abuse and lax enforcement as actual enforcement depends on either the affected law enforcement agency's discovery or the convicted federal firearm licensee abuser's self-reporting of such misdemeanor convictions and possession of firearms.

However, in spite of the potential and perceived problems, the U.S. Attorney's office in Hawai'i believes that enforcement of the Act does not present a major difficulty in Hawai'i.[175] As of the date of publication, the U.S. Attorney's office has not prosecuted anyone under the Act.[176] It is the U.S. Attorney's position that convicted abusers who are members of law or military

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[170] 18 U.S.C. § 921(a)(33)(A) (Supp. 1997).

[171] *See id.* This is true whether or not the statute or ordinance specifically defines the offense as a domestic violence misdemeanor. *See id.*

[172] *See* Letter from John W. Magaw, *supra* note 165.

[173] *See* 18 U.S.C. ch. 920 (Supp. 1997).

[174] *See id.*

[175] *See* Interview with Eliott Enoki, *supra* note 153.

[176] *See id.*

enforcement will turn in their weapons upon command.[177] Federal firearms licensees convicted of familial violence are easily identified through registration of firearms and court documentation of criminal convictions.[178] The important issues regarding enforcement are simply which law enforcement agency should enforce, and how, within agencies, the Act should be enforced. [179] The proposed solution to these issues is discussed in Part VI.

Despite its clear benefits, the Act faces criticism because of its harsh and inflexible application. With the enactment of the Act "law enforcement officers and other government officials who have been convicted of such a misdemeanor will not be able to lawfully possess firearms or ammunition for any purpose including performing their official duties."[180] Although the Act laudably protects women from firearms by removing firearms from abusive and deadly situations, the law as written is unusually harsh due to its retroactive effect, thereby including many licensees who may have been convicted of a qualifying misdemeanor but are not, in fact, abusers.[181] Part VI discusses these issues and proposes solutions.

D. Act 198 and Protecting Children

The American criminal justice system has responded to protect women victims, punish male abusers and removed the most deadly weapons used in domestic violence situations in order to end the domestic violence phenomenon. The criminal justice system also has responded to protect children from domestic abuse.[182] State protection order and custody statutes "have been moving toward supporting a presumption against awarding custody to a batterer where there is evidence of abuse."[183] Indeed, the State of Hawai'i's criminal justice system's response to the victimization of children includes Act 198, a recently enacted amendment to Hawai'i's custody law.[184]

This Act raises a rebuttable presumption in favor of custody for the non-abusive parent when there has been a finding of familial violence in a disputed custody case.[185] The law removes children and mothers from contact with the

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[177] *See id.*

[178] *See id.*

[179] *See* Interview with Eliott Enoki, *supra* note 153.

[180] Letter from John W. Magaw, *supra* note 165; *see* 18 U.S.C. ch. 920 (Supp. 1997).

[181] *See* 18 U.S.C. § 923(j) (Supp. 1997).

[182] *See* discussion *infra* notes 254-55 and accompanying text.

[183] Klein & Orloff, *supra* note 16, at 956.

[184] *See* HAW. REV. STAT. § 571-46 (Supp. 1996).

[185] *See id.* In an interview with Senior Judge of the Family Court of the First Circuit Michael A. Town, Judge Town stated that Act 198 adopts the view preferred by the National Council of Juvenile and Family Court Judges, a view that protects children from domestic abuse. Interview

abuser, ending the violence and its traumatic effects.[186] The amendment represents the state's recognition that violence in the home is not in the best interest of the child, and that it may result in further criminal activities among the children of abusive parents[187] and increased social costs for generations to come—expensive burdens the state does not wish to bear.[188] The relevant section of Act 198 states:

> (9) In every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that family violence has been committed by a parent raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence.[189]

The Act also describes new factors the court must consider in a proceeding in which the custody of the child or visitation by the parent is at issue, and in which the court has made a finding of family violence by a parent.[190] The factors include the safety and well-being of victim and child in addition to the perpetrator's history of causing physical harm, injury and assault.[191] Act 198 expressly states that absence or relocation by the victim because of an act of violence by the abuser is not a factor that weighs against the parent in determining custody or visitation.[192] The court may award visitation to the abusive parent if safety provisions can be made.[193] The courts are also provided with wide powers of discretion to fashion orders of visitation, including ordering: 1) payment for the supervised visits; 2) posting of a bond

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with Judge Michael A. Town, Senior Family Court Judge of the Family Court of the First Circuit, in Honolulu, Haw. (Feb. 14, 1997)(notes on file with author).

[186] *See* Klein & Orloff, *supra* note 16, at 966. Klein & Orloff explain why contact with the abuser is prohibited, as follows:

> Judicial authorities strongly urge against the award of joint custody in custody disputes where domestic violence is an issue. A Joint Resolution unanimously passed by the United States House of Representatives and Senate noted that joint custody guarantees the batterer continued access and control over the battered spouse's life through their children . . . .

Id.

[187] *See id.* at 949-67.

[188] If the abuse of a family or household member leads to criminal conviction and the expense of incarceration for one inmate for one year is approximately $35,000, the social costs of domestic violence are clearly exorbitant. *See* LEAGUE OF WOMEN VOTERS, *supra* note 15, at 3.

[189] HAW. REV. STAT. § 571-46 (Supp. 1996).

[190] *See id.*

[191] *See id.*

[192] *See id.*

[193] *See id.*

for such visits; 3) that addresses of all abused parties remain confidential; and 4) other such remedies as necessary.[194]

Act 198, although appearing benign, really may be malignant. Its text says nothing about how to rebut the powerful statutory presumption in favor of sole custody for the non-abusive parent. It is important to remember that over 75% of male university students indicated a likelihood of wife battering.[195] But most batterers do not automatically deserve to be separated from their children forever upon a finding by a state judge of an incident of familial violence. This ambiguity concerning both the process and substantive evidence necessary to rebut the presumption creates potential for abuse.[196]

The language of the statute also gives family court judges unfettered discretion to fashion custody and visitation orders. [197] These judges face an enormous calendar full of proceedings where there are issues of both familial violence and the custody of a minor child. The sheer volume of cases involving abuse and custody issues results in crowded calendars and swift justice for the consumers of family court services. This becomes a major issue when HRS section 571-46(9) states that when there has been a determination by the court that family violence has been committed by a parent, a rebuttable presumption of custody to the non-abusive parent arises.[198] Serious custody and visitation decisions made under extreme time sensitive conditions give rise to the potential for abuse and mistake.

The spouse who desires custody conceivably could allege familial abuse, retain a skilled lawyer and convince the court to determine that such abuse has occurred. The realities of the criminal justice system's overburdened capacity combined with the wide discretion given to the court provided for in the language of the amendment to HRS section 571-46 invite mistake and abuse. Time constraints due to the large number of cases create the possibility of problems in making sensitive judicial determinations. For example, in accordance with Act 198, which may decide whether an alleged abuser may see his children again in the near or distant future, judiciary staff sometimes only have twenty minutes to interview the family members and to make a

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[194] *See id.*

[195] *See* LEAGUE OF WOMEN VOTERS, *supra* note 15, at 2. A 1987 study of male university students looked at their self-reported likelihood of wife battering and found that 79% of the subjects indicated some likelihood of battering. *See id.*

[196] *See* Interview with Cori A. Kekina, *supra* note 116.

[197] *See* HAW. REV. STAT. § 571-46 (Supp. 1996). The statute states, that "[i]n the actions for divorce, separation, annulment, separate maintenance, or any other proceeding where there is at issue a dispute as to the custody of a minor child, the court, during the pendancy of the action, at the final hearing, or at any time during the minority of the child, may make an order for the custody of the minor child as may seem necessary or proper." *Id.*

[198] *See* HAW. REV. STAT. § 571-46 (Supp. 1996).

report as to what acts of abuse have or have not occurred.[199] This, without a doubt, leads to abuse of the process and mistakes. Such potential for unscrupulous parties' manipulation and abuse of the law is not in the best interest of the child, parents, or judiciary and remains problematic. Therefore, improvement is necessary and proposed improvements are discussed in Part VI of this Comment.

E. The HRE and Punishing Abusers

Despite such recent American criminal justice system responses, abusers may still escape conviction and punishment (and possibly abuse again) because evidentiary issues arising under the HRE can cause prosecutors to fail to prove abusers' guilt "beyond a reasonable doubt," the standard of proof in criminal domestic violence cases.[200] Under the current HRE, prosecutors face evidentiary problems in meeting their standard of proof because victims frequently recant, are unavailable to testify, or do not remember the abuse.[201] Furthermore, past incidents of abuse and other character evidence regarding the abuser and his relationship with the victim are sometimes ruled inadmissible in domestic abuse cases because of the potential prejudice to the alleged abuser, thereby making it easier for abusers to escape punishment.[202] Indeed, although Honolulu police found probable cause for arrests for familial violence four thousand six hundred sixty-five times in 1995,[203] the number of familial violence convictions remained much lower.[204] Possible factors influencing low conviction rates include complaining witnesses who contradict their earlier statements or who do not participate in the trial of their abuser and prior bad acts which are inadmissible evidence at such trials.[205] The exclusion of such evidence can create reasonable doubt in the minds of the fact finder, possibly resulting in an acquittal or a not guilty verdict, and ultimately endangering the safety of the women and children involved.

These evidentiary problems are significant hurdles for the prosecution of domestic violence crimes because the evidence typically presented in such

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[199] *See* Interview with Cori A. Kekina, *supra* note 116.

[200] *See* Klein & Orloff, *supra* note 16, at 1172.

[201] *See* Interview with Cori A. Kekina, *supra* note 116.

[202] *See* Raeder, *supra* note 22, at 1469; *see also* Marie De Sanctis, *supra* note 18, at 364; Lisa A. Linsky, *Domestic Violence and the Law Symposium: Use of Domestic Violence History Evidence in the Criminal Prosecution: A Common Sense Approach*, 16 PACE L. REV. 73, 75 (1995).

[203] *See* LEAGUE OF WOMEN VOTERS, *supra* note 15, at 4.

[204] *See* Interview with Cori A. Kekina, *supra* note 116.

[205] *See* LEAGUE OF WOMEN VOTERS, *supra* note 15, at 1.

domestic violence cases centers on the complaining witness' testimony.[206] Indeed, the victim's testimony is usually the most important evidence introduced at trial.[207] Other forms of evidence offered by the prosecution include witness testimony regarding relevant issues such as injuries, medical history, police reports, photographs, victims' statements, protection orders from any and all jurisdictions, and/or expert witnesses.[208]

Despite such broad evidentiary sources, the abused victim will often recant, will not be available to testify, or will simply claim not to remember the alleged abuse.[209] Clearly, this can lead to problems in proving the abuser's guilt when proof centers on the victim's testimony but the victim's testimony is recanted, unavailable or unreliable. Typically, victims obtain civil protection orders and/or call the police, fill out Victim's Voluntary Statement Forms ("VVSF") on the scene with a police observer, and have the abusers arrested.[210] However, by the time of trial, the victims are typically too afraid, or caught in the reconciliation phase of the cycle of violence to follow through and testify against their abuser in court.[211] The victim may then recant any prior statements of abuse such as those recorded on the VVSF's.[212] Some victims may simply fail to show up on the trial date.[213] Others may get on the stand and claim not to remember either the alleged abuse or making the VVSF.[214]

The victims' prior statements, such as the VVSF, are hearsay under the HRE and therefore are not admissible unless included under a statutory

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[206] *See* Interview with Cori A. Kekina, *supra* note 116. Indeed, the evidence may include only the victim's testimony. *See* Klein & Orloff, *supra* note 16, at 1172.

[207] *See* Marie de Sanctis, *supra* note 18, at 367.

[208] *See id.*; *see also* Interview with Cori A. Kekina, *supra* note 116; Klein & Orloff, *supra* note 16, at 1172.

[209] *See* Klein & Orloff, supra note 16, at 1173; *see also* Interview with Cori A. Kekina, *supra* note 116; Marie de Sanctis, *supra* note 18, at 367. Although some victims are eager to come forward with information regarding the abuse, the majority of domestic violence victims, in up to ninety percent of the cases, are uncooperative. *See id.*

[210] According to Detective Bernie Cambell, Voluntary Victim Statement Forms ("VVSF") are used by the Honolulu Police Department to take the victims' statements at the time of investigating domestic violence incidents. *See* Interview with Detective Bernie Cambell, *supra* note 98. Typical questions on the VVSF include, but are not limited to, "What is your relationship to the person who struck you?" and "Are you living together?" *Id.*

[211] Even if they do testify, the victims, particularly those who have been victimized over a long period of time, tend to underestimate both the frequency and severity of the violence they experience. *See* Klein & Orloff, *supra* note 16, at 1173. The victims tend to fear their abuser and/or hope for some kind of reconciliation and therefore do not testify to the true extent of the abuse, if at all. *See* Marie de Sanctis, *supra* note 18, at 368-69.

[212] *See* Klein & Orloff, *supra* note 16, at 1173.

[213] *See id.*

[214] *See id.*

exception to the hearsay rule.[215] Such an exception exists for prior inconsistent statements by witnesses who testify at trial.[216] Such statements are admissible to prove the truth of the matter asserted when: 1) the witness is subject to cross-examination at trial concerning the subject matter of the statement; 2) the statement is inconsistent with the testimony of the witness at trial; 3) the inconsistent statements are brought to the attention of the witness; and 4) the statement is written and signed or otherwise adopted by the witness.[217] Therefore, when a victim recants on the stand, the prosecution may use HRE 802.1, impeach the victim with her VVSF, and prove the abuser's guilt beyond a reasonable doubt, if the evidence is sufficient.

In spite of such statutory exceptions, there are flaws in the existing HRE. When the victim makes a prior statement, such as in a VVSF, and then is unavailable to testify or cannot remember making the VVSF statements and therefore is not subject to cross-examination regarding the prior inconsistent statements' subject matter, the exception does not apply.[218] As previously discussed, victims frequently are uncooperative in such ways, leaving a loophole for the defense to avoid a conviction.[219] This is therefore an ongoing problem which should be remedied to better protect domestic violence victims.

Just as the victims' relevant prior inconsistent statements may be excluded from evidence if the victim is not subject to cross-examination at trial, the abusers' relevant prior bad acts of abuse in the relationship are typically excluded on the grounds of prejudice.[220] The general rule in the State of Hawai'i is that evidence of a person's character is not admissible for the purpose of proving that he acted in conformance with that character.[221] Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.[222]

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[215] *See* HAW. R. EVID. 802.1.

[216] *See id.*

[217] *See id.*

[218] *See, e.g.*, State v. Canady, 80 Hawai'i 469, 911 P.2d 104 (App. 1996).

[219] *See* Klein & Orloff, *supra* note 16, at 1173.

[220] *See* HAW. R. EVID. 404(b); *see also* Raeder, *supra* note 22, at 1488-89; Marie de Sanctis, *supra* note 18, at 365.

[221] *See* HAW. R. EVID. 404(a). The rule states, in relevant part: (a) Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion[.] *Id.*

[222] Such character evidence is prohibited under HAW. R. EVID. 404(b), stating in relevant part:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible where such evidence is probative of any other fact that is of consequence to the determination of the action, such as proof of motive,

However, there are exceptions to this rule. Evidence of prior bad acts may be admissible where such evidence is probative of any other fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.[223]

Policy dictates that the relevance of such prior bad act evidence does not outweigh its prejudice, as our society has decided that the greater evil is that jurors may convict on past atrocities instead of convicting on the evidence, and beyond a reasonable doubt as required by our criminal justice system; clearly an unjust result.[224] However, the probative value of such evidence is significant in the true pursuit of justice. Without the context of the domestic violence relationship, the jury may not understand any uneven and fragmentary presentation of the facts, which may result from the exclusion of prior bad acts of abuse in the relationship.[225] Indeed, in one case where a significant amount of prior bad act evidence was excluded based on prejudice, a juror commented after the trial "the jury would certainly have found Sweeny guilty of murder if they had heard all the evidence."[226]

As stated above in Part III, the typical juror is not likely to understand the unique dynamic of familial violence and probably believes in certain familial violence myths which prejudice the victim indirectly.[227] In order to help the jurors understand the familial violence situation presented to them, prosecutors need to introduce the past history of prior bad acts of domestic abuse into evidence.[228] As such, said evidence is both material and relevant.[229] Indeed, it is typically necessary to inform the court and the fact finder of the sequence

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opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.

Id. A possible factor influencing low domestic violence conviction rates is evidentiary rules originating in a patriarchal society which excludes prior acts of violence perpetrated by the same abuser upon the victim in the same relationship. *See* Raeder, *supra* note 22, at 1463-64. It has been widely stated that "our criminal laws and evidentiary rules carry with them gender-biased views originating at a time when women's lives were devalued and the typical male perspective on domestic femicide was that the victim provoked her husband by her words or deeds." *Id.*

[223] *See* HAW. R. EVID. 404(b).

[224] *See* Raeder, *supra* note 22, at 1490. As policy is involved, it is necessary to consider redressing decades of discrimination and abuse against women and children by the American criminal justice system. *See id.* This is important when deciding policy-laden evidentiary questions, such as the effect of the relevant evidentiary rules on the state prosecution of abusers under statutes prohibiting the abuse of a family or household member. *See id.*; *see also* HAW. R. EVID. 403.

[225] *See* Raeder, *supra* note 22, at 1475; *see also* Marie de Sanctis, *supra* note 18, at 365.

[226] *See* Marie de Sanctis, *supra* note 18, at 365.

[227] *See* Linsky, *supra* note 202, at 81.

[228] *See id.*

[229] *See id.*

of events leading up to the crime to complete the narrative of events.[230] Such evidence is usually inextricably interwoven with otherwise admissible evidence, and is therefore necessary for a complete understanding of the unlawful events.[231] Prior bad act evidence aids understanding typical domestic violence trial issues such as why the victim delayed in disclosing the crimes, recanted her allegations, remained with her abusive partner, or did not attend the trial of her own abuser.[232] These issues can create reasonable doubt in the minds of the jury.[233] Much of this evidence may still be excluded under the HRE as too prejudicial and inflammatory, and this therefore remains a problem with the current state of the law.

Recognizing the need to increase familial violence convictions, and consequently the level of protection afforded to familial violence victims, the response of the Hawai'i criminal justice system has been to allow the use of prior inconsistent statements during the prosecution's case in chief in the form of signed, written statements by the recanting complaining witness who testifies at trial, and the use of prior incidents of abuse in the domestic violence relationship. The HSCT and ICA recently held that in a HRS section 709-906 conviction for abuse of a family and household member, prior inconsistent statements are admissible as substantive evidence of the facts asserted therein, and that prior bad acts are admissible to explain the context of the domestic violence relationship.[234] Such hearsay and character evidence is sufficient to establish physical abuse, the manner in which it was inflicted, and the context of the abuse, without additional independent corroborative evidence; such statements and prior bad acts may themselves be sufficient to support a criminal conviction if they satisfy the substantial evidence standard applied in criminal cases.[235]

The recent interpretation of the HRE should result in more convictions and send messages: messages that family violence will not be tolerated, that family violence is a crime punishable by incarceration, that familial violence dynamics are understood by the criminal justice system and that the cycle of family violence *will* be broken. Although the ICA for the State of Hawai'i remedied some historic effects of gender imbalance through interpretation of the existing evidence rules, further improvement is necessary.[236] The admission into evidence of prior inconsistent statements and the prior bad acts

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[230] *See id.*

[231] *See* Linsky, *supra* note 202, at 81.

[232] *See* Marie de Sanctis, *supra* note 18, at 368-69.

[233] *See id.*

[234] *See supra* note 14.

[235] *See id.*

[236] *See id.*

of the defendant is clearly beneficial, but further liberal interpretation of HRE is needed to ensure the safety of victims and the punishment of abusers.

VI. IMPROVEMENTS IN THE VAWA, GCA, ACT 198 AND HRE

A. Improving Women's Safety Through Implementation and Enforcement of Title II of the Violence Against Women Act

Although Hawai'i's interim plan implements Title II of the VAWA, [237] formal procedures and/or statewide legislation are/is needed. Currently, there is no formal implementation plan or legislation,[238] creating a potential gap in the legal protection afforded to female victims.[239] However, as of May 1997, no prosecutions have been brought under the VAWA in Hawai'i and the interim plan has not been tested.[240] When compared with other state plans, Hawai'i's plan has certain strengths and weaknesses. On the basis of these weaknesses, the following changes are proposed to better protect women: 1) The adoption of legislation providing for registration of out-of-state civil orders of protection; 2) legislation providing for qualified immunity for police enforcing such protective orders; 3) revising Hawai'i's domestic abuse protective order forms so that they may be easily enforced in some other foreign state; and 4) increased police training to better serve and protect women.

Hawai'i's implementation of VAWA must have a registration option. Registration of foreign protection orders in a statewide registry enhances enforcement and eliminates error.[241] Registration is not required by the VAWA,[242] and therefore it must be made clear that the registration requirement is optional and not a condition precedent to protection. Problems are illustrated by Kentucky, New Jersey and West Virginia's registration requirements.[243] Even Oregon's temporary automatic enforcement for thirty days is undesirable because it expires, leaving some women unprotected.[244] In spite of these problems, the benefits of registration demand a need for some registration procedure.

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[237] *See* Interview with Judge Michael A. Town, supra note 185.

[238] *See id.*

[239] *See* Klein, *supra* note 128, at 254-55.

[240] *See* Interview with Cori A. Kekina, *supra* note 116.

[241] *See* Klein, *supra* note 128, at 263.

[242] *See id.*

[243] *See* Klein, *supra* note 128, at 258-64. Kentucky, New Jersey, and West Virginia all require registration before they will afford full faith and credit to foreign protection orders, leaving certain women unprotected. *See id.*

[244] *See id.*

While providing for a statewide registry of foreign civil protection orders, VAWA also could be better implemented and women better protected with the implementation of qualified immunity for police when enforcing such orders. The police need to be given qualified immunity when making arrests for violations of foreign protection orders because they fear false arrest claims.[245] Many police are reluctant to enforce foreign orders because the orders look different, have different terms and conditions, and are generally unfamiliar and unknown to them. Unfamiliarity leads to reluctance in making arrests if there is no qualified immunity because of the potential liability the officers face.[246] With qualified immunity, officers can judge the authenticity of foreign orders by requiring complainants to swear to the order's validity, leaving them free to do their job: protect the public and arrest the perpetrator.

In addition to the registry and qualified immunity features, the Family Court should revise Hawai'i's domestic abuse protective order forms to clearly describe the VAWA's full faith and credit mandate and the nationwide validity of said orders. Revising the language of the orders simplifies other state's police officers' enforcement of foreign orders per the VAWA. Hawai'i's revised order would allow police officers in foreign states to immediately ascertain the validity of the order, facilitating the protection of women.

Finally, increased police training is crucial to improving the protection of women because the police are the agents making split-second determinations as to the validity of these orders.[247] Currently, police are reluctant to make arrests based on an order for protection from a foreign state. However, if properly trained and given qualified immunity, police will enforce foreign protection orders better, leading to the increased protection of victims. All the measures described above, if adopted, will provide greater protection for women.

B. Enforcing the Gun Control Act to Decrease Domestic Femicides

In addition to better implementation and enforcement of laws like the VAWA, the criminal justice system's response must provide for continued enforcement of the Act through a coordinated effort of affected state and federal agencies, while eliminating the Act's unique retroactive character. The Act needs to be effectively enforced to take guns away from spouse abusers within affected agencies such as law enforcement and the military. Improved enforcement through increased communication between both the

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[245] *See* Interview with Det. Bernie Cambell, *supra* note 98.

[246] *See id.*

[247] *See id.*

federal U.S. Attorney and various law enforcement and military agencies affected by the amended GCA creates possibilities of compliance.[248] The position of the U.S. Attorney is that enforcement is not a problem because of: 1) the federal mandate, and 2) law enforcement's willingness to cooperate with the federal government.[249] For example, the Honolulu Police Department recently announced that twelve of its officers' firearms were being turned in because of the Act.[250] The current federal policy of allowing affected agencies to police themselves appears effective in realizing the GCA's intent, yet improvement is possible through imposition of increased responsibility on the agencies for discovering affected licensees and implementing procedures for self-reporting.

While the focus of the GCA amendment to date has been on law enforcement, in the future the focus should shift to all abusers, including abusers like Saldy Marzan. If federal and state law enforcement jointly concentrated their efforts on taking guns away from licensees, lives could be saved.

In addition, the elimination of the retroactive language of the GCA promises benefits to members of law enforcement and firearms licensees. Such language is disturbing because of its harsh effects. Once a law enforcement or military officer is prohibited from possessing firearms his/her career is hampered.[251] With the Act's retroactive reach, every licensee with a qualifying misdemeanor conviction will be subject to the firearm prohibition. Some of the convictions were likely the result of a bargain, a desire to end the litigation or some other unknown reason; some of the persons convicted of misdemeanors are not abusers. Those same people, convicted of a qualifying misdemeanor who decided just to take the misdemeanor conviction and get on with their lives, most likely would not have made the same choice had they known it would mean being forever banned from possessing a firearm and essentially ending their career.[252]

For example, consider this hypothetical situation: A wife and husband fight. Both are injured. Police arrive on the scene and, because the fight took place during a phase when police policy was to arrest everyone involved and then determine the abuser later, both are arrested even though husband was the primary aggressor. Both plead guilty to abuse of a family or household member, a misdemeanor crime, and both are fined and released. The wife states that she pleaded guilty just to move on with her life. Three years later

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[248] *See* Interview with Eliott Enoki, *supra* note 153.

[249] *See id.*

[250] *See id.*

[251] *See* Interview with Det. Bernie Cambell, *supra* note 98.

[252] *See id.*

she wants to become a police officer but cannot because she cannot possess a firearm according to the Act.[253]

Another situation could entail a police officer wrongfully arrested and charged with abuse of a family or household member for using reasonable force to discipline his fourteen-year-old daughter who, thinking that abuse of a family or household member was simply a misdemeanor crime, pled guilty to avoid the time, money, and publicity that a trial would cost him, the State of Hawai'i, and his daughter.[254] Now he sits at a desk with decreased pay, looking at a severe restriction of his career potential as a police officer.

Legal and procedural changes can solve this problem. The federal government needs to eliminate retroactive language and adopt a procedure to provide for a holistic review of each contested case. These cases need to be decided on an individual basis so that injustice to dedicated law enforcement officers is avoided.

C. The State of Hawai'i's Response to Child Victimization: Act 198

Act 198 should be amended to curb its potential for abuse and mistake through the creation of a temporary evaluation period and a mandatory review of the custody and visitation decisions within sixty days. Either an amendment or a formal procedure creating a temporary evaluation period should be enacted. This period, during which a social study would be conducted, would allow further evaluation of the familial environment. This would provide the court with more information, assisting them in making a better decision regarding custody. For example, the Act 198 presumption could arise, the court could make custody and visitation decisions in favor of the non-abusive parent and, after the ruling, a statutory temporary evaluation period could begin running, during which a fair and accurate social evaluation would be performed.

A temporary evaluation period would alleviate the strain on the courts and relocate it to social services agencies better equipped to deal with such problems. The period would help relieve the impact of Act 198 on the judges' calendars. Judges could make determinations with minimum evidentiary hearings and make their rulings conditional on a subsequent social study conducted during the temporary evaluation period. If the study confirms the judges' decisions, the ruling stands; if the study recommends something different, the parties can re-litigate and a final determination may be made.

A mandatory review of the custody and visitation decision by the court must be created to ensure against abuse and mistake. It could clear the calendars

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[253] *See id.*

[254] *See id.*

because the judges can streamline evidentiary hearings and make preliminary custody and visitation decisions as they deem fair. There would be no increase in litigation over the decision because there would be a mandatory evaluation period and review in sixty days. Thus, the parent who wants to contest the decision has two months to prepare arguments addressing why the decision should be modified.

Proponents of Act 198 argue it provides an opportunity for judges to step in and manage the case early, which improves efficiency while preventing further familial abuse and promoting uniformity in decision making. But, Act 198 accomplishes these goals at the potential expense of a fair and accurate decision regarding custody and visitation. Proponents argue that the aggrieved party is allowed to challenge the ruling whenever the best interests of the child may have changed; for example, an abusive parent could successfully complete counseling, and petition the court to gain a modification of the custody ruling.[255] However, this is a vague and discretionary remedy whose purpose and intent would be better served through statutory guarantees of fairness and accuracy in the form of a temporary evaluation period and a mandatory review of all custody and visitation decisions.

The safety and well-being of the child and parent, who are victims of familial violence, and the perpetrator's history of causing violence or the reasonable fear of violence must be considered when making a custody determination. Indeed, Act 198's rebuttable presumption in favor of custody for the non-abusive parent is laudable legislation. However, additional guarantees of fairness and accuracy are necessary to better effectuate Act 198's intent: to protect victims of familial violence and break the cycle of violence.

D. Punishing Abusers and the HRE

Recent decisions of the HSCT and ICA allow certain hearsay statements and prior bad acts as evidence in familial violence cases.[256] However, even more liberal admittance of prior inconsistent statements and prior bad acts into evidence is necessary. This section first analyzes the appellate courts' interpretation of the HRE in *State v. Eastman*,[257] *State v. Moore*,[258] and *State v. Canady*.[259]

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[255] *See* HAW. REV. STAT. § 571-46 (Supp. 1996).

[256] *See, e.g.*, State v. Eastman, 81 Hawai'i 131, 913 P.2d 57 (1996); State v. Moore, 82 Hawai'i 202, 921 P.2d 122 (1996); State v. Canady, 80 Hawai'i 469, 911 P.2d 104 (App. 1996).

[257] 81 Hawai'i 131, 913 P.2d 57 (1996).

[258] 82 Hawai'i 202, 921 P.2d 122 (1996).

[259] 80 Hawai'i 469, 911 P.2d 104 (App. 1996).

The liberal allowance of prior inconsistent statements as substantive evidence in said opinions also supports allowance of prior bad acts as substantive evidence. Next, this section argues for widespread admission of prior bad acts as substantive evidence in conjunction with prior inconsistent statements to facilitate the punishment of abusers through an examination of *State v. Clark*.[260]

The admission of prior inconsistent statements of a victim when that victim later recants and is subject to cross-examination concerning the subject matter of the inconsistent statement helps to protect women and children from their abusers, is required by the HRE, and should be followed by district court judges.[261] For example, in *Eastman*, Thomas Eastman appealed his conviction of abuse of a family or household member for an assault on his wife, Renee Bautista, to the Hawai'i Supreme Court.[262] Bautista, her baby, and Eastman lived together at the time of the alleged incident of abuse.[263] Following an argument, Bautista took the telephone receiver and "conked [Eastman] over the back of the head with it until [she] saw blood running."[264] Eastman then called the police to report the incident.[265] When officers interviewed Bautista about Eastman's complaint, they noticed that she had a swollen left eyebrow and she told them that Eastman had slapped her.[266] They also observed that she "had a knot on her head, and she was very incoherent and constantly crying."[267] The officers took photographs of her injuries which were later introduced at trial.[268]

The officers encouraged Bautista to fill out a VVSF.[269] Bautista answered on the form that she had been physically abused, that she had been slapped by Eastman, and that she in turn had hit Eastman with the phone receiver.[270] At trial the prosecution introduced the photographs and VVSF into evidence.[271]

However, when testifying at Eastman's subsequent trial, Bautista recanted her VVSF.[272] She stated that Eastman had not slapped her at all, but rather

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[260] 83 Hawai'i 289, 926 P.2d 194 (1996).

[261] *See, e.g., Eastman*, 81 Hawai'i at 131, 913 P.2d at 57; State v. Zukevich, No. 17991 Slip Op. (Haw. Ct. App. Jan. 31, 1997)(holding that a recanting witness' prior inconsistent statement was admissible under HRE 802.1); *Canady*, 80 Hawai'i at 480, 911 P.2d at 115.

[262] *See Eastman*, 81 Hawai'i at 133, 913 P.2d at 59. *See also supra* note 14.

[263] *See id.*

[264] *Id.*

[265] *See id.*

[266] *See id.* at 134, 913 P.2d at 60. *See also supra* note 214.

[267] *Id.*

[268] *See id.*

[269] *See id.*

[270] *See id.*

[271] *See id.* at 134, 913 P.2d at 57-61.

[272] *See id.* at 133, 913 P.2d at 57-60.

that Bautista repeatedly struck herself to deceive the officers into believing Eastman hit her.[273] She claimed that her prior statement on the VVSF was a lie.[274] She indicated that she and Eastman had reconciled and admitted she would do anything to keep him from going to jail.[275]

The Hawai'i Supreme Court stated that under HRE Rule 802.1(1)(B), the substantive use of prior inconsistent hearsay statements, which have been reduced to writing and are signed, adopted or approved by the declarant, such as Bautista's statements on the VVSF, is allowed in familial violence cases.[276] Before a prior inconsistent statement can be admitted as substantive evidence under HRE Rule 802.1(1)(B), certain foundational requirements must be met.[277]

The *Eastman* court reasoned that the trial court could have found that the prior inconsistent statements in the form of the victim's complaint statement was more reliable than the recanting complaining witness' testimony at trial.[278] The statements can be fairly attributed to the witness and are necessary to gain the convictions required to break the cycle of violence.[279] The statements generally are taken immediately following the incident, are signed and written in the complainant's own handwriting, and allow the police officer obtaining the statement to note her observations regarding the state of mind of the

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[273] *See id.*

[274] *See id.*

[275] *See id.*

[276] *See Eastman*, 81 Hawai'i at 137-39, 913 P.2d at 63-65; *see also* HAW. R. EVID. 802.1(1)(B), which states in relevant part:

> The following statements previously made by witnesses who testify at trial or hearing are not excluded by the hearsay rule:
>
> (1) Inconsistent Statement. The declarant is subject to cross-examination concerning the subject matter of the declarant's statement, the statement is inconsistent with the declarant's testimony, the statement is offered in compliance with rule 613(b) and the statement was:. . . .(B) Reduced to writing and signed or otherwise adopted or approved by the declarant.

Id.

[277] The *Eastman* court delineates the foundational requirements as: 1) a witness must testify about the subject matter of his or her prior statements so that the witness is subject to cross-examination concerning the subject matter of those prior statements; 2) the witness' prior statements must be inconsistent with his or her testimony; 3) the prior inconsistent statements must be reduced to writing and signed or otherwise adopted by the witness; 4) the prior inconsistent statements must be offered in compliance with HAW. R. EVID. 613(b), which requires that, on direct or cross-examination, the circumstances of the prior inconsistent statement have been brought to the attention of the witness, and the witness has been asked whether he or she made the prior inconsistent statements. *See Eastman*, 81 Hawai'i at 137, 913 P.2d at 61; *See also* State v. Zukevich, No. 17991 slip op. (Haw. Ct. App. Jan. 31, 1997).

[278] *See Eastman*, 81 Hawai'i at 139-40, 913 P.2d at 65-66.

[279] *See* Fagan, *supra* note 95, at 50.

complainant.[280] In contrast, the testimony of the complaining witness at trial has had many days to be infected with bias or other non-truth telling functions or motivations.[281] There is no reliability issue because of the short amount of time elapsed between the incident and the statement.[282] In addition, the police observations are fresh and clear, and the complainant has not had time to be intimidated or coerced into recanting by her abuser who, in most cases, still resides with her.[283] Thus, district court judges should use and follow *Eastman* to better protect women and children, and to ensure justice.

Although *Eastman* allows the use of prior inconsistent statements when the victim is subject to cross-examination, the HRE excludes such important statements when the victim is unavailable for cross-examination on the subject matter of the statements.[284] In *Moore*, the HSCT found the victim's prior testimony was admissible, although the witness was unavailable at trial.[285] In *Moore*, Robert Moore drove up to police officers in a Mercedes with his lights flashing and horn honking and stated that "someone shot my wife."[286] An officer proceeded to Moore's car and discovered Lani Moore, his wife, slumped with a bloody chest area in the passenger seat.[287] Mrs. Moore told the officer in a barely audible voice, "[h]e shot me."[288] The officer pointed to Mr. Moore and asked if she meant him.[289] She responded affirmatively and stated: "He's a good man. I told him I was leaving him. He's distraught."[290] Mr. Moore denied shooting his wife.[291]

At Mr. Moore's hearing for supervised release, Mrs. Moore testified in his favor.[292] However, she admitted that he shot her "four or five [times], I'm not certain."[293] At trial, the prosecution reported that although Mrs. Moore was under subpoena to appear and testify against her husband, she had left the state.[294] The trial court ruled that Mrs. Moore was unavailable to testify as a witness, as a result, her testimony from the supervised release hearing was

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[280] *See* Interview with Det. Bernie Cambell, *supra* note 98.
[281] *See id.*; *see also* Marie de Sanctis, *supra* note 18, at 368-69.
[282] *See* Marie de Sanctis, *supra* note 18, at 368-69.
[283] *See id.*
[284] *See Moore*, 82 Hawai'i at 206, 921 P.2d at 126.
[285] *See id.*
[286] *Id.*
[287] *See id.*
[288] *See id.*
[289] *See id.*
[290] *Id.*
[291] *See id.*
[292] *See id.* at 207, 921 P.2d at 127.
[293] *Id.*
[294] *See id.* at 208, 921 P.2d at 128.

admissible as former testimony given at a hearing in the same proceeding, and that the defense had the opportunity to cross-examine her.[295]

Following Mr. Moore's conviction for attempted second degree murder and use of a firearm in the commission of a felony, Mr. Moore appealed, claiming that his conviction was based on inadmissible hearsay and violated his constitutional right to confront and cross-examine his accuser.[296] The HSCT affirmed his conviction, stating that the prosecution had properly established Mrs. Moore's unavailability and her prior statements' reliability, and that defense counsel did not question her statement that Mr. Moore had in fact shot her.[297] The court accordingly ruled that her prior testimony was admissible.[298]

Although the end result in *Moore* is that her prior testimony was admissible evidence, if Mrs. Moore had not testified at a prior proceeding in the same matter, for instance if she had only made a VVSF statement and not testified at Mr. Moore's supervised release hearing, and subsequently was unavailable for to testify at trial, then her prior inconsistent statement would not have been admissible.[299] This is therefore a problem that needs to be addressed by allowing the use of prior inconsistent statements of the victim in a domestic violence case as substantive evidence even when the victim is unavailable to testify and has never testified in the proceeding.

Similarly, material, relevant evidence, such as a victim's prior inconsistent statement, may be excluded when the victim/declarant cannot remember making a prior inconsistent statement or the alleged incident of abuse.[300] In *Canady*, Steven Canady was convicted for injuring his girlfriend.[301] Complainant and Canady had lived together for thirteen years.[302] Police officers arrived at the scene in response to a domestic argument call.[303] They observed that the complainant had a facial injury and that her "face was covered with blood."[304] The officers took two photographs of her injuries.[305]

One of the officers went to the hospital to investigate and to have the complainant fill out a form similar to the VVSF.[306] According to the officer, the complainant "said she did not want to write it out. She was going to give

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[295] *See id.*
[296] See *id.* at 222, 921 P.2d at 142.
[297] *See id.* at 224, 921 P.2d at 144.
[298] *See id.*
[299] *See, e.g.*, State v. Canady, 80 Hawai'i 469, 911 P.2d 104 (App. 1996).
[300] *See id.*
[301] *See id.* at 471, 911 P.2d at 106.
[302] *See id.* at 473, 911 P.2d at 108.
[303] *See id.* at 471, 911 P.2d at 106.
[304] *Id.* at 474, 911 P.2d at 107.
[305] *See id.*
[306] *See id.*

it to me verbally, and I filled [sic] out the sheet for her."[307] The officer testified that he assisted complainant in filling out the VVSF by writing down her verbal responses to the questions of the VVSF.[308] He then signed as a witness and complainant signed as well.[309] She stated that a "friend" with whom she had lived with for thirteen years struck her.[310] She further listed Canady and her address as the address of the person who struck her.[311] She further stated that she was afraid Canady would "come and beat her up" if he saw her talking to the police.[312]

The complainant testified at trial that she could not remember whether a police officer spoke to her or questioned her at the hospital.[313] She did testify that the signature on the VVSF was her own.[314] On the basis of police testimony and the VVSF, Canady was convicted.[315] He then appealed on the grounds that the complainant had not been subject to cross-examination concerning the subject matter of the statement as required by the HRE.[316]

The ICA reversed the trial court and remanded the case.[317] The ICA decided that "HRE Rule 802.1(1) requires, as a guarantee of the trustworthiness of a prior inconsistent statement, that the witness be subject to cross examination about the subject matter of the prior statement, that is, that the witness be "capable of testifying substantively about the event, allowing the trier of fact to meaningfully compare the prior version of the event with the version recounted at trial."[318] Thus, the complainant's inability to recall her VVSF prohibited her from being subject to cross-examination on this issue and the VVSF was inadmissible.[319]

Again, this problem needs to be addressed by allowing the use of prior inconsistent statements of the victim in a domestic violence case as substantive evidence even when the victim cannot remember making the statement or the incident of abuse. Material, relevant evidence such as a victim's prior inconsistent statement may be excluded when the victim/declarant cannot remember making a prior inconsistent statement or the alleged incident of abuse. If *Canady* is allowed to control, all the alleged abuser must do to

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[307] *See id.*
[308] *See id.*
[309] *See id.*
[310] *See id.* at 475, 911 P.2d at 108.
[311] *See id.*
[312] *Id.* at 474, 911 P.2d at 107.
[313] *See id.* at 475, 911 P.2d at 108.
[314] *See id.*
[315] *See id.*
[316] *See id.* at 476, 911 P.2d at 109.
[317] *See id.* at 479, 911 P.2d at 112.
[318] *Id.* at 482-83, 911 P.2d at 115-16.
[319] *See id.* at 482, 911 P.2d at 116.

escape conviction is intimidate the victim to "forget" everything concerning the abuse. Concerns regarding the trustworthiness of the statements are clearly allayed by the police officer acting as a witness. If the police officer signs the VVSF or attests to the prior inconsistent statements, the concern regarding the trustworthiness of the statement is answered. Therefore, the HRE should be interpreted to allow the admission of prior inconsistent statements even when the victim/declarant cannot recall her statement or the alleged abuse.

Just as further liberal interpretation of the HRE's rules on prior inconsistent statements is necessary, liberal interpretation of the admission of prior bad acts of the alleged abuser as evidence is necessary to protect women and children from their abusers. In *State v. Clark*, the victim's prior inconsistent statements as well as the prior bad acts of the defendant were ruled admissible evidence.[320] A police officer at the scene of abuse "observed a woman, Diana May Clark, bleeding from her chest."[321] Mrs. Clark told police that Mr. Clark punched her in the back and then stabbed her.[322] An officer testified "[s]he was really shaken. It was obvious she was scared, terrified. She was trembling."[323] Mrs. Clark also told medical personnel and a detective essentially the same story.[324]

At trial, Mrs. Clark testified that she had stabbed herself and that her prior inconsistent statements were lies.[325] Mr. Clark was convicted of attempted second degree murder of his wife.[326] Mr. Clark appealed, claiming that the trial court erred in admitting Mrs. Clark's prior inconsistent statements and allowing prosecutors to question Mrs. Clark about prior bad acts.[327] The HSCT, following *State v. Eastman*, ruled that the prior inconsistent statements were admissible because Mrs. Clark was directly examined on the circumstances of the stabbing and her prior statements, her testimony was inconsistent at trial and she was cross-examined as to those inconsistencies.[328]

The court further ruled that the admission of prior bad acts evidence was proper.[329] The evidence was not improperly used to prove action in conformity with past abuse.[330] Rather, it was properly used to "establish that [Mrs. Clark], as an individual in an abusive relationship, could be expected to

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[320] *See* State v. Clark, 83 Hawai'i 289, 291, 926 P.2d 194, 196 (1996).

[321] *Id.*

[322] *See id.*

[323] *Id.* at 297, 926 P.2d at 202.

[324] *See id.* at 291-93, 926 P.2d at 196-98.

[325] *See id.* at 293, 926 P.2d at 198.

[326] *See id.*

[327] *See id.*

[328] *See id.* at 295, 926 P.2d at 199.

[329] *See id.*

[330] *See id.* at 301, 926 P.2d at 206.

protect [Mr. Clark] by taking the blame for the injuries she suffered as a result of the attack at issue in the instant matter."[331] The court continued, stating that such actions are characteristics common to individuals in abusive domestic relationships, and the prior incidents of domestic violence between Mr. and Mrs. Clark showed the jury the context of Mrs. Clark's relationship with Mr. Clark and the basis for her recantation at trial.[332] Therefore, the conviction was affirmed.[333]

Circuit court judges must use the *Clark* decision to produce a just result and to ensure the safety of the abused. Concerns regarding prejudice to the defendant should be outweighed by concerns of truth and justice; a true account of the alleged events and a just decision cannot come about without the unique context of a domestic violence relationship being explained. Such an account and decision depend on the admission of prior incidents of abuse as evidence under *Clark*.

VII. CONCLUSION

The criminal justice response to the social problem of familial violence affords inadequate and ineffectual protection to women. It needs further improvement on both the federal and state levels because social costs in terms of lost lives and wasted moneys are too extreme to continue to ignore the problem. Although the VAWA, GCA, Act 198, HRE, and other responses similar to these have been employed throughout the nation, millions of women are still being injured by their family members each year.[334] In spite of an American criminal justice system armed with a formidable array of newly created legislative weapons, the violence and the femicides continue.[335] Why? It is because the consequences for abusers who are convicted are not severe.[336] It is because those convicted perpetrators who fail to comply with probation or sentencing terms are not severely punished. It is because the message the criminal justice system is sending to abusers is that familial violence is acceptable.[337]

Better enforcement, implementation and supplementation of the existing criminal justice system is necessary to remedy these problems. The VAWA's Title II full faith and credit mandate concerning foreign orders of protection must be better implemented in the State of Hawai'i as the number of women

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[331] *Id.*

[332] *See id.* at 303, 926 P.2d at 208.

[333] *See id.* at 291, 926 P.2d at 196.

[334] *See* Raeder, *supra* note 22, at 1465.

[335] *See* FAMILY VIOLENCE PREVENTION FUND, *supra* note 2, at 3.

[336] *See* LEAGUE OF WOMEN VOTERS, *supra* note 15, at 1.

[337] *See id.*

fleeing their batterers and seeking protection through foreign protection orders increases. Greater use and knowledge of the VAWA by the public and law enforcement requires improved implementation procedures. The GCA amendment must be strictly enforced under the coordinated watch of federal and state law enforcement to prevent lax enforcement among agencies and licensees in general. At the same time, changes are needed to correct perceived unfairness regarding the retroactivity and finality of the new law. Act 198 must be amended to curb the potential for abuse and any unnecessary infringement of the fundamental right to parenthood. The addition of a temporary evaluation period and a mandatory review of all final custody and visitation decisions concerning findings of domestic violence will eliminate Act 198's shortcomings. The HRE must allow into evidence certain hearsay statements and certain prior bad acts of abuse under a re-interpretation of the existing evidentiary rules. These proposals, if realized, promote more comprehensive protection for women and children as they attempt to escape the fatal dangers of familial violence.

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The Misappropriation Doctrine in Cyberspace: Protecting the Commercial Value of "Hot News" Information

I. INTRODUCTION

Knowledge is power, goes the old adage; knowledge can mean money, too. The commercial value of certain time-sensitive information cannot be disputed.[1] A lucrative market exists for breaking news items, stock quotations, market activity, real-time[2] sports scores, and other similar kinds of data.[3] Time truly is of the essence for this class of publicly disclosed[4] information, colloquially known as "hot news;"[5] as the information becomes stale, its worth

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[1] "In the Information Age, information becomes the primary economic commodity, the source of greatest wealth." Pamela Samuelson, *Information as Property: Do Ruckleshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365, 367 (1989).

[2] Real-time data is transmitted during the actual time which the event generating the data takes place. *See* National Basketball Ass'n v. Sports Team Analysis & Tracking Sys., Inc., 939 F. Supp. 1071, 1075 n.3 (S.D.N.Y. 1996), *aff'd in part, rev'd in part sub nom.*, National Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997).

[3] In 1996, four companies which provide a constant stream of real-time financial market news and data, Bloomberg, Bridge, Dow Jones, and Reuters, generated a total of $4.4 billion in revenues. *See Arming for the Data Wars*, THE ECONOMIST, June 14, 1997, at 79. The Chicago Mercantile Exchange ("CME") takes in $34.8 million per year by selling time-critical market data. *See* William J. Cook, *Court Clock Ticking on Delays of Time-Sensitive Information*, CHI. LAW., Jan. 1997, at 59.

[4] This Comment concerns publicly-disseminated information which is not eligible for traditional statutory or common law intellectual property protection. As discussed *infra* Part II.A., once information is disseminated to the public, the disseminator is generally without legal recourse in controlling subsequent use of such information by another absent a confidential or contractual relationship with the receiver of the information. Secret information shared in confidence or taken by improper means may be protected by trade secret law. *See, e.g.*, Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) (holding that trade secret law protects unpatentable but secret process from unauthorized disclosure by former employee of trade secret holder). Unauthorized use of information imparted within a contractual relationship may trigger damages or other relief. *See, e.g.*, ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (holding that use of uncopyrightable database information was conditioned upon terms of contract between seller of database and buyer).

[5] A congressional report recording the legislative intent of the bill which became the Copyright Act of 1976 describes certain types of facts, such as breaking news items or data updates from scientific, business, or financial databases, as "hot news." H.R. REP. NO. 94-1476, at 132 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5748 [hereinafter HOUSE REPORT]. The concept, although not the term, of hot news was first developed in International News Serv. v. Associated Press, 248 U.S. 215 (1918) [hereinafter *INS*]. *See* discussion of the *INS* case *infra* Part III.B. Court opinions have adopted the "hot news" terminology in referring to such time-

diminishes rapidly.[6] Hot news information has tremendous, albeit transient, exchange value: those who want it but do not have it will pay a princely sum for its speedy, accurate, and reliable provision.

Similar to many tangible things with exchange value, hot news information consequently may be considered property, and providers of time-sensitive information may be considered to have proprietary rights over such information.[7] Intellectual property laws serve to provide creators of intangibles limited property rights akin to those enjoyed by owners of real or personal property.[8] Intellectual property rights are protected from infringement by specific

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sensitive information. *See, e.g.*, National Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 843 (2d Cir. 1997); Financial Info., Inc. v. Moody's Investors Serv., Inc., 808 F.2d 204, 209 (2d Cir. 1986), *cert. denied*, 484 U.S. 820 (1987) [hereinafter *FII*]; G.D. Searle & Co. v. Philips-Miller & Assocs., Inc., 836 F. Supp. 520, 525 (N.D. Ill. 1993); Harper & Row, Publishers, Inc. v. Nation Enters., 501 F. Supp. 848, 851 (S.D.N.Y. 1980), *aff'd*, 732 F.2d 195 (2d Cir. 1983), *rev'd*, 471 U.S. 539 (1985); Leonard Storch Enters., Inc. v. Mergenthaler Linotype Co., 208 U.S.P.Q. 58 (E.D.N.Y. 1980), *aff'd*, 659 F.2d 1060 (2d Cir. 1981).

Despite the use of the term "hot news" by the House Report and the courts, a specific definition of the term has been elusive in the legal literature. Samuelson, in her discussion of information, defines information as "discrete items of knowledge of a particular event or situation." Samuelson, *supra* note 1, at 368 n.19. Nimmer and Krauthaus differentiate between data and information. For them, data are "signals, symbols, or at most discrete facts." Raymond T. Nimmer & Patricia Ann Krauthaus, *Information as a Commodity: New Imperatives of Commercial Law*, 55 LAW & CONTEMP. PROBS. 103, 106 (1992). In contrast, information arises when a person or persons or tradition ascribes a particular meaning to data. *See id.* As an example, Nimmer and Krauthaus explain that the letters "LEXIS" are data, but comprise information only when a person recognizes that the letters signify or stand for a legal electronic database. *See id.* Moreover, they observe that knowledge springs from "the use of data and their association into patterns incorporating judgments and interpretations." *Id.*

Hot news appears to encompass the definitions of data and information, in the sense that hot news conveys to a person discrete facts or items of a particular happening or existence. In addition, the term hot news embodies the characteristic of being timely or "fresh." *See, e.g.*, Gannett Satellite Info. Network, Inc. v. Rock Valley Community Press, 1994 WL 606171, at *5 (N.D. Ill. 1994). One court has held that information that is ten days old does not satisfy the requirement of "hotness" to be considered hot news under *INS*. *See FII*, 808 F.2d at 209.

For the purposes of this Comment, the term "hot news" means discrete items or facts of a particular event or situation which has time-sensitive or perishable commercial value.

[6] In the case of CME market data, such information is said to become stale within five minutes and is virtually worthless after twenty minutes. *See* Cook, *supra* note 3, at 59.

[7] Justice Swayne, in discussing Fourteenth Amendment protection of "property," remarked, "[p]roperty is everything which has an exchange value, and the right of property includes the power to dispose of it according to the will of the owner." The Slaughter House Cases, 83 U.S. (16 Wall.) 36, 127 (1872) (Swayne, J., dissenting). *But cf. INS*, 248 U.S. at 250 (Brandeis, J., dissenting) ("But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property.").

[8] For instance, the federal patent law provides a patentee the exclusive right to make, use, or sell the patented invention for the period of the patent. *See* 35 U.S.C. § 154 (1994). The

remedies.[9] The furnishing of property rights, including exclusive rights to possess, use, and sell, to providers of hot news information would serve to maximize its commercial value and to reward the initial investment of time, energy, and resources expended to generate or gather such information.

From early on, information providers generally sought exclusive rights for informational works through the law of copyright.[10] The statutory laws governing intellectual property, however, view as inimical the extension of property rights to facts or ideas.[11] The traditional intellectual property regimes are designed to strike a delicate balance between the incentive to innovate and the pursuit of free competition.[12] Preserving the public's unfettered right to copy or imitate unprotected (or unprotectable) intangible material in the public domain is believed to be the best avenue to achieve this prime objective.[13] Accordingly, intellectual property laws possess specific rules which are sensitive to the conflicting interests involved in according protection to intangibles, especially information.[14] The dominant intellectual property

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federal copyright law provides a copyright holder, subject to certain limitations, the exclusive right to reproduce, make derivative works, distribute, perform, and display the copyrighted work. *See* 17 U.S.C. § 106 (1994).

[9] For example, copyright owners may demand an injunction against infringing activity (*see* 17 U.S.C. § 502 (1994)); impoundment and destruction of infringing material (*see* 17 U.S.C. § 503 (1994)); actual damages and any additional profits of the infringer or statutory damages (*see* 17 U.S.C. § 504 (1994)); and costs and attorney's fees (*see* 17 U.S.C. § 505 (1994)).

[10] *See generally* Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1873-81 (1990) (discussing early English and American copyright protection in useful, informative works such as maps, arithmetic and grammar primers, calendars, and law books).

[11] *See* Samuelson, *supra* note 1, at 365 ("Informed by the Enlightenment tradition that influenced the drafters of the United States Constitution, American intellectual property law has generally resisted regarding information as something in which its discoverer or possessor can have a property interest.").

[12] *See, e.g.*, Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 230-31 (1964) ("[T]he patent system is one in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition."); Kern River Gas Transmission Co. v. Coastal Corp., 899 F.2d 1458, 1463 (5th Cir.), *cert. denied*, 498 U.S. 952 (1990) ("In drawing this fundamental distinction [between copyrightable expression and uncopyrightable ideas], Congress balanced the competing concerns of providing incentives to authors to create and of fostering competition in such creativity."). *See also* J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51, 52-53 (1997) (observing the demarcation in national patent and copyright systems between incentives to create and the public interest in free competition).

[13] *See, e.g.*, Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146 (1989) ("From their inception, the federal patent laws have embodied a careful need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy.").

[14] *See* DeCosta v. Viacom Int'l, Inc., 981 F.2d 602, 604-05 (1st Cir. 1992), *cert. denied*, 509 U.S. 923 (1993) ("The laws of patents, copyright, trade secrets, trademarks, unfair

system therefore leaves informational products employing hot news, which is basically facts or data, deliberately vulnerable to lawful copying.[15]

In reaction to this intentional absence of protection of hot news information under traditional intellectual property laws, a perennial cause of action proffered to protect a business' investment in supplying factual information or data from uncompensated copying is the common law tort of misappropriation. As initially recognized by the United States Supreme Court in *International News Service v. Associated Press*,[16] a party guilty of misappropriation is liable for the "unfair" copying of breaking news items collected by a commercial competitor. The misappropriation doctrine is premised upon the notion that a commercial rival should not be allowed to unfairly profit from the costly original investment and labor of an information producer.[17] By granting legal liability for the copying of hot news, the initial incentive to invest in factual information products valuable to society will be preserved, while ethical competitors will be protected from unfair competition.[18] Because this cause of action may be used to protect that which the dominant intellectual property laws deem unprotectable, controversy has plagued the misappropriation tort from the start, and the debate regarding its current viability continues to this day.[19]

The overwhelming growth of the Internet[20] poses new challenges to preserving the value of informational products, especially electronic databases which

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competition, and misappropriation balance the conflicting interests in protection and dissemination differently in different contexts through specific rules that determine just who will receive protection, of just what kind, under what circumstances, and for how long.").

[15] *See, e.g.*, Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991) (holding that white pages telephone directory containing alphabetical listing of names, towns, and telephone numbers did not satisfy requirements for copyright protection).

[16] 248 U.S. 215 (1918).

[17] *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. b (1995).

[18] *See id.*

[19] Some of the more recent commentaries on misappropriation include Edmund J. Sease, *Misappropriation is Seventy-Five Years Old; Should We Bury It or Revive It?*, 70 N. DAK. L. REV. 781 (1994); Note, *Nothing But Internet*, 110 HARV. L. REV. 1143 (1997); Raymond A. Be, Comment, *Dead or Alive?: The Misappropriation Doctrine Resurrected in Texas*, 33 HOUS. L. REV. 447 (1996). For references to commentaries of older vintage, *see id.* at 782 n.7; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 reporter's note, cmt. b (1995).

[20] *See* Reno v. American Civil Liberties Union, 117 S. Ct. 2329, 2334-36 (1997)("The Internet has experienced extraordinary growth") (internal quotations omitted). *See generally* U.S. INFORMATIONAL INFRASTRUCTURE TASK FORCE, THE NATIONAL INFORMATION INFRASTRUCTURE: AGENDA FOR ACTION (1993) (examining the growth of information technology in the United States); ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, GLOBAL INFORMATION INFRASTRUCTURE—GLOBAL INFORMATION SOCIETY (GII-GIS): POLICY REQUIREMENTS (1997) (examining the growth of information technology worldwide).

contain vast amounts of factual, time-sensitive information.[21] Information digitally entered onto the Internet may be cheaply and rapidly copied and disseminated virtually worldwide, whether through a web site on the World Wide Web, an automatic mailing list service ("listserv"), or by electronic mail ("e-mail").[22] The ease of free riding on the investment of others via Internet-related technological advances threatens to be a serious disincentive to investment in the development of data-based informational products.[23] Misappropriation, because of its ability to halt the uncompensated use of hot news information, has the promise to be an effective weapon against unfair business tactics in the digital age.[24]

Nevertheless, this Comment argues that *common law* misappropriation should be allowed to wither away. Common law misappropriation has the potential capacity, to an extent greater than other forms of intellectual property protections, to shackle publicly disseminated information that should otherwise be free to use by all and sundry. To grant information providers property rights to factual information or to hold commercial competitors liable for the use of such information would inappropriately provide too much legal protection at the expense of unimpeded access to facts. The core policies animating the federal intellectual property laws, such as maintaining the correct balance between incentive and access, and preserving the public domain, would suffer by the unchecked or ill-considered application of a misappropriation remedy.

Nevertheless, in the age of the Internet, information providers who are victim to hot news piracy due to technological advances will demand relief. If any type of misappropriation liability is to be provided for by law, this Comment advocates the enactment by Congress of a federal statute based on the objectives of the misappropriation doctrine. Statutory misappropriation, drafted through the legislative process, would harmonize the conflicting interests of those who clamor for increased intellectual property protection for informational products, such as data-intensive informational databases, and those who staunchly protest any encroachments on the public's access to information. In addition, a misappropriation statute should respond to

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[21] For discussions of the impact of digital technology on intellectual property protection, *see* Dennis S. Karajala, *Misappropriation as a Third Intellectual Property Paradigm*, 94 COLUM. L. REV. 2594 (1994); Raymond T. Nimmer & Patricia Ann Krauthaus, *Copyright on the Information Superhighway: Requiem for a Middleweight*, 6 STAN. L. & POL'Y REV. 25 (1994).

[22] *See Reno*, 117 S. Ct. at 2334-36 (describing the Internet, e-mail, listservs, and the World Wide Web).

[23] *See* Karajala, *supra* note 21, at 2594.

[24] *See* U.S. COPYRIGHT OFFICE, REPORT ON LEGAL PROTECTION FOR DATABASES 73 (1997) [hereinafter COPYRIGHT OFFICE REPORT] (listing state misappropriation laws as one means of legal protection against informational database piracy).

criticisms of the amorphousness of common law misappropriation by demarcating definite boundaries and requiring particular criteria in the finding and enforcing of liability. Lastly, relief should not be available through state legislation because of the policy of federal uniformity and preemption; only Congress should have the power to enact a misappropriation statute.

The question that remains is whether Congress will be persuaded that a misappropriation right is consonant with traditional intellectual property protections. Defining misappropriation's role within the context of the other intellectual property regimes is central to the current national and international discussions concerning statutory and treaty-based database protection. In the final analysis, a robust misappropriation statute should be guided by the first principles of all intellectual property laws in achieving the proper balance between incentive and access in the competitive marketplace.

This Comment will examine the misappropriation doctrine's conceptual and historical development and the role it plays in the protection (or nonprotection) of information. Part II describes the qualities of information that make the legal treatment of it problematic and discusses the economic and policy rationales for and against providing legal protection to informational products. Part III examines common law misappropriation and its development in protecting the labor investment in gathering information. Part IV addresses how complications regarding the federal copyright protection of factual compilations have renewed interest in the misappropriation doctrine. Part V analyzes how federal copyright preemption of state intellectual property laws affects state common law misappropriation. Lastly, Part VI discusses current national, foreign, and international efforts to create *sui generis* protection for informational databases which incorporates elements of the misappropriation doctrine. This Comment concludes that any potential misappropriation statute which Congress chooses to enact must form an integral, consonant part of the overall federal intellectual property structure.

II. On Protecting Information: The Incentive-Access Balance

A. The Incentive for Investment in Informational Products

In order to evaluate the appropriateness of protecting information through the misappropriation doctrine, one must first understand its relation to the first principles which define the scope of intellectual property protection in general. Information possesses a number of characteristics which pose certain predicaments in according property rights to it.[25] Information in itself is not

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[25] *See* Samuelson, *supra* note 1, at 368.

tangible.[26] Its contours are "almost infinitely expandable and malleable," attributes which create difficulties in delimiting what one means by the term "information" with the specificity necessary for it to be capable of being subject to property interests.[27] In contrast, real and personal property have concrete limitations (the boundaries of a plot of land, for example) which aid in defining the scope of the "property" to which the proverbial "bundle of sticks" may be assigned.[28]

Moreover, information, as an intangible, has the characteristics of a public good.[29] A resource is considered a public good when consumption or enjoyment of the resource by one person does not prevent or diminish consumption of the full value of the resource by others; in other words, it is inexhaustible.[30] Moreover, a public good is indivisible; consumption by additional persons of the resource cannot be prevented once it is supplied to one person.[31] Since a public good is not depletable, incentives to produce

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[26] *See id.* Although information can be recorded in a tangible form, such as a CD-ROM database, such fixation does not alter its essential intangible character. *See id.*

[27] *Id.* at 368-69. *See supra* note 5 for various conceptions of information.

[28] The most common sticks found in the bundle include rights of possession, use and enjoyment, transfer, and to exclude others. *See* Samuelson, *supra* note 1, at 370 (citing R. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 1.2 (lawyer's ed. 1984)) (discussing Hohfeldian conception of property).

[29] *See* Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 413 n.9 (1983) (citing Harold Demsetz, *The Private Production of Public Goods*, 13 J. L. & ECON. 293 (1970)) ("Information comes close to being a public good, as an economist uses the term."); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 28 J. LEGAL STUD. 325, 326 (1989) ("A distinguishing characteristic of intellectual property is its 'public good' aspect."). A public good is "a commodity whose benefits may be provided to all people (in a nation or town) at no more cost than that required to provide it for one person." PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 980-81 (13th ed. 1989). In constrast, a private good is a commodity which, once consumed by one person, cannot be consumed by another. *See id.*

[30] *See* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 73 n.45 (1986). A classic example of a public good is national defense. One citizen's enjoyment of the security that national defense provides does not hamper the similar enjoyment of security by another citizen or by all other citizens. Another example are environmental protection measures, wherein a regulation which reduces air pollution benefits not just one person, but all persons. In contrast, the consumption of a loaf of bread is limited to one person; that person, once she has eaten the bread, prevents another from consuming it also. *See generally* SAMUELSON & NORDHAUS, *supra* note 29, at 980-81.

[31] *See* Merrill, *supra* note 30, at 73 n.45. For example, one citizen's enjoyment of security from the provision of national defense cannot be prevented once the resources to supply national defense have been expended. Likewise, the benefits from reduced air pollution cannot be captured by just one person, but are shared by all. In contrast, once a loaf of bread is consumed by one person, another is necessarily prevented from consuming the bread. *See generally* SAMUELSON & NORDHAUS, *supra* note 29, at 980-81.

such resources are difficult to create, as the ability to extract payment from all users of the resource in order to recoup the total costs of production is difficult to maintain.[32] For example, in the case of a breaking news story, once a paid subscriber reads the latest scoop published in a newspaper, the paper will not receive one additional cent from the person to whom the subscriber subsequently recounts the news. If enough of these "free riders"[33] receive news without paying for the newspaper's efforts to gather and report it, the paper may ultimately not be able to regain its costs of production through newspaper sales.

Thus absent legal restrictions, the public goods quality of information enables "second comers" to repeat or to copy information in a tangible product for free or at a fraction of the cost incurred by the initial information provider/gatherer.[34] Second comers do not contribute to the usually high initial costs and risks of gathering information, but normally incur only reproduction expenses.[35] The economic motivation for second comers to free ride is irresistible, and indeed rational, given that the second comer need only expend the cost of reproduction, while the original information gatherer incurs both the cost of gathering information, plus the cost of reproduction.[36] Consequently second comers can sell their own products incorporating the appropriated information at a lower price than that of products offered by the original information provider.[37] Since price competition from copyists forces the initial information provider to limit the price charged for its products, free riders filch future profits which would have otherwise accrued to the initial provider.[38] In a legal environment where one cannot prevent free riding through property rights in information, information products such as databases remain vulnerable to cheap and easy reproduction by others after the original product is introduced into the stream of commerce.[39]

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[32] *See* Samuelson, *supra* note 1, at 371.

[33] Free riding occurs where one benefits from the activity of another without any contractual or voluntary relationship between the former and the later. *See* Owen C. Paepke, *An Economic Interpretation of the Misappropriation Doctrine: Common Law Protection for Investments in Innovation*, 2 HIGH TECH L.J. 55, 59 n.23 (1987).

[34] *See* Landes & Posner, *supra* note 29, at 326.

[35] *See* Paepke, *supra* note 33, at 59.

[36] *See* Landes & Posner, *supra* note 29, at 326.

[37] *See* Glynn S. Lunney, Jr., *Reexamining Copyright's Incentive-Access Paradigm*, 49 VAND. L. REV. 483, 493 (1996).

[38] *See* J.H. Reichman, *Charting the Collapse of the Patent-Copyright Dichotomy: Premises for A Restructured International Intellectual Property System*, 13 CARDOZO ARTS & ENT. L.J. 475, 486 n.47 (1995).

[39] *See* Lunney, *supra* note 37, at 493.

Just as important as the cheap cost of reproduction is the speed at which copying is done.[40] A period of time usually exists after the publication or public dissemination of information before others can appropriate the information for their own uses.[41] This lead time advantage is a crucial consideration to the original information provider in estimating the earnings return on its initial investment.[42] An information product which has been available on the market for a significant period of time before commercial rivals are able to copy the information provided may be better able to recoup investment costs than a product which is copied soon after its public release.[43]

The initial calculation to invest in information production, therefore, depends heavily upon the likelihood of preserving the fruits of investment to the original provider.[44] Cheap and rapid free riding erodes the investment return of an information entrepreneur by transferring wealth from the innovator to the imitator.[45] More invidious from a social welfare perspective, however, is the chilling effect produced by the *expectation* of free riding and the consequent disincentive to invest.[46] The resulting uncertainty as to the ability to recoup investment costs produces a disincentive to create informational works[47] and results in the underproduction of such works.[48]

Intellectual property laws attempt to overcome the inherent public goods disincentive that hampers the commercial exploitation of intangible goods.[49] For example, the limited monopoly of copyright aims to promote the efficient allocation of resources in creating works of authorship.[50] Under the incentive theory of copyright,[51] copyright protection responds to the necessity to

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[40] *See* Stephen J. Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 299-302 (1970) (discussing lead time benefit).

[41] *See* Landes & Posner, *supra* note 29, at 330.

[42] *See* Paepke, *supra* note 33, at 61.

[43] *See id.*

[44] *See id.* at 59.

[45] *See id.* at 60-61.

[46] *See id.* at 61.

[47] *See* Landes & Posner, *supra* note 29, at 329.

[48] *See* Lunney, *supra* note 37, at 493. Underproduction occurs when the threat of free riding prevents the creation of a work of authorship whose benefit to consumers would outweigh its cost of creation. *See id.* at 493 n.22 (quoting William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1700 (1988)).

[49] *See* Reichman, *supra* note 38, at 475 n.1.

[50] *See* Landes & Posner, *supra* note 29, at 325.

[51] The incentive theory of copyright is the dominant American rationale behind the granting of a copyright. *See* Reichman, *supra* note 38, at 495 n.87. In contrast, the natural rights theory of copyright posits that the fruits of a person's mental labor is by right the property of the person who created it. *See* Alfred C. Yen, *Restoring the Natural Law: Copyright As Labor and Possession*, 51 OHIO ST. L.J. 517, 524 (1990) (discussing natural law theory of copyright).

overcome the economic problem of free rider copying and to stimulate the optimal production of literary and artistic works.[52] Because free riding dampens the incentive to create literary and artistic works, the protection from rampant free copying a copyright provides acts as a reward for the production of such works and results in a greater number and variety of works.[53]

B. Access to Public Domain Informational Material

Nonetheless, the overprotection of information may have a deleterious effect on the public's access to intangible goods.[54] If the scope of intellectual property protection were so broad as to encompass the product of *all* intellectual effort, the ability of intellectual property owners to demand extraordinary prices for their goods would inevitably decrease the public's aggregate access to these goods.[55] Consequently, people will purchase fewer intellectual property goods at higher prices than they could have in a more competitive market, or would have to make do with inferior substitutes or without a good at all.[56]

The incentive to create and invest provided by intellectual property rights, therefore, is tempered by concerns about the accompanying diminished access to the protected works because of monopoly pricing.[57] As such, the scope of intellectual property protection is defined by public policy concerns of providing authors and inventors sufficient incentive to create innovations and literary or artistic works, without placing too onerous a cost on society by foreclosing public access to such works.[58] In the patent and copyright

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[52] *See* Reichman, *supra* note 38, at 495 n.87.

[53] *See* Lunney, *supra* note 37, at 485. The Supreme Court commented on the incentive theory of copyright in *Mazer v. Stein*, 347 U.S. 201, 219 (1954):

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

Id.

[54] *See* Pamela Samuelson et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308, 2311 n.5, 2414 (1994).

[55] *See* Lunney, *supra* note 37, at 497-98 (discussing the ability of copyright holders to charge monopoly prices for their works).

[56] *See id.*

[57] *See id.* at 485.

[58] *See, e.g.*, Sony Corp. of America v. Universal City Studios, Inc. 464 U.S. 417, 429 (1984) ("This task [of defining the scope of copyright] involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand.").

regimes, the public's access to intangible goods is accommodated by the existence of the public domain.[59]

According to intellectual property policy, any publicly disclosed informational or technological material that fails to be eligible for intellectual property protection falls into the public domain, free for all to appropriate.[60] An intangible good is public domain material if, and only if, no intellectual property right protects it.[61] Early common law recognized the benefits to science and the arts of freely dipping into the well of the public domain.[62]

Central to the *raison d'être* of the public domain is the belief that copying acts as an engine for innovation and learning just as much as the grant of exclusive rights under patent or copyright acts to spur invention and creativity.[63] The public domain preserves the availability of intangible works to not only the consuming public at large, but also to inventors and authors themselves.[64] Unencumbered by legal restraints, the quotidian entrepreneur will be inspired to produce beneficial products and literary works from the facts and ideas unearthed by his or her industrious predecessors.[65] Anyone by

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[59] *See* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 967 (1990) (discussing the role of the public domain in copyright law).

[60] *See, e.g.*, Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 237 (1964) ("To forbid copying would interfere with the federal policy, found in Art. I, s. 8, cl. 8, [the Patent-Copyright Clause] of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave to the public domain."). The Patent-Copyright Clause states: "The Congress shall have the Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]" U.S. CONST. art. I, § 8.

[61] *See* 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 1:31, at 1-59 (4th ed. 1997). Thus, for example, if a work is not copyrightable, it does not mean that it is in the public domain, and thus freely copyable; the work may be protected by patent law. *See id.*

[62] *See, e.g.*, Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (Story, J.) ("Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.").

[63] *See* Litman, *supra* note 59, at 967 ("[T]he public domain is the law's primary safeguard of the raw material that makes authorship possible.").

[64] *See* Lunney, *supra* note 37, at 495-97 (discussing how a broad copyright, by limiting the ability of future authors to reuse certain elements of a copyrighted work, impedes access to elements required for future works). *See generally* Litman, *supra* note 59 (discussing how the public domain permits the copyright system to function by leaving the "raw material of authorship" available for future authors to use).

[65] As Benjamin Kaplan insightfully observed:

> [I]f man has any "natural" rights, not the least must be a right to imitate his fellows, and thus to reap where he has not sown. Education, after all, proceeds from a kind of mimicry, and "progress," if it is not entirely an illusion, depends on [a] generous indulgence of copying.

BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 2 (1966), (cited in Baird, *supra* note 29, at 411).

presumption therefore should be unencumbered from employing publicly disseminated information as he or she wishes.[66] Consequently, a fundamental goal of the intellectual property laws is to foster the growth of the amount of public domain material.[67]

In contrast, the recognition of intellectual property rights in information would naturally lead to restrictions on its use and dissemination.[68] Exclusive rights in facts, ideas, and information would vest enormous control in initial possessors over "their" facts or ideas, thus denying others the opportunity to build upon that information absent consent or recompense.[69] Although benefiting the initial possessor, such a proprietary system may be detrimental to society as a whole,[70] and could hinder the constitutional objective of promoting scientific and literary creation.[71] Therefore, the federal intellectual property law system generally resists recognizing property rights in information.[72] As one commentator succinctly put it: "Public domain is the rule: intellectual property is the exception."[73]

The policy rationale behind the denial of property rights in information illustrates the belief that the framers of the Constitution viewed technological and economic progress as best served by the unrestrained access and use of information.[74] The framers believed free access to knowledge served as an essential component in building a nation conceived by democratic ideals.[75]

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[66] *See* Baird, *supra* note 29, at 411. *See, e.g.*, Baker v. Selden, 101 U.S. 99, 100-01 (1879) (stating that where "the truths of a science or the methods of an art are the common property of the whole world," one has the right to express such "truths" or "methods" in his or her own way).

[67] *See* Nimmer & Krauthaus, *supra* note 21, at 27.

[68] *See, e.g.*, Jessica Litman, *Copyright and Information Policy*, 55 LAW & CONTEMP. PROBS. 185, 207 (1992) ("As access to ideas and information is swept more into the realm of private control under the rubric of copyright, ideas and information increasingly become available only to those citizens who purchase access to the works that contain them.").

[69] *See id.*

[70] *See* Landes & Posner, *supra* note 29, at 347-53 (discussing the welfare effect of denying copyright to facts and ideas).

[71] *See* Samuelson, *supra* note 1, at 366 ("This goal [of free dissemination of information] has been understood as implicit in the constitutional clause to which the patent and copyright laws trace their heritage in the American legal system.").

[72] *See, e.g.*, International News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communications to others, free as the air to common use.").

[73] 1 MCCARTHY, *supra* note 61, § 1:2, at 1-4. *See* Bonito Boats, Inc. v. Thunder Craft, Inc., 489 U.S. 141, 151 (1989) ("[The patent statute requirements] embody a congressional understanding, implicit in the Patent Clause itself, that free exploitation of ideas will be the rule, to which the protection of a federal patent is the exception.").

[74] *See* Samuelson, *supra* note 1, at 371-72.

[75] *See id.*

Faithful to the Enlightenment tradition of the "enabling powers of knowledge," the Constitution's drafters tailored the Patent-Copyright Clause to construct an intellectual property regime which would promote a range of social, political, and economic objectives.[76] Accordingly, the Patent-Copyright Clause[77] grants exclusive rights in inventions and works of authorship to the extent thought necessary to provide incentives to innovate, while simultaneously protects the free and widespread dissemination of information.[78]

The principle of balancing the competing interests of overcoming free riding through legal incentives and preserving public access to valued works continues to drive the debate as to the proper degree of information protection.[79] Of the dominant intellectual property laws, copyright laws have traditionally been relied upon to provide protection from the copying of informational products.[80] However, a cardinal precept constrains the

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[76] *Id.* at 372. *See* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION 39 (1986), (quoted in Samuelson, *supra* note 1, at 372 n.36 ("A democratic polity was thought to be a prerequisite to advancement in applied science, while technological achievements were expected to provide the physical means of achieving the democratic objectives of political, social, and economic equality.")).

[77] U.S. CONST. art. I, § 8. *See supra* note 60.

[78] *See* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("[The] limited grant [of copyright] is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."); Samuelson, *supra* note 1, at 372 & n.37.

[79] *Cf.* Landes & Posner, *supra* note 29, at 326 ("Striking the correct balance between access and incentives is the central problem in copyright law."). *See generally* COPYRIGHT OFFICE REPORT, *supra* note 24, at 71-110 (examining the conflicting interests in providing legal protection to informational databases); Lunney, *supra* note 37 (examining the incentive-access paradigm and questioning its adequacy in explaining copyright); Litman, *supra* note 59 (advocating for a strong public domain).

[80] Other forms of traditional intellectual property protection lack copyright's applicability in general for the protection of informational products. The strict requirements of novelty, utility, and nonobviousness of patent law set extremely exclusive standards for patent protection of ideas and innovations. *See* Graham v. John Deere Co., 383 U.S. 1 (1966). Trade secret may protect compilations of data. *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. d (1993). However, trade secret protection is usually unavailing because of the necessity of secrecy; informational products derive their value from being publicly sold. Moreover, a claim for breach of trade secrecy requires a contractual or confidential relationship between the secret owner and the breacher, or the use of improper means by the breacher, such as theft, fraud, or inducement of breach of confidence, to obtain the secret. The ordinary sale and use of informational products will not normally give rise to these elements. *See* Paepke, *supra* note 33, at 63-66 (discussing inadequacy of patent and trade secret in protecting investments in innovation).

protection that copyright law may extend to informational works: the non-copyrightability of facts.

C. The Idea/Expression Dichotomy

The copyright law incorporates the concept of the public domain by not allowing facts or ideas to be copyrighted. The Constitution empowers Congress to grant authors and inventors exclusive rights for a limited time to intangible works they create in order to promote "the Progress of Science and the useful Arts."[81] Accordingly, the federal copyright statute[82] confers a bundle of exclusive rights[83] for a limited time[84] to creators of original works of authorship which are fixed in a tangible medium of expression.[85] However, the protection which the copyright statute provides does not comprise "any idea, procedure, process, system, method of operation, concept, principle, or discovery" which may be contained in a copyrighted work.[86] Supreme Court

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[81] U.S. CONST. art. I, § 8, cl. 8.

[82] Copyright Act of 1976, as amended, 17 U.S.C. §§ 101 *et seq.* (1994).

[83] Section 106 of the 1976 Copyright Act provides:

> Subject to sections 107 through 120, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:
> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106 (1994).

[84] In general, copyright in a work created on or after January 1, 1978, lasts for the life of the author plus fifty years. *See* 17 U.S.C. § 302(a) (1994).

[85] *See* 17 U.S.C. § 102(a) (1994). Section 102(a) of the 1976 Copyright Act provides, in pertinent part:

> Copyright protection subsists, in accordance to this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

Id.

[86] 17 U.S.C. § 102(b) (1994). Section 102(b) of the 1976 Copyright Act provides:

> In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Id.

cases interpret this provision of the copyright statute as prohibiting the copyright of facts.[87]

Therefore no one can copyright one's ideas or the facts that one narrates.[88] A work seeking copyright protection must manifest some creative expression to satisfy the originality requirement of the copyright statute.[89] Therefore, a piece of original expression incorporating factual information (for instance, a reporter's article covering a baseball game) will be eligible for copyright.[90]

At the same time, the news itself, as factual material, will be ineligible for copyright protection.[91] Under copyright doctrine, facts are considered "discovered," not "created," by an act of authorship.[92] For instance, while a news article reporting a just-completed merger of two corporations may be copyrighted, the fact that a merger occurred is not copyrightable and may be taken from that article and may be repeated in another news article without infringing the former article's copyright.[93] The factual element of the news article may be copied and used by others at will.[94]

This "idea/expression dichotomy" is the fundamental concept of copyright law.[95] Original expression is protected by copyright;[96] facts and ideas belong

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[87] *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 356 (1991) ("Section 102(b) is universally understood to prohibit any copyright in facts."); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985).

[88] *See Feist*, 499 U.S. at 344-45; *Harper & Row*, 471 U.S. at 547 ("[N]o author may copyright facts or ideas."). This principle was established by the Court in the seminal case of *Baker v. Selden*, 101 U.S. 99 (1879). *See generally* 1 JAY DRATLER, JR., INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE, AND INDUSTRIAL PROPERTY § 5.01[2] (rel. 1997) (discussing the concept of the idea/expression dichotomy).

[89] *See Feist*, 499 U.S. at 363-64.

[90] *See, e.g.*, International News Serv. v. Associated Press, 248 U.S. 215, 234 (1918).

[91] *See* Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1372 (5th Cir. 1981) (denying copyright to facts reported in news story).

[92] *See Feist*, 499 U.S. at 347.

[93] Note that if the latter news article copied verbatim the original expression of the news of the former article, such action would be copyright infringement. *See, e.g.*, Chicago Record-Herald Co. v. Tribune Ass'n, 275 F. 797 (7th Cir. 1921) ("But in so far as the [plaintiff's] article involves authorship and literary quality and style, apart from the bare recital of the facts and statement of news, it is protected by the copyright law.").

[94] *See Feist*, 499 U.S. at 349-50 ("The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.' . . . To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.").

[95] *See* 1 DRATLER, *supra* note 88, § 5.01[2], at 5-6.

[96] *See, e.g.*, Mazer v. Stein, 347 U.S. 201, 217 (1954) ("Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself.").

to the public domain, which allows their use by anyone without restriction.[97] A work consisting of historical events or a factual narrative must embody the author's original expression to enjoy copyright protection.[98]

The idea/expression dichotomy is premised on two policies.[99] First, the dichotomy prevents ideas that do not satisfy the strict requirements of novelty, utility, and nonobviousness of patent protection from acquiring copyright protection, which requires the less rigorous standard of "originality."[100] Such a lenient monopoly on ideas would subvert the patent law's policy of rewarding only genuine advances, and would consequently retard technological and artistic progress.[101] Second, the dichotomy protects free speech rights guaranteed by the First Amendment by safeguarding the free flow of information; unconstitutional restraints on information may occur if an author were granted exclusive rights in facts or ideas.[102]

The idea/expression dichotomy of copyright, however, appears to conflict with the essence of the misappropriation doctrine. Common law misappropriation attempts to protect against the copying of information by free riders who profit from employing cheap reproductive methods.[103] The rationale behind misappropriation is powerfully compelling: to combat the disincentive to invest in developing commercial information products caused by unfair competitive behavior.[104] Both copyright and misappropriation could be thought of as advancing the same general objective of promoting the optimal production of societally-valued information products.[105]

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[97] *See, e.g.*, Baker v. Selden, 101 U.S. 99, 100-01 (1879) ("Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way.").

[98] *See* Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 974 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980) ("[T]he scope of copyright in historical accounts is narrow indeed, embracing no more than the author's original expression of particular facts and theories already in the public domain.").

[99] *See* 1 DRATLER, *supra* note 88, § 5.01[2][b], at 5-10.

[100] *See id.* § 5.03[4][a], at 5-78. *Cf. Feist*, 499 U.S. at 345 ("Originality does not signify novelty.").

[101] *See, e.g.*, Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 229-30 (1964) (discussing the strict requirements of the statutory patent system in order to promote the general public welfare).

[102] *See* 1 DRATLER, *supra* note 88, § 5.01[2][b], at 5-10. *See, e.g., Harper & Row*, 471 U.S. at 556 (The idea/expression dichotomy "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.") (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 723 F.2d 195, 203 (2d Cir. 1983), *rev'd*, 471 U.S. 539 (1985)) (internal quotations omitted).

[103] *See* discussion *infra* Part III.A.

[104] *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. b (1995).

[105] *See* Landes & Posner, *supra* note 29, at 325 (discussing copyright law as a means for promoting efficient allocation of resources).

The means used by the misappropriation doctrine nevertheless can directly oppose those of copyright.[106] The former may bestow legal protection upon portions of an information product which the latter, because of the idea/expression dichotomy, is expressly forbidden to protect.[107] Misappropriation and copyright appear to be mutually exclusive.

Before we can reach that conclusion, however, the origins and evolution of common law misappropriation must be examined. Part III analyzes the law and policy behind the protection of information under the misappropriation doctrine. After that, a comparative look at how copyright law treats informational products is presented in Part IV. Following this discussion, Part V examines how the principles of federal preemption have attempted to reconcile the clash between misappropriation and copyright.

III. PROTECTION OF INFORMATION BY COMMON LAW MISAPPROPRIATION

A. The Misappropriation Doctrine

Initially recognized by the Supreme Court in *International News Service v. Associated Press*,[108] the tort of misappropriation holds a person liable for the taking of a publicly disclosed or disseminated intangible good or value where a commercial rival developed that intangible good through substantial investment and where such taking caused damage to that rival.[109] The somewhat amorphous nature[110] of misappropriation protection stems from the judicial desire to right the perceived injustice of a commercial competitor enjoying the fruits of another's labors.[111] Since the Supreme Court's decision, the courts of a number of states have adopted the misappropriation doctrine

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[106] *See* Leo J. Raskind, *The Misappropriation Doctrine as a Competitive Norm of Intellectual Property Law*, 75 MINN. L. REV. 875, 882 (1991) (observing that misappropriation can serve as a barrier against competitive acts that reduce the supply of a given good to the detriment of social welfare).

[107] See discussion *supra* Part II.C.

[108] 248 U.S. 215 (1918).

[109] *See, e.g.*, Summit Mach. Tool Mfg. Corp. v. Victor CNC Sys., Inc., 7 F.3d 1434, 1441 (9th Cir. 1993) (citing Self Directed Placement Corp. v. Control Data Corp., 908 F.2d 462, 467 (9th Cir. 1990)) (listing the elements of California's common law tort of misappropriation). Although this definition captures the usual elements of a misappropriation claim, other jurisdictions differ in defining the elements of common law misappropriation. *Cf.* National Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997) (listing the elements of New York's common law tort of misappropriation). *See also* Sease, *supra* note 19, at 784 (listing the elements of a proposed uniform definition of common law misappropriation).

[110] *See* Roy Export Co. Establishment v. Columbia Broad. Sys., Inc., 672 F.2d 1095, 1105 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982) ("The tort is adaptable and capricious.").

[111] *See INS*, 248 U.S. at 239-40 (decrying efforts of a misappropriator to "reap where it has not sown").

to provide a state common law remedy to address unfair commercial practices involving some intangible good.[112]

Misappropriation law is viewed as a subset of the law of unfair competition.[113] Generally, laws affecting the nation's economy are premised upon the freedom to engage in business and the right to compete against others to attract potential customers.[114] The assumption is that competition in a free market economy promises to lower costs, improve quality, and increase allocative efficiency.[115] Unfair competition laws temper the unbridled pursuit of competition by imposing liability only when certain "unfair" business practices injure rather than promote competition.[116] Misappropriation laws aim to secure the incentive to invest in the creation of intangible goods and to prevent potential unjust enrichment by those competitors who appropriate the fruits of another's investment.[117] Misappropriation liability arises in situations

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[112] *See* Sease, *supra* note 19, at 801-06 (discussing states which have adopted the misappropriation doctrine).

[113] "'Unfair competition' . . . is a limited concept. Primarily, and strictly, it relates to the palming off of one's goods as those of a rival trader. In recent years . . . [i]t has been held to apply to misappropriation . . . of what equitably belongs to a competitor." A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 531-32 (1935) (citations omitted). *See generally* 1 MCCARTHY, *supra* note 61, ch. 1 (discussing the basic principles of unfair competition law).

[114] *See* Eastern Wine Corp. v. Winslow-Warren, Ltd., 137 F.2d 955, 958 (2d Cir.), *cert. denied*, 320 U.S. 758 (1943) ("[T]here is a basic public policy, deep-rooted in our economy and respected by the courts, resting on the assumption that social welfare is best advanced by free competition . . . ."); 1 MCCARTHY, *supra* note 61, § 1:1, at 1-3 ("A basic policy objective of the law regulating the American free market economy is the promotion and encouragement of competition."); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. a (1995) (discussing unfair competition law).

[115] *See* 1 MCCARTHY, *supra* note 61, § 1:1, at 1-3; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. a (1995).

[116] *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. a (1995). Other forms of unfair competition law which involve intangibles include trade secret and the right of publicity, *see id.* §§ 39-45 (restating the norms of trade secret); *id.* §§ 46-49 (restating the norms of the right to publicity).

[117] *See id.* § 38 cmt. b. Misappropriation has at times been confused with palming off. The difference is that when one engages in palming off, one attempts to deceive the consumer into believing one's good is produced by another. *See INS*, 248 U.S. at 258 (Brandeis, J., dissenting) (describing "passing off" situation). In contrast, misappropriation involves one attempting to sell another's good under one's own name. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. b (1995). As Justice Holmes elaborated in his concurrence in *INS*:

> The ordinary case [of unfair competition], I say, is palming off the defendant's product as the plaintiff's, but the same evil may follow from the opposite falsehood—from saying, whether in words or by implication, that the plaintiff's product is the defendant's . . . . The falsehood is a little more subtle, the injury a little more indirect, than the ordinary case of unfair trade, but I think that the principle that condemns the one condemns the other. It is a question of how strong an infusion of fraud is necessary to turn a flavor into a poison.

INS, 248 U.S. at 247 (Holmes, J., concurring).

where a second-comer can copy using a method whose cost is below the cost of creating the original information product.[118]

Misappropriation often comes into play when a certain intangible good does not fit the requirements of traditional intellectual property protections.[119] Indeed, the statutory schemes of the federal patent and copyright laws provide by design that certain intangible goods cannot be eligible for intellectual property protection.[120] Misappropriation performs an interstitial role in protecting the investment in developing intangible goods which are otherwise ineligible for traditional intellectual property protection.[121]

B. International News Service v. Associated Press

In *International News Service v. Associated Press* ("*INS*"),[122] the Supreme Court laid the foundation for future misappropriation analysis.[123] The Court declared that a news gathering organization had an equitable "quasi-property" interest in the news it reported.[124] Substantial appropriation of such reported news by a business competitor, therefore, amounted to unfair activity which subjects the competitor to liability for the appropriation.[125] The *INS* case is significant in that the Court recognized a common law intellectual property interest in breaking news items, which, under copyright law, would otherwise be in the public domain.[126]

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[118] *See* Karajala, *supra* note 21, at 2598.

[119] *See* United States Golf Ass'n v. St. Andrews Sys., Data-Max, Inc., 749 F.2d 1028, 1035 (3d Cir. 1984) ("The doctrine [of misappropriation] has been applied to a variety of situations in which the courts have sensed that one party was dealing 'unfairly' with another, but which were not covered by the three established statutory systems protecting intellectual property: copyright, patent, and trademark/deception as to origin.") (footnote omitted). *See also INS*, 248 U.S. at 250-51 (Brandeis, J., dissenting) (discussing how the taking of news does not conform to the standards of protection or liability under copyright, patent, breach of contract, breach of confidence or trust, or unfair competition).

[120] *See* discussion *supra* Part II.B.

[121] *See* 3 PAUL GOLDSTEIN, COPYRIGHT § 15.14.2, at 15:126 (2d ed. 1996).

[122] 248 U.S. 215 (1918).

[123] *See, e.g.*, Baird, *supra* note 29, at 412-16 (describing the *INS* case).

[124] *See INS*, 248 U.S. at 236.

[125] *See id.* at 240.

[126] *See* Sease, *supra* note 19, at 781. Under copyright, facts and ideas are unprotectable public domain material. *See* discussion *supra* Part II.C.

Decades later, in apparent contradiction to its jurisprudence under the dominant intellectual property regimes, the Supreme Court would imply that property rights may be held in information. In *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986 (1984), the Court ruled that research data submitted to a federal agency could be considered in certain circumstances be considered property under a Fifth Amendment takings analysis. In *Carpenter v. United States*, 484 U.S. 19 (1987), the Court held that a *Wall Street Journal* reporter had fraudulently deprived his employer of a property interest by buying securities for his own commercial gain based on

International News Service ("INS") and Associated Press ("AP") were rival syndicates which sold news reportage to their respective member newspapers nationwide for a fee.[127] During World War I, British censors prevented INS correspondents in England from sending dispatches of the war to America.[128] In response, INS employees copied, both verbatim and in substance, news items which either were posted publicly on AP's bulletin boards or were published in east coast AP-member newspapers.[129] West coast INS-member newspapers received the news by telegraph in time for publication.[130] AP accused INS of unlawfully pirating AP's admittedly uncopyrighted news stories[131] through these allegedly unfair trade practices.[132]

The Supreme Court, speaking through Justice Pitney, first addressed the copyrightability of news articles.[133] Recognizing the "dual character" of news, the Court emphasized the need to "distinguish[] between the substance of the information and the particular form or collocation of words in which the

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information in a column that the reporter himself had written. *See generally* Samuelson, *supra* note 1 (expressing view that the Court was inadvertent in ascribing property interest in information in *Ruckleshaus* and *Monsanto*, but that the cases could be used to assert the same in the future).

[127] *See INS*, 248 U.S. at 229-30. This membership fee was part of the costs of production for these member newspapers, which presumably recouped their expenses through subscriptions, newsstand sales, and advertising fees. *See id.* Both INS and AP expended vast resources, nationally and overseas, to report on current events. *See id.*

[128] *See* Baird, *supra* note 29, at 412 (citing E. KITCH & H. PERLMAN, LEGAL REGULATION OF THE COMPETITIVE PROCESS 33-34 (2d ed. 1979)); *INS*, 248 U.S. at 263 (Brandeis, J., dissenting) (explaining that foreign governments prohibited INS correspondents from cabling or telegraphing news bulletins from the war front in Europe).

[129] *See INS*, 248 U.S. at 231.

[130] *See id.* INS also obtained news gathered by AP by bribing employees of AP-member newspapers to furnish the news before publication, and by inducing AP-member newspapers themselves to furnish pre-publication news, in violation of the AP by-laws which prohibited news dissemination to non-AP members before publication. *See id.* at 230-31. The district court granted a preliminary injunction against INS for these tortious actions, but refused to restrain INS from procuring AP news from AP bulletin boards or newspapers. *See id.* at 231. The Circuit Court of Appeals modified the injunction to additionally prohibit INS from taking news from AP bulletin boards and newspapers "until its commercial value as news had passed away." *Id.* at 232.

[131] *See id.* at 233. Under the Copyright Act of 1909, the requirement of placing a copyright notice on a work at the moment of publication made retaining copyright protection for AP's news stories difficult. If any one of AP's subscriber newspapers published a story without a copyright notice, forfeiture of the copyright nationwide would have resulted. *See* Baird, *supra* note 29, at 412 n.5.

[132] *See INS*, 248 U.S. at 231-32. As INS only appealed the injunction based upon the takings from the AP bulletin boards and the newspapers, the Court only considered those actions in its decision. *See id.* at 232.

[133] *See id.* at 234.

writer has communicated it."[134] News articles, as literary works, were unquestionably eligible for copyright protection under the federal copyright statute then in force, the Copyright Act of 1909.[135]

In contrast, however, the Court stated that:

> the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day. It is not to be supposed that the framers of the Constitution . . . intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.[136]

As a result, the informational nugget in any published news story remains free of copyright protection.[137]

Despite AP's lack of property rights stemming from copyright, the Court nevertheless refused to excuse INS's apparently blatant copying of news reported by AP.[138] The Court acknowledged that once news is disseminated to the public, the news producer loses "any remaining property interest" as against the public.[139] Nevertheless, taking into account the "character and circumstances" of the news business, a residual property interest remains in published news as against rival news organizations, "irrespective of the rights of either as against the public."[140] In the eyes of the Court, the value of news gathered "at the cost of enterprise, organization, skill, labor, and money" warrants its treatment as "quasi property" against competitors.[141] Accordingly, when INS appropriated news from AP, its direct competitor, the Court held that INS engaged in unfair competition.[142] The Court sustained the injunction of the lower court that AP could protect its investment in gathering breaking news by preventing INS from copying such news items for an

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[134] *Id.*

[135] *See id.* Under the previous copyright acts of 1790 (1 Stat. 124) and 1802 (2 Stat. 171), newspapers were not eligible for copyright. *See* Clayton v. Stone & Hall, 5 F. Cas. 999, No. 2,872 (C.C.S.D.N.Y. 1829), *cited in INS*, 248 U.S. at 234. *See also* Baker v. Selden, 101 U.S. 99, 105 (1879)(discussing *Clayton*). The Copyright Act of 1909, conversely, explicitly provided for copyright in "periodicals, including newspapers." Act of March 4, 1090, ch. 320, § 5, 35 Stat. § 1076, *quoted in INS*, 248 U.S. at 234.

[136] *INS*, 248 U.S. at 234.

[137] *See id.* at 235 ("[T]he news of the current events may be regarded as common property"). *See also* discussion of the idea/expression dichotomy *supra* Part II.C.

[138] *See INS*, 248 U.S. at 234-35.

[139] *Id.* at 236.

[140] *Id.*

[141] *Id.*

[142] *See id.* at 240 ("The transaction speaks for itself, and a court of equity ought not to hesitate long in characterizing it as unfair competition in business.").

undefined period until which AP could realize its investment and all commercial value in the news had "passed away."[143]

C. Lessons From INS

The *INS* Court appeared to base its recognition of misappropriation on three distinct reasons: 1) a labor theory of property; 2) commercial immorality; and 3) the preservation of the incentive to invest in information gathering. All three rationales have sustained the continued viability of the misappropriation doctrine well to the present.

First, misappropriation protects one's interest in commercially valuable information, which otherwise would be in the public domain, from appropriation by a direct competitor.[144] The Court proclaimed a "quasi property" interest in breaking news which AP expended resources and money to procure.[145] This interest inured to AP because of the time and resources spent by AP to gather the news, which is a direct link to the labor theory of property, wherein property rights are deserved out of respect for a person's expended labor.[146] INS therefore could not permissibly "reap where it has not sown";[147] the rationale for misappropriation liability thereby has a direct link to the natural rights, "sweat of the brow" justification of copyright.[148]

Second, misappropriation functions as a form of unfair competition law, punishing the commercially immoral conduct of competitors.[149] The copying by INS of AP's news items "amounts to an unauthorized interference" into the business operations of AP.[150] Because of such conduct, INS had "diverted"

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[143] *Id.* at 245.

[144] *See INS*, 248 U.S. at 234-36.

[145] *Id.* at 236.

[146] *See* Baird, *supra* note 29, at 416. This theory is similar to that of the "sweat of the brow" theory of copyright protection for factual compilations. *See* discussion *infra* Part IV.A.

[147] The Court explained its rationale for holding INS liable to AP by stating:

> [D]efendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown.

INS, 248 U.S. at 239-40.

[148] *See* Baird, *supra* note 29, at 416 ("Although an artist's natural rights have been at best an undercurrent in federal intellectual property law, the misappropriation doctrine of *INS* and its progeny have recognized them explicitly.") (citation omitted). *See generally* Yen, *supra* note 51 (discussing the natural rights theory of copyright).

[149] *See INS*, 248 U.S. at 235.

[150] *Id.* at 239-40.

to itself a portion of the profits which should have rightfully accrued to AP.[151] The Court considered INS's actions as "unfair competition in business."[152]

What did INS do that struck the Court as unfair? Two aspects seem relevant. INS did not independently gather the news; instead, INS simply copied the efforts of the AP reporters.[153] In addition, INS did not pay for the copying that it did or contribute to the costs of gathering the news.[154] These factors contributed to the finding of the Court that healthy competition was injured by INS's conduct.[155]

Third, misappropriation served to preserve the incentive of AP to continue to invest millions of dollars in gathering the news.[156] The Court noted that news organizations such as AP provided a public service by ensuring that everyone had ready access to the latest news by paying a few cents for the morning paper.[157] To permit INS to continue copying AP's news dispatches with impunity would ultimately damage AP's incentive to invest in news reportage.[158]

At bottom, the *INS* case may be seen as a situation where the technology of telegraphy allowed rapid and inexpensive copying of a news company's breaking dispatches by a rival news organization, all without running afoul of the dominant intellectual property laws.[159] Misappropriation was the Court's response to the threat to investment in producing hot news information by the unfair exploitation of technology by direct commercial rivals. As such, the parallels of emerging technologies at the dawn of this century and its close are striking;[160] recourse to the protean misappropriation doctrine then and now is, therefore, understandable.

D. Two Critics of Misappropriation: Brandeis and Hand

Even as the majority of the *INS* Court issued its ruling, critics of misappropriation expressed their skepticism of the doctrine. Their criticisms targeted

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[151] *Id.*

[152] *Id.*

[153] *See id.*

[154] *See id.*

[155] *See id.* at 240.

[156] *See id.*

[157] *See id.* at 235.

[158] *See* Baird, *supra* note 29, at 415.

[159] *See* Karajala, *supra* note 21, at 2598.

[160] *See* Gary Myers, *The Restatement's Rejection of the Misappropriation Tort: A Victory for the Public Domain*, 47 S.C. L. REV. 673, 688 (1996) ("What is striking today is the extent to which this kind of instant copying and transmission can be accomplished even more readily.").

the unsuitability of judges creating intellectual property protection,[161] the amorphous scope of misappropriation,[162] and the conflict between misappropriation and the dominant intellectual property regimes.[163] The critiques of Louis Brandeis and Learned Hand cogently elucidate the problems associated with common law misappropriation.

Justice Brandeis, in his dissent to the *INS* majority opinion,[164] rejected the notion that intellectual property rights could be created solely through money and labor.[165] Consistent with his view of the importance of the free flow of facts and ideas voluntarily disclosed,[166] any restrictions created by intellectual property laws must be "definitely established and wisely guarded."[167] Brandeis acknowledged the considerable role of the common law in the administration of justice.[168] He was sensitive, however, to the need to protect the interests of the public in recognizing a novel intellectual property right via the equity powers of a court.[169] Accordingly, he viewed judges as "ill-equipped" to undertake the required inquiry into the limits which should precede any establishment of property rights in news.[170]

Addressing the heart of the majority's rationale for concluding that INS acted unfairly, Brandeis responded, "[t]o appropriate and use for profit, knowledge and ideas produced by other men, without making compensation or even acknowledgment, may be inconsistent with a finer sense of propriety; but, with the exceptions [of trade secret or breach of contract or trust], the law has heretofore sanctioned the practice."[171] Brandeis argued that only behavior involving fraud, force, or "the doing of acts otherwise prohibited by law" consisted of unfair methods of conducting business.[172] Competition is not

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[161] *See, e.g., INS*, 248 U.S. at 267 (Brandeis, J., dissenting).

[162] *See, e.g.*, Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 280 (2d Cir. 1929), *cert. denied*, 281 U.S. 728 (1930) (Hand, J.).

[163] *See, e.g., id.* at 280.

[164] *See INS*, 248 U.S. at 248-67 (Brandeis, J., dissenting).

[165] *See id.* at 250 (Brandeis, J., dissenting) ("But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property.").

[166] *See supra* note 72.

[167] *INS*, 248 U.S. at 263 (Brandeis, J., dissenting).

[168] *See id.* at 262 (Brandeis, J., dissenting) ("The unwritten law possesses capacity for growth; and has often satisfied new demands for justice by invoking analogies or by expanding a principle or rule.").

[169] *See id.* at 262-63 (Brandeis, J., dissenting) ("[T]he creation or recognition by courts of a new private right may work serious injury to the general public, unless the boundaries of the right are definitely established and wisely guarded.").

[170] *Id.* at 267 (Brandeis, J., dissenting).

[171] *Id.* at 257 (Brandeis, J., dissenting).

[172] *Id.* at 258 (Brandeis, J., dissenting).

unfair "merely because the profits gained are unearned, even if made at the expense of a rival . . . ."[173]

In conclusion, Brandeis argued that the legislature, not the courts, was better able to discern whether the creation of new intellectual property rights were warranted.[174] He trusted the ability of the legislative branch to conclude that the benefits of granting property rights to news or of imposing liability for acts similar to those performed by INS would outweigh the harm to society.[175] Therefore, even if equity called for a remedy, Brandeis believed that courts should decline such an invitation in deference to the legislative branch.[176]

Likewise, skeptical jurists, such as Learned Hand, were chary of broadening the application of misappropriation to any situation where one appropriated an intangible good which lacked any intellectual property protection.[177] For example, in *Cheney Bros. v. Doris Silk Co.*,[178] the plaintiff sued a competitor who copied the plaintiff's popular silk design and sold the counterfeit silks at lower prices.[179] The design was unpatented and uncopyrighted, so the plaintiff sought to rely upon the expansive language of *INS* to support a claim of misappropriation.[180]

Hand soundly rejected a broad interpretation of *INS*-style misappropriation. In the absence of statutory or "recognized" common law rights,[181] "a man's property is limited to the chattels which embody his invention. Others may imitate these at their pleasure."[182] If the court were to establish misappropriation liability in this instance, Hand could not logically curtail application of the doctrine to other claims, such as appropriation of processes, machines, and secrets otherwise unprotected by law.[183]

Hand therefore declared that the misappropriation doctrine should be limited to situations "substantially similar" to those of *INS*, involving news or

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[173] *Id.* at 259 (Brandeis, J., dissenting).

[174] *See id.* at 264 (Brandeis, J., dissenting).

[175] *See id.* at 264-67 (Brandeis, J., dissenting).

[176] *See id.* at 267 (Brandeis, J., dissenting).

[177] *See, e.g.*, *Cheney Bros.*, 35 F.2d at 280; *accord*, R.C.A. Mfg. Co., Inc. v. Whiteman, 114 F.2d 86, 90 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940) (Hand, J.) (denying misappropriation liability for broadcast of phonographic records of musical performances); G. Ricordi & Co. v. Haendler, 194 F.2d 914, 916 (2d Cir. 1952) (Hand, J.) (denying misappropriation liability for copying by photographing pages of book whose copyright had expired). *See generally* Paul Goldstein, *Federal System Ordering of the Copyright Interest*, 69 COLUM. L. REV. 49, 51-62 (discussing Hand's rejection of the *INS* rationale).

[178] 35 F.2d 279 (2d Cir. 1929), *cert. denied*, 281 U.S. 728 (1930) (Hand, J.).

[179] *See id.*

[180] *See id.* at 280.

[181] Hand did not elaborate on which "recognized" common law rights he was referring to, but they apparently did not include misappropriation. *See id.*

[182] *Id.*

[183] *See id.*

perhaps stock quotations.[184] To hold otherwise, he warned, was to erect a common law patent or copyright regime which would offer protections similar (or greater) to those of statutory patent and copyright, but which would not require the satisfaction of equivalent statutory conditions.[185] Such an "insuperable" and "incredible" outcome would "flagrantly" clash with the sound statutory intellectual property scheme that Congress had devised.[186]

Like Brandeis,[187] Hand believed that courts possessed only a limited power to amend the law.[188] Once Congress had addressed through legislation an area of the law, judges "must stand aside, even though there be an hiatus in completed justice."[189] Consonant with this philosophical bent towards judicial restraint, Hand concluded that the U.S. Constitution authorizes only Congress, and not the courts, to create intellectual property protections.[190]

Hand's persuasive rejection of a broad reading of *INS* highlights the fundamental incompatibility of common law misappropriation with the statutory federal intellectual property system. Without a stringent check on the application of the misappropriation tort, a potentially expansive use of the doctrine by the courts could vitiate the balance between the incentive to create and free access that Congress had established pursuant to its constitutional mandate under the Patent-Copyright Clause.[191] Hand's reasoning foreshadowed much of the rationale advanced decades later in support of preemption of common law misappropriation in accordance to federal intellectual property principles.[192]

Brandeis's call for the legislative branch to enact a misappropriation statute, if deemed appropriate, appears to sensibly respond to the main issues raised by Hand. Brandeis noted that Congress may craft a misappropriation statute which would determine whether a property or liability standard would better preserve the investment in information.[193] A statutory approach would clarify

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[184] *Id.*

[185] *See id.*

[186] *Id.*

[187] Indeed, Hand cites Brandeis's dissent to the majority opinion of *INS*. *See id.* at 281.

[188] *See id.*

[189] *Id.*

[190] *See id.* at 280.

[191] Almost apologetically, Hand muses that "[i]t seems a lame answer . . . to turn the injured party [the plaintiff] out of court, but there are larger issues at stake than his redress." *Id.* at 281.

[192] *See, e.g.*, Synercom Tech. v. Universal Computing Co., 474 F. Supp. 37, 44 (N.D. Tex. 1979)(holding state common law misappropriation preempted where federal policy of disclosure of and free access to ideas would be hindered). *See* discussion *infra* Part V.

[193] *See INS*, 248 U.S. at 266-67 (Brandeis, J., dissenting). *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (discussing how an entitlement may be protected either by injunction (a property rule), or by damages (a liability rule)).

the scope of protection and the measure of injunctive relief or damages.[194] Hand, in concluding that only Congress could supply intellectual property relief in this case,[195] essentially agreed with the deference Brandeis showed to the legislative branch.[196]

E. Subsequent Interpretation of the Misappropriation Doctrine By Lower Courts

Since the Supreme Court issued the *INS* decision, the misappropriation doctrine has been adopted by a number of state courts.[197] Lower federal and state courts, in deciphering the teachings of the opinion, have attempted to track the elements found in the original *INS* decision.[198] In most misappropriation cases, the plaintiff has expended resources in producing the intangible good or value; the defendant who is accused of using or copying the good was the plaintiff's competitor; and commercial damage to the plaintiff resulted from the defendant's conduct.[199]

For the most part, the runaway and ill-equipped judiciary which Brandeis and Hand had feared has not transpired. Courts have on the whole restrained the misappropriation doctrine's potentially wide-ranging applicability.[200] Most cases in which the courts did recognize a proper misappropriation action have been those involving either appropriation of breaking news from dispatches[201] or sports performances.[202] These situations are similar to that of *INS* in that they involved news information of public events which had limited

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[194] *See INS*, 248 U.S. at 266 (Brandeis, J., dissenting).

[195] *See Cheney Bros.*, 35 F.2d at 280.

[196] *See INS*, 248 U.S. at 266-67 (Brandeis, J., dissenting).

[197] *See* Sease, *supra* note 19, at 801-03. Because the Supreme Court decided *INS* in the era prior to its decision of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), misappropriation became part of federal common law. Due to the *Erie* decision, general federal common law ceased to exist, thereby technically abolishing misappropriation based on *INS*. Nevertheless, state courts were free to adopt the equitable principles of misappropriation in crafting their own state common law remedies. *See* Fashion Originators' Guild of Am., Inc. v. Federal Trade Comm'n, 312 U.S. 457, 468 (1941) (observing that after *Erie*, liability based on *INS* is a matter of state law).

[198] *See* Sease, *supra* note 19, at 787, 804.

[199] *See* Paepke, *supra* note 33, at 68.

[200] *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. b (1995) ("Although the [*INS*] decision has been frequently cited, it has been sparingly applied. Notwithstanding its longevity, the decision has had little effect.").

[201] *See, e.g.*, Associated Press v. KVOS, Inc., 80 F.2d 575 (9th Cir. 1935), *rev'd for lack of jurisdiction*, 299 U.S. 269 (1936); Pottstown Daily News Publishing Co. v. Pottstown Broad. Co., 192 A.2d 657 (Pa. 1963).

[202] *See, e.g.*, Pittsburgh Athletic Co. v. KQV Broad. Co., 24 F. Supp. 490 (W.D. Pa. 1938); Twentieth Century Sporting Club v. Transradio Press Serv., 300 N.Y.S. 159 (N.Y. Sup. Ct. 1937).

time value.[203] As in *INS*, the misappropriation doctrine provided a useful legal justification for remedying the economic injustice of the plaintiff's free riding activities where traditional intellectual property or unfair competition laws did not fashion a cure.[204]

For example, in *Associated Press v. KVOS, Inc.*,[205] the court found a radio station liable for lifting breaking news accounts taken from newspapers, despite the argument by the station that the newspaper served a different news-consuming market.[206] In *McCord Co. v. Plotnick*,[207] the court applied the misappropriation doctrine to halt publication of credit information which was copied from a trade newspaper. A ballclub, in *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*,[208] successfully enjoined a radio broadcaster from peeking over the ballpark fence and recounting the play-by-play over the air. Likewise, the court in *Twentieth Century Sporting Club v. Transradio Press Service*[209] prevented an unlicensed eavesdropper at boxing matches featuring Joe Louis from recounting the commentary of a licensed ringside announcer next to whom sat the eavesdropper.

Not all state courts have been sympathetic to the misappropriation doctrine in situations with similar facts to *INS*. In *Triangle Publications, Inc. v. New England Newspaper Publishing Co.*,[210] the court declared that the use of race horse statistics culled from a competitor's race sheets was not unfair competition.[211] In *Gary Van Zeelant Talent, Inc. v. Sandas*,[212] the court held that the misappropriation doctrine did not protect consumer lists from appropriation. Indeed, the more contemporary cases confronting an allegation of misappropriation have followed Hand's footsteps by explicitly acknowledging the balancing of interests necessarily implicated in providing common law protections to information dissemination.[213]

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[203] *See* Sease, *supra* note 19, at 788. In this manner, most courts have followed the example of Hand in *Cheney Bros.* in limiting the *INS* holding to its facts. *See, e.g.*, Speedry Prods., Inc. v. Dri Mark Prods., Inc., 271 F.2d 646, 649 (2d Cir. 1959)(holding the *INS* case as "*sui generis*"); Famolare, Inc. v. Melville Corp., 472 F. Supp. 738, 747 (D. Haw. 1979), *aff'd*, 652 F.2d 62 (9th Cir. 1981).

[204] *See generally* Sease, *supra* note 19 (surveying history of misappropriation cases).

[205] 80 F.2d 575 (9th Cir. 1935), *rev'd for lack of jurisdiction*, 299 U.S. 269 (1936).

[206] *See id.* at 579.

[207] 239 P.2d 32 (Cal. Dist. Ct. App. 1951).

[208] 24 F. Supp. 490 (W.D. Pa. 1938).

[209] 300 N.Y.S. 159 (N.Y. Sup. Ct. 1937).

[210] 46 F. Supp. 198 (D. Mass. 1942).

[211] *Id.* at 203 ("The courts of Massachusetts . . . have never followed the implications which the bar sought to derive from the *International News* case.").

[212] 267 N.W.2d 242 (Wis. 1978).

[213] *See, e.g.*, United States Golf Ass'n v. St. Andrews Sys., Data-Max Inc., 749 F.2d 1028, 1035 (3d Cir. 1984) ("[T]he dilemma posed by the doctrine can be best viewed as an attempt to provide the necessary incentives to the creators of intellectual property without necessarily

A recent spate of lawsuits involving time-sensitive information products and electronic commerce have seemingly revived misappropriation from desuetude.[214] Commercial competitors in cyberspace are finding that the traditional intellectual property laws fail to protect their investments in information-intensive products and services.[215] Misappropriation is perceived as a method to fortify available legal protection of informational products, especially data-intensive databases, from free rider copying in cyberspace.[216]

Before the viability of utilizing misappropriation as a digital-age cudgel against information appropriators can be evaluated, however, an examination of the copyright law's handling of informational products must first be examined. Such an examination must be undertaken for two reasons. First, a significant Supreme Court case reaffirming the non-copyrightability of facts has repudiated the labor-based theory of copyright protection of factual compilations.[217] This opinion has had a monumental effect of raising the anxieties of information providers about the adequacies of the legal protections of their wares under copyright.[218] These fears have prompted information providers to resort to common law protections such as misappro-

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restricting the public's free access to information."); Board of Trade v. Dow Jones & Co., Inc., 456 N.E.2d 84, 89 (Ill. 1983) ("Competing with the policy that protection should be afforded one who expends labor and money to develop products is the concept that freedom to imitate and duplicate is vital to our free market economy.").

[214] *See, e.g.*, National Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997) (misappropriation action brought by professional basketball league against pager manufacturer and on-line service provider for transmitting real-time scores from ongoing basketball games); ProCD, Inc. v. Zeidenberg, 908 F. Supp. 640 (W.D. Wis.), *rev'd*, 86 F.3d 1447 (7th Cir. 1996) (misappropriation action brought by computer database provider against user who downloaded telephone listings off of CD-ROM and posted listing on the Internet); CD Law, Inc. v. LawWorks, Inc., 35 U.S.P.Q.2d 1352 (W.D. Wash. 1994) (unfair competition action brought by manufacturer of CD-ROM containing scanned judicial decisions against competitor who allegedly copied contents of plaintiff's product); Washington Post Co. v. Total News Inc., 97 Civ. 1190 (S.D.N.Y., Feb. 20, 1997) (cited in Barry D. Weiss, *Metasites Linked To IP Violations*, NAT'L L.J., July 21, 1997, at B9) (misappropriation action brought by group of on-line news services against developer of website which used "framing" technique while displaying content of plaintiffs' own websites).

[215] *See generally* Jane C. Ginsburg, *Putting Cars on the Information Superhighway: Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466 (1995) (exploring potential legal deficiencies in protecting works of authorship in cyberspace).

[216] *See* COPYRIGHT OFFICE REPORT, *supra* note 24, at 73 (listing misappropriation as a possible method to protect databases).

[217] *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991).

[218] *See generally* COPYRIGHT OFFICE REPORT, *supra* note 24; Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information after Feist v. Rural Telephone*, 92 COLUM. L. REV. 338 (1992).

priation.[219] Part IV deals with the scope of copyright protection of informational compilations.

Second, the success of plaintiffs in bringing misappropriation actions depends upon convincing a court that the tort has not been preempted by federal intellectual property law. A line of Supreme Court cases has expanded the preemptive effect of the federal intellectual property laws on state laws which provide parallel protections to intangible goods. Moreover, the federal intellectual property statutes themselves, especially the Copyright Act of 1976, contain explicit provisions[220] which override state common law and legislative actions which conflict with the federal laws. Part V examines the effect of federal preemption on common law misappropriation.

IV. THE LIMITS OF COPYRIGHT PROTECTION OF INFORMATION

A. Copyright Protection of Informational Compilations

The copyright statute expressly provides copyright protection for compilations of facts.[221] Apparently, consonant with the idea/expression dichotomy, an informational compilation that consists exclusively of facts, such as electronic databases and business directories, may be within the scope of copyright.[222] Hot news information, like stock quotes, within a database format would therefore arguably be eligible for copyright protection.

Part of the reason factual compilations are protected under the copyright statute is explained by the approach historically taken by English and American courts in protecting informational works under the early copyright statutes.[223] Initially, the kinds of artistic works that were protected by copyright statutes were often useful informational works, such as maps, arithmetic and grammar primers, calendars, and law books, and not artistic

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[219] *See* COPYRIGHT OFFICE REPORT, *supra* note 24, at 73.

[220] *See, e.g.*, 17 U.S.C. § 301 (1994).

[221] Section 103 of the 1976 Copyright Act provides, in pertinent part, that "[t]he subject matter of copyright as specified by section 102 includes compilations . . . ." 17 U.S.C. § 103 (1994). Section 101 of the 1976 Copyright Act defines "compilation" as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101 (1994). *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345 (1991) ("[I]t is beyond dispute that compilations of facts are within the subject matter of copyright.").

[222] *See generally* Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516, 527 (1981) ("Compilations of facts have long rested securely within the scope of copyright.").

[223] *See* Ginsburg, *supra* note 10, at 1873-81 (discussing early English and American copyright cases).

works of high creativity.[224] Because most works were of an informational nature, judicial decisions up until the mid-nineteenth century focused on the "expense, or skill, or labor, or money," rather than the artistic inspiration, involved in creating the work.[225]

The theory that the sheer expending of labor in creating intangible goods creates intellectual property rights is called the "sweat of the brow" or the "industrious collection" doctrine.[226] The doctrine clearly owes its heritage to the Lockean labor theory of property rights.[227] John Locke's proposition held that one may acquire property rights in a thing not already owned by expending labor to gather or produce it.[228] Gathering or producing information often requires expenditure of labor, time, and capital; analogously, property rights may inhere to those who acquire information by labor.[229]

Beginning from the mid-nineteenth century, the courts shifted to focusing on the creative expression, or the originality, of a work to determine if copyright is appropriate.[230] Under this theory, copyright exists to protect the "original intellectual conceptions of the author."[231] "The writings which are to be protected," the Supreme Court announced, "are the fruits of intellectual labor."[232]

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[224] *See id.* at 1873.

[225] Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass 1845). *See* Ginsburg, *supra* note 10, at 1874 ("No matter how banal the subject matter, if the author's work resulted from original efforts, rather than from copying preexisting sources, the author was entitled to a copyright.").

[226] *See Feist*, 499 U.S. at 352. The classic articulation of the doctrine appeared in *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83, 88 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922):

> The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are publici juris, or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author.

Id.

[227] *See* Samuelson, *supra* note 1, at 369 & n.26, (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 27-28 (P. Laslette 2d ed. 1967) (1698)). The "reap where one has not sown" theory of *INS* also appears to reflect a Lockean labor theory of property. *See* discussion *supra* Part III.B.

[228] *See* Samuelson, *supra* note 1, at 369.

[229] *See id.* at 369-70.

[230] *See, e.g.*, Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884); The Trademark Cases, 100 U.S. 82 (1879). In defining the word "writings" in the Copyright Clause, *see supra* note 60, the Supreme Court held that the term required a minimal degree of creativity on the part of the work's author. *See The Trademark Cases*, 100 U.S. at 94.

[231] *Burrow-Giles*, 111 U.S. at 59-60.

[232] *The Trademark Cases*, 100 U.S. at 94.

However, the labor rationale of copyright continued to coexist with the emerging theory of authorial creativity.[233] Because of the ambiguous language of the 1909 Copyright Act[234] in defining the scope of copyright for factual compilations,[235] some lower courts interpreted the copyright law as protecting independently assembled data compilations as the "industrious collection" of facts.[236] In doing so, a few courts appeared to have invested the facts themselves with copyright protection in these "sweat of the brow" compilations.[237] The sole way another could show noninfringement of a "sweat of the brow" compilation was to prove independent creation, by gathering the information from original sources without any reference to the earlier work.[238]

Congress attempted to clarify the definition of compilation in its revision of the copyright statute, the Copyright Act of 1976, which focused on the selection, coordination, or arrangement of the compilation in order to satisfy the originality requirement to merit copyright protection.[239] The effect of this clarification may be illustrated by two Second Circuit cases. In *Eckes v. Card Prices Update*,[240] the court held that a comprehensive listing of the market prices of 18,000 baseball cards was copyrightable. The court found that the defendant, a baseball card price guide publisher, had exercised "selection, creativity and judgment" in choosing which cards were to be categorized as premium or regular cards in the publication.[241] Therefore the defendant had not infringed upon the plaintiff's similar price guide, but had created a separate copyrightable work.

By contrast, in *Financial Information, Inc. v. Moody's Investor Service, Inc.*,[242] the court held that the plaintiff's bond information service, which consisted of cards reporting all municipal bond redemptions across the country, was not copyrightable. The cards listed just five facts: the series of

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[233] *See Feist*, 499 U.S. at 352.

[234] Act of March 4, 1909, 35 Stat. 1075.

[235] Section 5 of the 1909 Copyright Act listed compilations as one of the categories of work eligible for copyright. *See Feist*, 499 U.S. at 352.

[236] *See, e.g.*, Jeweler's Circular Publishing Co. v. Keystone Publishing Co., 281 F. 83 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922); Leon v. Pac. Tel. & Tel. Co., 91 F.2d 484 (9th Cir. 1937).

[237] *See Feist*, 499 U.S. at 353.

[238] *See, e.g.*, Williams v. Smythe, 110 F. 961 (C.C.M.D. Pa. 1901); List Publishing Co. v. Keller, 30 F. 772 (C.C.S.D.N.Y. 1887).

[239] 17 U.S.C. § 101 (1994). In so revising the copyright statute, Congress did not intend to alter the standard of originality under the 1909 Copyright Act, as interpreted by the courts. *See Feist*, 499 U.S. at 355.

[240] 736 F.2d 859 (2d Cir. 1984).

[241] *Id.* at 863. *Accord* Kregos v. Associated Press, 937 F.2d 700 (2d Cir. 1991) (plaintiff's baseball pitching forms which set out compiler's choice of nine categories of statistical information contained sufficient originality to warrant copyright).

[242] 808 F.2d 204 (2d Cir. 1986), *cert. denied*, 484 U.S. 820 (1987).

bonds, the issuing authority, the date and the price of the redemption, and the trustee or paying agent.[243] The plaintiff simply culled daily bond sales information from newspapers across the country.[244] The court stated that, unlike the price guide in *Eckes*, the cards lacked any independent creativity sufficient for copyrightability, but were the product of rote copying of data.[245]

Despite the clarification in the 1976 Copyright Act, a few courts persisted in granting copyright protection to "sweat of the brow" data compilations.[246] A split between the circuits soon unfolded;[247] the standard under which copyright was to be granted to factual compilations was thrown into question.[248] To resolve the issue, which implicitly would determine the correct scope of protection for information under copyright, the Supreme Court granted certiorari to a Tenth Circuit case concerning the alleged copyright infringement of a telephone directory.[249]

B. Feist Publications, Inc. v. Rural Telephone Service Co.

The Supreme Court squarely addressed the proper basis of copyright in factual compilations in *Feist Publications, Inc. v. Rural Telephone Service Co.*[250] In *Feist* the Court held that creative originality, not one's labor or "sweat of the brow," was the sole basis for copyright.[251] An author's independent selection, coordination, or arrangement of facts which manifest sufficient creativity will render a factual compilation eligible for copyright; but protection is limited to the particular expression of the selection, coordination, or arrangement of the factual elements.[252] Facts themselves,

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[243] *See id.* at 206.

[244] *See id.*

[245] *See id.* at 207.

[246] *See, e.g.*, United Tel. Co. v. Johnson Publishing Co., 671 F. Supp. 1514 (W.D. Mo. 1987), *aff'd*, 855 F.2d 604 (8th Cir. 1988); National Business Lists, Inc. v. Dun & Bradstreet, Inc., 552 F. Supp. 89 (N.D. Ill. 1982); Northwestern Bell Tel. Co. v. Bedco of Minnesota, Inc., 501 F. Supp. 299 (D. Minn. 1980).

[247] *Compare* Hutchinson Tel. Co. v. Frontier Directory Co., 770 F.2d 128 (8th Cir. 1985), *and* Southern Bell Tel. and Tel. Co. v. Associated Tel. Directory Publishers, 756 F.2d 801 (11th Cir. 1985) (granting copyright to compilations based on "sweat of the brow"), *with FII*, 808 F.2d 204, *and* Worth v. Selchow & Righter Co., 827 F.2d 569 (9th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988) (denying copyright to compilations for not satisfying "selection, coordination and arrangement" criteria).

[248] *See generally* Denicola, *supra* note 222 (arguing for a reasoned approach to copyright in factual compilations to be guided by first principles of copyright law).

[249] Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 498 U.S. 808 (1990) (cert. granted).

[250] 499 U.S. 340 (1991).

[251] *See id.* at 359-60.

[252] *See id.* at 350-51.

which lack the constitutional requirement of originality, cannot be accorded copyright protection under the statute.[253]

The case involved the valid scope of copyright protection to a white pages telephone directory.[254] Rural was a telephone utility which was required by state law to publish a local telephone directory.[255] Rural sued Feist, a publisher who allegedly copied the names, addresses, and other information directly from Rural's directory and listed the information taken in its own directory.[256]

The Court first resolved the apparent paradox between the denial of copyright to facts and the grant of copyright to factual compilations by examining the requirement of originality for copyright.[257] A work is original when it is independently created by the author (as opposed to copied from another), and it possesses at least a minimal amount of creativity.[258] Although the requisite level of creativity is "extremely low," the Court nevertheless declared that a "slight amount" is still needed.[259]

The Court stressed that originality was not only required under the copyright statute, but was constitutionally obligated by the Court's nineteenth-century interpretation of the terms "writings" and "authors" found in Copyright Clause.[260] In *The Trademark Cases*,[261] the Court had defined copyrightable "writings" as "only such [writings] as are original, and are founded in the creative powers of the mind."[262] In *Burrow-Giles Lithographic Co. v. Sarony*,[263] the Court had defined an "author" of a copyrightable work as "he to whom anything owes its origin; originator; maker."[264]

Following the teachings of its predecessors, the *Feist* Court concluded that the Constitution thereby limits copyright protection solely to that which is an original creation of an author.[265] Facts are not original, as in the result of creative effort by an author, but are instead simply discovered.[266] Facts

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[253] *See id.* at 351.
[254] *See id.* at 342.
[255] *See id.* at 342-43.
[256] *See id.* at 344.
[257] *See id.* at 344-351.
[258] *See id.* at 345.
[259] *Id.*
[260] *See id.* at 346.
[261] 100 U.S. 82 (1879).
[262] *Id.* at 94, *quoted in Feist*, 499 U.S. at 346.
[263] 111 U.S. 82 (1884).
[264] *Id.* at 58, *quoted in Feist*, 499 U.S. at 346.
[265] *See Feist*, 499 U.S. at 348.
[266] *See id.* at 347.

contained in an informational work, the Court held, are therefore barred by the Constitution from copyright protection.[267]

As to compilations, originality manifests itself in the author's independently-arrived and sufficiently-creative selection, coordination, and arrangement of the underlying facts within the work.[268] Thus a sufficiently original factual compilation is copyrightable.[269] However, all that copyright protects is the compiler's original expression in the selection and arrangement of facts; others may directly copy the factual information itself from a copyrighted informational product without infringing the copyright of the work.[270] By consequence, the Court admitted that copyright protection in factual compilations is thin.[271] Applying this standard of originality, the Court held that Rural's directory, which simply arranged telephone listings in alphabetical order, was "devoid of even the slightest trace of creativity," and thus was uncopyrightable.[272]

By emphasizing originality as the key to copyright, the Court repudiated the "sweat of the brow" rationale for copyright of factual compilations.[273] The Court made clear its prohibition against using copyright for the exclusive use of facts or data collected in compilations.[274] The Court stated that the 1976 Copyright Act made explicit what the 1909 Act murkily required: "[O]riginality, not 'sweat of the brow,' is the touchstone of copyright protection in directories and other fact-based works."[275] Copyright was not a reward for the industrious compiling of facts, but was available only to factual

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[267] *See id.* at 350.

[268] *See id.* at 348 ("These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.").

[269] *See id.*

[270] *See id.* at 349. This concept is reflected in § 103(b) of the 1976 Copyright Act, which states:

> The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

17 U.S.C. § 103(b) (1994).

[271] *See Feist*, 499 U.S. at 349.

[272] *Id.* at 362-63. The Court stated moreover that the alphabetical arrangement was "not only unoriginal, it [was] practically inevitable." *Id.*

[273] *See id.* at 350-354.

[274] "[C]opyright is not a tool by which a compilation author may keep others from using the facts or data he or she has collected." *Id.* at 359.

[275] *Id.* at 359-60.

compilations whose author exhibited some independent creativity in her work.[276]

C. Lessons From Feist

The important lesson from *Feist* for information providers is not the measure of copyright protection of informational works, but the standard of infringement by subsequent copyists. Even if information providers arrange their presentation of information in the most original manner, free riders will still be able to appropriate the factual elements of an information product with impunity, as long as the specific original expression of the initial work is not also lifted.[277] Whatever protection existed of one's investment in gathering information formerly available under the "sweat of the brow" theory of copyright for compilations has evaporated under *Feist*. As the Court observes, such an "unfair" outcome is not "some unforeseen by-product of a statutory scheme," but the deliberate result of a constitutional requirement.[278]

In sum, factual information will not be protected under copyright. The *Feist* Court's analysis of copyright originality can be thought of as raising the idea/expression dichotomy, initially a product of statutory interpretation, to the constitutional level.[279] Copyright ensures constitutional protection of the author's original expression and public access to the facts which are embedded in a copyrighted compilation.[280] The public domain benefits from weak copyright protection of factual compilations, which ensures that free access to information and ideas is preserved.[281]

Nevertheless, the effect of *Feist* on overruling *INS*-style misappropriation is ambiguous. The *Feist* Court appears to have repudiated the three rationales (labor theory of property, commercial immorality, and preservation of the incentive to invest in information gathering) proffered by the *INS* Court for protecting hot news information under misappropriation.[282] *Feist* delivered the death blow to the "sweat of the brow" labor theory of data protection by copyright.[283] Implicit with disclaiming "sweat of the brow," the Court seemed

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[276] *See id.*

[277] *See Feist*, 499 U.S. at 349, *citing* Ginsburg, *supra* note 10, at 1868.

[278] *Id.* (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 589). As the Second Circuit noted in *Financial Info., Inc. v. Moody's Investors Serv., Inc.*, "if . . . the work is unprotected by federal law . . . then its use is neither unfair or unjustified." 808 F.2d 204, 208 (2d Cir. 1986), *cert. denied*, 484 U.S. 820 (1987).

[279] *See Feist*, 499 U.S. at 349-50 (discussing idea/expression dichotomy in the framework of constitutionally-required originality for copyright).

[280] *See id.* at 348-49.

[281] *See id.* at 349-50.

[282] *See* discussion *supra* Part III.C.

[283] *See Feist*, 499 U.S. at 350-54.

undaunted by the possible threat to investment in informational products which its holding might produce; copyright protection would be withheld from those factual compilations which lack sufficient originality, regardless of the magnitude of resources committed to their development.[284] Finally, the Court dismissed any notion that the direct copying of unprotected facts by commercial competitors was unfair; such a result was the express constitutional design of copyright.[285]

Nevertheless, the *Feist* Court, while citing *INS* for the proposition that facts are unprotectable under copyright, declined to overrule the holding of *INS* and explicitly stated that "[t]he [*INS*] Court ultimately rendered judgment for Associated Press on noncopyright grounds that are *not relevant here*."[286] Moreover, the Court left the door open to alternate forms of protection for "sweat of the brow" works. The opinion tantalizingly quoted a treatise which stated that research produced through one's labor, although not protectable under copyright, may be safeguarded in certain circumstances under unfair competition law.[287]

Accordingly, the Court may not see any inconsistency in denying facts or ideas copyright protection due to the constitutional originality requirement, but granting protection to "sweat of the brow" works through the law of unfair competition. The Court may have subtly indicated its view that protection of hot news information under certain forms of federal or state intellectual property law may yet survive copyright preemption. Part V attempts to ascertain the extent of federal preemption of common law misappropriation.

V. THE EXTENT OF FEDERAL PREEMPTION OF STATE COMMON LAW MISAPPROPRIATION

A. Federal Preemption of Parallel State Laws

An inquiry into the continuing viability of the misappropriation doctrine must consider the issue of preemption of state law by federal law. As noted earlier,[288] misappropriation is currently a creature of state tort law. The Supremacy Clause of the U.S. Constitution[289] empowers Congress, in the exer-

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[284] *See id.*

[285] *See id.* at 349.

[286] *Id.* at 354 n.* (emphasis added).

[287] "Protection of such [factual] research . . . may in certain circumstances be available under a theory of unfair competition." *Id.* at 354 (quoting 1 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 3.04, at 3-23 (rel. 43 1997)) [hereinafter NIMMER ON COPYRIGHT].

[288] *See supra* note 197.

[289] The Supremacy Clause provides, in pertinent part:

This Constitution, and the Laws of the United States which shall be made in Pursuance

cise of its delegated powers, to enact federal statutes that preempt, or override, parallel state law[290] in areas of legitimate federal concern.[291] Therefore federal intellectual property laws may preempt misappropriation actions.

Preemption of state law occurs under three broad circumstances.[292] First, Congress may define explicitly in statutory language the extent it intends to preempt state law.[293] Second, Congress may implicitly intend to "occupy the field" or regulate exclusively a certain subject matter, and thus preclude enforcement of parallel state law.[294] Third, state law is preempted when it comes into actual or irreconcilable conflict with federal law,[295] or when such state law "stands as an obstacle" to the accomplishment and execution of a congressional objective or purpose.[296] The touchstone to preemption analysis is congressional intent.[297]

In the area of intellectual property, Congress passed the patent, copyright, trademark, and allied statutes to effectuate the constitutional goal of promoting the progress of science and the useful arts.[298] In determining the preemptive effect of such congressional enactments, the Supreme Court has held that federal intellectual property statutes do preempt some areas of state law where the uniformity of federal intellectual property protection is threatened.[299] Therefore, the intellectual property protections provided by state courts and legislatures, such as misappropriation, are capable of being preempted by federal law. Although these state laws may exist to advance legitimate state interests, such as avoidance of consumer confusion, the federal courts have not hesitated to void incompatible state laws.[300] Neverthe-

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> thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI.

[290] State law includes statutes, regulations, and common law. *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 522 ("At least since *Erie R. Co. v. Tompkins*, . . . we have recognized the phrase 'state law' to include common law as well as statutes and regulations.").

[291] *See* Northwest Central Pipeline v. State Corp. Comm'n, 489 U.S. 493, 509 (1989). *See generally* DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 902 (1993) (discussing preemption analysis).

[292] *See* English v. General Elec. Co., 496 U.S. 72, 78-79 (1990).

[293] *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983).

[294] *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

[295] *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

[296] *See* Hines v. Davidowitz, 312 U.S. 52 (1941).

[297] *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992).

[298] *See* discussion *supra* Part II.A.

[299] *See, e.g.*, Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964). *See generally* Paul Goldstein, *Kewanee Oil Co. v. Bicron Corp.: Notes on a Closing Circle*, 1974 SUP. CT. REV. 81 (analyzing the Supreme Court's intellectual property preemption cases up to 1974).

[300] *See Sears*, 376 U.S. at 225.

less, state intellectual property laws may survive preemption if the state interests in question do not conflict with the federal interests advanced by the federal intellectual property statutes.[301]

The extent of preemption must be gauged by a study of the Court's analysis of the general preemptive effect of the intellectual property statutes, and of any express preemption clauses in the statutes themselves. As the issue of whether common law misappropriation survives preemption has generally focused on the Copyright Act of 1976,[302] the specific preemption provision of the statute, section 301,[303] is examined. Lastly, the application of the Court's preemption analysis to interpret section 301 by the lower courts is analyzed.

B. The Supreme Court Intellectual Property Preemption Cases

The Supreme Court's preemption cases highlight the primacy of safeguarding the uniformity of federal intellectual property policies from encroachments by parallel state laws. At the same time, however, they maintain a safe harbor for state laws which do not conflict with the uniformity the federal laws aim to instill. In the two companion cases, *Sears, Roebuck & Co. v. Stiffel Co.*[304] and *Compco Corp. v. Day-Brite Lighting Inc.*,[305] the Court held that state unfair competition law may not provide to unpatentable items[306] protection which is equivalent to that of federal patent law. Items are unpatentable either because they are not the kind of subject matter that the federal statutes protect, or because they do not meet the patent statute's qualitative standards.[307] Noting the strict requirements for patentability, the Court stated that uniform federal standards were used with care to promote invention while at the same moment to preserve free competition.[308] To that end, whenever federal patent law requires that an unpatentable article fall within the public domain for all to copy, state law may not forbid what the federal law requires.[309] The Court was careful, however, not to preclude all state power to regulate competition,

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[301] For example, in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974), the Supreme Court held that the federal patent statute did not preempt state trade secret law because the state law advanced state interests, such as preserving commercial morality, which did not conflict with the interests underlying federal patent protection.

[302] *See* discussion *infra* Part V.C.

[303] 17 U.S.C. § 301 (1994).

[304] 376 U.S. 225 (1964).

[305] 376 U.S. 234 (1964).

[306] In both cases protection was sought under state unfair competition law to prevent duplication of unpatentable designs. *See Sears*, 376 U.S. at 225; *Compco*, 376 U.S. at 234.

[307] *See Sears*, 376 U.S. at 231-32; *Compco*, 376 U.S. at 237-38.

[308] *See Sears*, 376 U.S. at 230-32.

[309] *See id.* at 231.

stating that the ability of states to enforce state laws designed to prevent consumer confusion was not precluded by preemption.[310]

Moreover, *Goldstein v. California*[311] confirmed the ability of states to continue to enforce *state* intellectual property laws by upholding a state misappropriation statute that criminalized sound recording piracy.[312] The Court ruled that the Copyright Clause did not grant Congress the exclusive power to promote the progress of science and the arts.[313] Instead, the states retained concurrent power to pass and enforce state copyright-like laws which do not conflict with federal copyright laws.[314] The Court distinguished *Sears/Compco*, stating that whereas those cases dealt with the Patent Act, which by its nature requires national uniformity, the nature of "writings" covered by the Copyright Act of 1909 did not call for the same measure of uniformity that demanded exclusive federal control.[315] Therefore, the Court reasoned that no comparable conflict existed between federal and state copyright laws to trigger preemption of the state record piracy statute.[316]

The *Goldstein* Court's analysis unfortunately did not seem to recognize that the interest of protecting the public domain from encroachment by incompatible state laws is just as strong in copyright as it is in patent. As *Sears/Compco* declared that a state law may not block an unpatentable device from entering the public domain, similarly, a state law must not block a work of authorship that fails to satisfy federal copyright requirements. National uniformity of intellectual property policy would suffer if the Court's analysis were to be

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[310] *See id.* at 232-33; *Compco*, 376 U.S. at 238. For example, although the lamp designs at issue were not patentable, a state law may mandate that a copyist clearly identify on the packaging of its lamps that the lamps were manufactured by the copyist, and not by the original designer.

[311] 412 U.S. 546 (1973).

[312] Prior to the enactment of the Sound Recording Amendment of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971), as amended, Pub. L. No. 93-573, 88 Stat. 1873 (1974), which provided copyright protection to sound recordings, record manufactures relied upon state misappropriation laws to combat record piracy. *See, e.g.*, A&M Records, Inc. v. M.V.C. Distrib. Corp., 574 F.2d 312 (6th Cir. 1978); Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955) (record piracy cases). Similarly, misappropriation was used by record companies and musical performers to halt unauthorized broadcasts of musical performance, which were denied copyright protection until the enactment of the Copyright Act of 1976. *See, e.g.*, Waring v. WDAS Broad. Station, Inc., 194 A. 631 (Pa. 1937) (holding misappropriation law prevents unauthorized radio broadcast of recordings); Metropolitan Opera Ass'n v. Warner-Nichols Recorder Corp., 101 N.Y.S.2d 483 (N.Y. Sup. Ct. 1950), *aff'd*, 107 N.Y.S.2d 795 (N.Y.A.D. 1951) (holding misappropriation law prevents the sale of unauthorized recordings of radio opera broadcasts).

[313] *See Goldstein*, 412 U.S. at 557-58.

[314] *See id.*

[315] *See id.* at 570.

[316] *See id.* at 557-58.

taken to its logical extreme. Nevertheless, under *Goldstein*, states do preserve the ability to enforce their own laws which grant copyright-like rights and protections, as long as they do not conflict with federal copyright law.

Applying the *Goldstein* formulation, preemption of a particular state law should be measured to the extent it conflicts with the idea/expression dichotomy, which protects access to public domain material. In *Kewanee Oil Co. v. Bicron Corp.*,[317] the Court recognized that a state law, if it is to survive preemption, may do no harm to the public domain. In *Kewanee Oil* the Court preserved a state's trade secret[318] law from preemption by federal patent law.[319] The Court reasoned that the principles behind state trade secret protection did not harm the patent law's policy objective of disclosure.[320] As such, trade secret laws do not remove ideas which federal intellectual property laws place in the public domain, for trade secrets are by their very nature confidential.[321]

The Court's most recent intellectual property preemption case is *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*,[322] which once more underscored the primacy of the public domain. The Court struck down a state law which prohibited duplication of an unpatented boat hull design by casting a mold of the hull. The Court reiterated the holdings of *Sears/Compco*, stating that state law could not protect utilitarian and design ideas which the patent law otherwise leaves unprotected.[323] In holding that preemption had occurred, the Court said that the patent law created "a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."[324] The Court, however, reiterated *Goldstein*'s teaching that the states continue to possess the power to adopt laws which promote

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[317] 416 U.S. 470 (1974).

[318] The Uniform Trade Secrets Act defines trade secret as:

> information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
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> (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
>
> (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Uniform Trade Secrets Act, as amended, § 1(4) (1996).

[319] *See Kewanee Oil*, 416 U.S. at 493.

[320] The patent statute requires that patent specifications contain a complete description of the patented invention, thereby disclosing to the general public how the invention works and the means to reproduce it. *See* 35 U.S.C. § 111 (1994).

[321] *See Kewanee Oil*, 416 U.S. at 484 ("By definition a trade secret has not been placed in the public domain.").

[322] 489 U.S. 141 (1989).

[323] *See id.* at 143.

[324] *Id.* at 167 (quotations omitted).

intellectual creation within their respective jurisdictions.[325] Speaking perhaps to the lower courts, the Court warned against "the extrapolation of . . . a broad pre-emptive principle" which may impermissibly cramp the efforts of states to enforce intellectual property laws not in conflict with the federal statutes.[326]

The thread linking the preemption cases is the willingness of the Court to allow non-conflicting state intellectual property laws to exist, notwithstanding the primacy of structuring a uniform intellectual property regime. Admittedly, the confines within which the states are permitted to act are circumscribed. The boundaries nevertheless are wide enough to allow a host of state-level remedies, such as trade secret[327] and unfair competition laws.[328] Under the broad strictures of the Court's decisions, common law misappropriation at minimum has the possibility of a continued existence. This possibility must be measured against the preemptive effect of the Copyright Act of 1976.

C. The Preemptive Effect of Section 301 of the 1976 Copyright Act

When exercising its constitutional duties, Congress may preempt state law by explicitly saying so in a statute.[329] In enacting the current version of the copyright statute, Congress provided for express preemption of parallel state laws.[330] Section 301 of the Copyright Act of 1976 preempts any state common law or statutory protections offering copyright-like protections.[331] Preemption under section 301 essentially occurs when a state regulation: 1) concerns a work of authorship that is fixed in a tangible medium of expression; 2) covers copyrightable subject matter as defined by the copyright statute; and 3) creates

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[325] *See id.* at 154.

[326] *Id.*

[327] *See Kewanee Oil*, 416 U.S. at 493 (upholding trade secret law).

[328] *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 354 (observing possibility of state unfair competition laws protecting "sweat of the brow" works). *See supra* note 287 and accompanying text.

[329] *See* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987) ("[W]hen acting within constitutional limits, Congress is empowered to pre-empt state law by so saying in express terms.").

[330] *See* 17 U.S.C. § 301 (1994).

[331] Section 301(a) of the 1976 Copyright Act states:

> On and after January 1, 1978, all legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under common law or statutes of any State.

17 U.S.C. § 301(a) (1994).

legal and equitable rights equivalent to those within the general scope of the copyright act.[332]

Under the Court's general preemption jurisprudence,[333] since the copyright statute explicitly provides for preemption in its text, the courts need not inquire whether the federal interest in the field is exclusive or dominant, whether the state law "stands as an obstacle" to the enforcement of federal law, or whether any other preemption test may apply in determining implicit congressional intent.[334] Unlike the balancing of policy considerations which the Court undertakes in *Sears/Compco* and the pre-1976 Copyright Act *Goldstein* case, the courts should be able to turn to the explicit language in the current copyright statute to determine whether a state law is preempted.[335]

Misappropriation appears to satisfy all three requirements for preemption under section 301 when the protection of information is involved. First, the requirement of fixation in some tangible medium of expression will almost always be satisfied. Fixation may be in print, on a web page displayed on a computer screen, or in computer media.[336] The transmission of information by misappropriators will need to be fixed on media at some point for practical use, such as conducting searches of data on a database.

Second, misappropriation protection of informational products falls within the subject matter of copyright. Works of authorship which include ideas and facts ("preexisting material") are mentioned as copyright subject matter in section 102(b) of the copyright statute, despite the denial of copyright protection to such preexisting material.[337] Lack of originality will cause the factual elements of an informational work to be uncopyrightable, but the informational product itself will still be considered copyright subject matter for preemption purposes.[338] To otherwise interpret the subject matter

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[332] *See id.*

[333] *See* discussion *supra* Part V.A.

[334] In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992), the Court stated:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation.

Id. (citations omitted).

[335] *See* 1 NIMMER ON COPYRIGHT, *supra* note 287, § 1.01[B], at 1-9. As of the October, 1997, term, the Supreme Court has yet to consider a § 301 preemption case.

[336] A possible exception may be hot news communicated solely through conversation or live broadcast which has not been recorded or otherwise fixed in a tangible medium of expression. *See* HOUSE REPORT, *supra* note 5, at 131, 1976 U.S.C.C.A.N. at 5747.

[337] *See* 17 U.S.C. § 103(b) (1994).

[338] The House Report on the Copyright Act of 1976 reinforces this view:

> As long as a work fits within one of the general subject matter categories of sections 102 and 103, the bill prevents the States from protecting it even if it fails to achieve Federal

requirement of section 301 would swing the door wide open for state law protection of unoriginal works. Instead of the limited scope of protection afforded by federal copyright, uncopyrightable works would be eligible for possibly greater protection under state law. Courts have deemed that such a result would violate the expressed legislative intent behind section 301 and nullify the preemption provision itself.[339]

Third, the protection provided by misappropriation, namely barring a competitor from unfair copying, is virtually identical to the exclusive right of reproduction granted by section 106 of the copyright statute.[340] Congress intended that section 301 "preempt and abolish *any* rights under the common law or statutes of a State that are equivalent to copyright."[341] Even if the misappropriator did not copy, but simply "used" the factual material in a tangible medium of expression, the legislative history of the 1976 Copyright Act expressed Congress's intent that a state-created right against the misappropriator would nevertheless be preempted.[342]

The intellectual property preemption doctrine expounded by the Supreme Court, however, does not preclude states from enforcing state-created intellectual property laws which do not conflict with the federal intellectual property regime.[343] In fact, section 301(b) of the 1976 Copyright Act[344]

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statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain.

HOUSE REPORT, *supra* note 5, at 131, 1976 U.S.C.C.A.N. at 5747.

[339] *See, e.g.*, Financial Info., Inc. v. Moody's Investors Serv. Inc., 808 F.2d 204 (2d Cir. 1986), *cert. denied*, 484 U.S. 820 (1987); Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905 (2d Cir. 1980).

[340] Likewise, commentators reject as faulty attempts by some courts to distinguish the right to enjoin unauthorized "copying" under copyright as qualitatively distinct from "misappropriation" in order to evade *Sears/Compco*-style preemption. *See, e.g.*, 1 NIMMER ON COPYRIGHT, *supra* note 287, § 1.01[B][1][f][iii] n.137 and cases cited therein. *See generally, id.* § 1.01[B][1][f][iii]; Note, *The "Copying-Misappropriation" Distinction: A False Step in the Development of the* Sears/Compco *Pre-emption Doctrine*, 71 COLUM. L. REV. 1444 (1971).

[341] HOUSE REPORT, *supra* note 5, at 130, 1976 U.S.C.C.A.N. at 5746 (emphasis added).

[342] "The preemption of rights under State law is complete with respect to any work coming within the scope of the [Copyright Act], even though the scope of exclusive rights given the work under the [Act] is narrower than the scope of common-law rights in the work might have been." *Id.* at 131, 1976 U.S.C.C.A.N. at 5747.

[343] *See* Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 232-33 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 238 (1964).

[344] Section 301(b) of the 1976 Copyright Act provides, in pertinent part:

Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

. . .

explicitly recognizes that states do retain some power touching copyright, by providing that the preemptive scope of section 301 does not "annul or limit" state laws which do not satisfy the three preemption requirements of section 301(a).[345] Section 301 therefore acts not only as an explicit preemption clause, but also as an express savings clause.[346]

The existence of the section 301 savings clause, which expresses Congress's intent to preserve some state power to enforce state intellectual property laws, casts doubt on the preemptive effect of the 1976 Copyright Act on misappropriation. Moreover, the legislative history of the 1976 Copyright Act specifies that certain misappropriation causes of action, especially the hot news species of *INS*, may survive preemption:

> [S]tate law should have the flexibility to afford a remedy (under traditional principles of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting "hot" news, whether in the traditional mold of *International News Service v. Associated Press*, 248 U.S. 215 (1918), or in the newer form of data updates from scientific, business, or financial databases.[347]

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(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 . . . .
17 U.S.C. § 301(b) (1994).

[345] For instance, common law copyright in works that have not been fixed in a tangible medium of expression are preserved from preemption. *See* HOUSE REPORT, *supra* note 5, at 131, 1976 U.S.C.C.A.N. at 5747.

[346] The House Report on the 1976 Copyright Act states:

> In a general way subsection (b) of section 301 represents the obverse of subsection (a). It sets out, in broad terms and without necessarily being exhaustive, some of the principal areas of protection that preemption would not prevent the States from protecting. Its purpose is to make clear, consistent with the 1964 Supreme Court decisions in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, that preemption does not extend to causes of action, or subject matter outside the scope of the revised copyright statute.

Id. (citations omitted).

[347] *Id.* at 132, 1976 U.S.C.C.A.N. at 5748 (citation omitted). There is some confusion, however, as to whether Congress actually meant for misappropriation to survive preemption. The "congressional colloquy" between members of the House of Representatives, in connection with the types of state regulations which may survive preemption under § 301(b)(3), was at best ambiguous. An earlier Senate version of that provision specifically mentioned state laws which would not be preempted by the Act, such as breaches of contract, breaches of trust, invasion of privacy, and misappropriation. *See* S. 22, 94th Cong., 2d Sess. (1976), *reprinted in* 1 NIMMER ON COPYRIGHT, *supra* note 287, § 1.01[B][1][f][i] n.114, at 1-26. The Justice Department, however, was concerned that because misappropriation theory was "vague and uncertain," having it specifically exempted from preemption would "almost certain to nullify preemption." Letter from Justice Department to Representative Robert Kastenmeier (July 27, 1976), *reprinted in* 1 NIMMER ON COPYRIGHT, *supra* note 287, app. 17. The entire language of specific exemptions was dropped in the final version of § 301(b)(3). *See* H.R. CONF. REP. NO. 94-1733,

The ambiguous language of the legislative history buttresses arguments by litigators and provides justification for courts to continue the viability of a misappropriation action, despite its apparent satisfaction of the preemption requirements of section 301.[348]

Some uncertainty exists whether the 1973 *Goldstein* holding, which upheld a state misappropriation statute,[349] is still valid after Congress enacted the Copyright Act of 1976.[350] The Court decided *Goldstein* when the 1909 Copyright Act, which did not contain a provision preempting state intellectual property law,[351] was still in force. The express preemption clause in section 301 is likely to have shifted the *Goldstein* calculus as to whether a state copyright law does conflict with present federal copyright law.[352] If so, state common law torts such as misappropriation, which apparently satisfy the criteria for preemption under section 301, probably would not survive preemption analysis.[353]

94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5809. *See also* 1 NIMMER ON COPYRIGHT, *supra* note 287, § 1.01[B][1][f][i], at 1-25 to 1-28.

The convoluted nature of the legislative history to section 301 has endlessly frustrated commentators. *See, e.g.*, Denicola, *supra* note 222, at 517 n.7 ("The legislative history is virtually useless . . . ."). In view of the ambiguous intent of the Congress, Nimmer and Nimmer advocate ignoring changes to the language of section 301(b)(3), and analyzing a misappropriation cause of action strictly by the requirements set out in the language of the statute. *See* 1 NIMMER ON COPYRIGHT, *supra* note 287, § 1.01[B][1][f][ii], at 1-28 to 1-29.

[348] *See, e.g.*, Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 672 n.25 (2d Cir. 1986), *cert. denied*, 480 U.S. 941 (1987) (discusses ambiguous legislative history of misappropriation provision in the Copyright Act of 1976).

[349] Goldstein v. California, 412 U.S. 546, 557-58 (1973).

[350] At least one court has explicitly stated that the Copyright Act of 1976 has overruled *Goldstein*. *See* Crow v. Wainwright, 720 F.2d 1224, 1225 (11th Cir. 1983) (declaring that the legislative history of section 301 "clearly evidences" congressional intent to overrule *Goldstein* by statute).

[351] Section 2 of the 1909 Copyright Act did provide that common law copyright to unpublished works was not preempted. *See* 1 NIMMER ON COPYRIGHT, *supra* note 287, § 1.01[B], at 1-9.

[352] In contrast to the *Goldstein* court's opinion that copyright did not require the same measure of national uniformity under the 1909 Copyright Act, the House Report on the Copyright Act of 1976 states:

> One of the fundamental purposes behind the copyright clause of the Constitution, as shown in Madison's comments in The Federalist, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States. Today, when the methods for dissemination of an author's work are incomparably broader and faster than they were in 1789, national uniformity in copyright protection is even more essential than it was then to carry out the constitutional intent.

HOUSE REPORT, *supra* note 5, at 129, 1976 U.S.C.C.A.N. at 5745.

[353] Nimmer and Nimmer assert that, except for certain state laws akin to common law copyright, the preemptive effect of the Copyright Act of 1976 has rendered the states'

In sum, enough doubt exists to permit state common law misappropriation to escape unequivocal federal preemption.[354] Hot news information providers may still be able to utilize state misappropriation laws to protect their efforts in gathering information from free-riding competitors. The ambiguity of both congressional intent in preempting misappropriation and the Supreme Court's oblique inference in *Feist* that unfair competition laws like misappropriation may be used to protect uncopyrightable data[355] allows lower federal courts and state judges to infer that the misappropriation doctrine is alive and well.

D. Lower Court Analysis of Section 301 Preemption of Common Law Misappropriation

In response to the confusion surrounding congressional intent and the Supreme Court's reticence concerning the survival of misappropriation from preemption, some courts have adopted the "extra element" test.[356] The extra element test is used to determine whether preemption of a state law occurs under section 301 of the Copyright Act of 1976.[357] Under this test, if "an extra element is required instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a state-created cause of action, then the right does not lie within the general scope of copyright and there is no preemption."[358] A state misappropriation law which requires an extra element, such as impairing one's reputation, may consequently survive federal preemption.[359]

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concurrent copyright powers "now almost completely without practical significance." 1 NIMMER ON COPYRIGHT, *supra* note 287, § 1.01[A] & n.18, at 1-8.

[354] *See, e.g.*, MICHAEL D. SCOTT, SCOTT ON MULTIMEDIA LAW § 13.04[A], at 13-10.1 (2d ed. supp. 1997) ("The question of whether misappropriation is preempted by the Copyright Act is unclear.") (citation omitted).

[355] Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 354 n* (1991).

[356] *See, e.g.*, Trandes Corp. v. Guy F. Atkinson Co., 996 F.2d 655, 659 (4th Cir.), *cert. denied*, 510 U.S. 965 (1993); Mayer v. Josiah Wedgewood & Sons, Ltd., 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985).

[357] *See* 1 NIMMER ON COPYRIGHT, *supra* note 287, § 1.01[B][1], at 1-15 to 1-16.

[358] Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 716 (2d Cir. 1992) (quoting 1 NIMMER ON COPYRIGHT, *supra* note 287, § 1.01[B], at 1-14 to 1-15) (internal quotations omitted).

[359] *See, e.g.*, Board of Trade v. Dow Jones & Co., Inc., 456 N.E.2d 84 (Ill. 1983) (barring commodities exchange market from using the Dow Jones stock average index for a new stock market index without permission from Dow Jones in order to protect Dow Jones's reputation).

The House Report on the 1976 Copyright Act states:

> The evolving common law rights of "privacy," "publicity," and trade secrets, and the general laws of defamation and fraud, would remain unaffected as long as the causes of action contain elements, such as an invasion of personal rights or a breach of trust or confidentiality, that are different in kind from copyright infringement.

Under preemption analysis, most courts have determined that section 301 preempts a misappropriation or unfair competition action which involves copying or duplication of a copyrighted expression.[360] The fact that a misappropriation claim was based upon simple commercial immorality or unjust enrichment, themes which heavily influenced the *INS* Court,[361] will not save the state action from federal preemption.[362] However, when a misappropriation action includes aspects of either a breach of a confidential or contractual relationship,[363] or likelihood of confusion as to the source of the intangible good,[364] the courts generally hold that these "extra elements" are different than those required under copyright law, and are thus the action is not preempted.

Moreover, a few lower courts have held that the hot news variety of common law misappropriation is not preempted by federal copyright law.[365] This exception to preemption is mostly based upon the ambiguous legislative history of section 301 on whether misappropriation of the *INS* variety is preempted or not.[366] Thus, although courts generally regard misappropriation

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HOUSE REPORT, *supra* note 5, at 132, 1976 U.S.C.C.A.N. at 5748.

[360] *See, e.g.*, Kregos v. Associated Press, 3 F.3d 656, 666 (2d Cir. 1993), *cert. denied*, 510 U.S. 1112 (1994); Del Madera Properties v. Rhodes & Gardner, Inc., 820 F.2d 973, 976-77 (9th Cir. 1987); Walker v. Time Life Films, Inc., 784 F.2d 44, 53 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986); Warner Bros., Inc. v. American Broad. Co., Inc., 720 F.2d 231, 247 (2d Cir. 1983).

[361] *See* discussion *supra* Part III.B.

[362] *See, e.g.*, Financial Info., Inc. v. Moody's Investors Serv. Inc., 808 F.2d 204, 208-09 (2d Cir. 1986), *cert. denied*, 484 U.S. 820 (1987) (holding commercial immorality claim preempted by the copyright statute); Mayer v. Josiah Wedgewood & Sons, Ltd., 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985)(holding commercial immorality implicit in copyright infringement, thus preempted by copyright statute); Rand McNally & Co. v. Fleet Management Sys., Inc., 591 F. Supp. 726 (N.D. Ill. 1983) (holding commercial immorality not qualitatively different from copyright violations).

[363] *See, e.g.*, Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147 (1st Cir. 1994); *Trandes*, 996 F.2d 655; Self Directed Placement Corp. v. Control Data Corp., 908 F.2d 462 (9th Cir. 1990). This type of misappropriation is similar to that of trade secret protection, which is generally believed to be not preempted by section 301. *See Computer Assocs.*, 982 F.2d 693 (holding trade secret law, under extra element analysis, not preempted by § 301); S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1090 n.13 (9th Cir. 1989) (noting state trade secret misappropriation law not preempted).

[364] *See, e.g.*, Lone Wolf McQuade Assoc. v. CBS, Inc., 961 F. Supp. 587 (S.D.N.Y. 1997); Princess Fabrics, Inc. v. CHF., Inc., 922 F.2d 99 (2d Cir. 1990).

[365] *See, e.g.*, *FII*, 808 F.2d at 209; P.I.T.S. Films v. Laconis, 588 F. Supp. 1383, 1385-86 (E.D. Mich. 1984); *Mayer*, 601 F. Supp. at 1531-35; Nash v. CBS, Inc., 704 F. Supp. 823, 833-35 (N.D. Ill. 1989), *aff'd*, 899 F.2d 1537 (7th Cir. 1990).

[366] *See, e.g.*, *FII*, 808 F.2d at 209 (misappropriation of hot news under *INS* is not preempted by the 1976 Copyright Act according to the House Report).

as preempted, hot news information may still be protected by state misappropriation law.

Recently, a Second Circuit case involving electronic dissemination of hot news information illustrates the lasting power of the hot news species of misappropriation. The Second Circuit in *National Basketball Association v. Motorola, Inc.*[367] held that the defendants, by transmitting real-time basketball game scores and other data taken directly from television and radio broadcasts of games while in progress to special pagers and a website, did not unlawfully misappropriate the plaintiff's property.[368] Because the pager transmissions and the Internet site only reproduced factual information, and not the copyrightable expression of game broadcasts, the court held that no infringement of the NBA's broadcast copyright occurred due to the defendants' actions.[369] In bluntly rejecting the misappropriation claim based on commercial immorality, the court stated that, "*INS* is not about ethics; it is about the protection of property rights in time-sensitive information so that the information will be made available to the public by profit-seeking entrepreneurs."[370]

Although the defendants' actions did not satisfy the elements for liability, the court declared that the hot news variety of common law misappropriation was not preempted by section 301 and continued to be a valid, though narrow, cause of action under New York law.[371] The court strictly limited the hot news exception to preemption to cases where: 1) the plaintiff generates or gathers information at a cost; 2) the information is time-sensitive; 3) the defendant's use of the information constitutes free-riding on the plaintiff's efforts; 4) the defendant is in direct competition with a product or service offered by the plaintiffs; and 5) the ability of others to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.[372] The court considered these extra elements as satisfying the test against preemption.[373] The court's analysis of the scope of hot news misappropriation protection, however, implies that only a narrow group of informational works in a limited number of circumstances may be eligible to be so protected.

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[367] 105 F.3d 841 (2d Cir. 1997).
[368] *See id.* at 847.
[369] *See id.*
[370] *Id.* at 853.
[371] *See id.*
[372] *See id.* at 852.
[373] *See id.* at 853.

VI. THE OUTLOOK FOR MISAPPROPRIATION

A. *Why Common Law Hot News Misappropriation Should Be Abolished*

Even though an analysis of federal preemption according to the criteria of section 301 of the copyright statute may indicate that hot news misappropriation can still exist as a viable tort under state common law, the inquiry should not end there. State protection that causes unwarranted interference with the first principles of intellectual property should nonetheless require preemption.[374] Liability for copying publicly disseminated information based upon common law misappropriation may upset the carefully structured balance of incentive and access promoted by the current architecture of the nation's intellectual property laws. Fidelity to the first principles of the federal intellectual property system must be the guide to any ongoing application of misappropriation.

Common law misappropriation arose during the early part of the twentieth century, prior to the full development of comprehensive federal patent, copyright, and trademark laws.[375] At the time, misappropriation may have fulfilled a perceived need to protect the investment and efforts of commercial information providers against the improper behavior of direct competitors.[376] Misappropriation protection, based on "sweat of the brow" theory of property, was consonant with the labor-rewarding rationale of copyright during that period.[377] Contemporary intellectual property jurisprudence, however, has since incrementally, but dramatically, changed the landscape of intellectual property protection.

Two policy concerns point to the appropriateness of abolishing recourse to state common law misappropriation protection. First, the Supreme Court in *Feist* interred the "sweat of the brow" theory of copyright and strongly reaffirmed the idea/expression dichotomy.[378] The policy impetus behind the constitutional requirement of originality, i.e., protection of information and the public domain, must drive similar considerations in disciplining misappropriation from protecting what copyright may not. Hot news misappropriation, in

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[374] A few cases have ruled, prior to the enactment of section 301, that state protection of facts and ideas was preempted under the Supreme Court's preemption rulings. *See, e.g.*, Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 980 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); Synercom Tech., Inc. v. University Computing Co., 474 F. Supp. 37, 44 (N.D. Tex. 1979) (stating state protection "would work a . . . significant interference with federal policy"). *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 reporter's notes, cmt. e (1995).

[375] See Myers, *supra* note 160, at 673-74.

[376] *See id.*

[377] *See* discussion *supra* Part IV.A.

[378] Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 350-51 (1991).

its current form, directly conflicts with the idea/expression principle of copyright.

Second, a similar balancing of incentive and access which underlies copyright, and indeed all intellectual property, must also apply to hot news misappropriation. In each case, an overbroad theory of liability will inhibit, instead of promote, the creation of useful informational products and services. Common law misappropriation, writ large, may lack the safety valves, interwoven into statutory intellectual property laws, that allow the public access to information which it should be entitled to under the policies of the public domain.[379] Liability based on common law misappropriation will thus be a barrier to competition, given criticisms of its amorphous nature.[380]

B. Statutory Misappropriation: A Possible Compromise

Nevertheless, the challenges posed by the growth of digital technologies may call for the development of some form of federal statutory misappropriation against the copying of hot news data. The elimination of a common law misappropriation remedy may lead to restricted access to informational products. As control over reproduction of factual information eludes information providers, they will be forced to tighten their control over the manner by which the information they produce will be disseminated. The most likely method will be to increase the price for information products, which may result in less access overall to information. The unfortunate effect of denying information providers protection from misappropriators may be to decrease the amount of valuable information available to the public as a whole. Therefore, misappropriation protection for hot news and other types of factual information in the age of the Internet should not be totally foreclosed.

The development of a misappropriation statute for the protection of hot news information would follow the tradition of Congress in responding to the need for new forms of intellectual property protection which common law misappropriation previously provided. Two examples are record piracy,[381]

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[379] An obvious example is the fair use defense to copyright infringement, wherein copying of copyrighted material for use in criticism, comment, news reporting, teaching, scholarship, research, or the like is permitted. *See* 17 U.S.C. § 107 (1994). *See* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989) (holding what federal patent law places in the public domain may not be protected by parallel state law).

[380] *See* International News Serv. v. Associated Press, 248 U.S. 215, 262-67 (1918) (Brandeis, J., dissenting); Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 280 (2d Cir. 1929), *cert. denied*, 281 U.S. 728 (1930) (Hand, J.); Raskind, *supra* note 106, at 875 (decrying that the misappropriation doctrine possesses "no criteria derived from competition").

[381] *See, e.g.*, Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955) (enjoining distribution of recordings in United States).

which prompted the Sound Recording Amendment of 1971,[382] and the unauthorized rebroadcasting of radio and television programs,[383] which led to regulation of cable and satellite broadcasters under the 1976 Copyright Act.[384] Likewise, statutory concepts such as the idea/expression dichotomy[385] and the fair use defense[386] under copyright law are codifications of common law principles.[387]

Statutory misappropriation should better harmonize the conflicting interests in balancing incentive and access. Those who are in favor of more legal protection for informational products and those who are opposed to broadening such protection may let their views be known to Congress. As Brandeis observed, the legislative branch may be better equipped to reconcile the clashing of interests;[388] at the least, both sides of the debate will have a full airing of their positions. In addition, a misappropriation statute should end the criticisms of the amorphousness of common law misappropriation by prescribing definite statutory rights, exceptions, and remedies to competitive behavior that Congress deems as unfair.

Because *Feist* apparently forecloses any authority to Congress to provide protection of hot news information under the Copyright Clause,[389] any misappropriation statute would probably be enacted pursuant to the Commerce Clause.[390] Thus statutory misappropriation protection of fact-based works would be *sui generis*[391] in nature. Congress previously passed two *sui generis* statutes, the Semiconductor Chip Protection Act[392] and the Plant Variety

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[382] Pub. L. No. 92-140, 85 Stat. 391 (1971), as amended, Pub. L. No. 93-573, 88 Stat. 1873 (1974); *codified at* 17 U.S.C. § 114 (1994).

[383] *See, e.g.*, Mutual Broad. Sys., Inc. v. Muzak Corp., 30 N.Y.S.2d 419 (N.Y. Sup. Ct. 1941) (halting retransmission of radio broadcast of the 1941 World Series).

[384] *See* 17 U.S.C. §§ 111, 119 (1994).

[385] *See* 17 U.S.C. § 102(b) (1994).

[386] *See* 17 U.S.C. § 107 (1994).

[387] *See* Baird, *supra* note 29, at 417-18.

[388] *See INS*, 248 U.S. at 264-67 (Brandeis, J., dissenting).

[389] *See* Ginsburg, *supra* note 218, at 339-40 (commenting on how the *Feist* court's "sweeping declarations" have imposed constitutional limitations of Congress' authority to provide intellectual property protection under the Copyright Clause).

[390] *See* COPYRIGHT OFFICE REPORT, *supra* note 24, at 107-10 (discussing possibility of passing data protection legislation by Congress under the Commerce Clause); Ginsburg, *supra* note 218, at 367-74 (discussing problems which may be encountered in passing database legislation relying upon the Commerce Clause).

[391] "*Sui generis*" means "of its own kind or class." BLACK'S LAW DICTIONARY 1434 (6th ed. 1990). *Sui generis* regimes are those special purpose intellectual property laws which deviate from traditional intellectual property paradigms, such as patent or copyright. *See* Reichman & Samuelson, *supra* note 12, at 54 n.6.

[392] 17 U.S.C. §§ 901-914 (1994).

Protection Act,[393] to cover inventions that did not meet the requirements of patent or copyright protection.

In any case, Congress must ensure that any *sui generis* statute passed under the Commerce Clause will not unconstitutionally interfere with the protections involving the right to information granted by the Copyright Clause and the First Amendment.[394] An important aspect of any such legislative enactment would be the preservation of the public domain status of factual information, as compelled by copyright's originality or idea/expression doctrine.[395] In addition, free speech and privacy concerns must also be taken into consideration.[396]

Differing conceptions as to the object and scope of protection has led to protracted disagreements as to what an adequate *sui generis* regime would be. Some commentators focus on the type or nature of intangible goods (such as "industrial compilations," "know-how," or algorithms) which may be the object of greater legal protection.[397] Others look at the methods of acquiring intangible goods, whatever type they may be, and restricting "unfair" methods of copying.[398] An important aspect of any statutory design should cover future technological developments which would facilitate even cheaper and easier copying of information.[399] Technological advances will continually improve the methods of copying; a *sui generis* misappropriation statute should be geared towards anticipating future anticompetitive practices.[400]

A possible model for this statute is the Directive on the Legal Protection of Databases of the European Union ("EU"),[401] issued to harmonize national laws

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[393] 7 U.S.C. §§ 2321-2583 (1994).

[394] *See* COPYRIGHT OFFICE REPORT, *supra* note 24, at 107-10; Ginsburg, *supra* note 218, at 367-87.

[395] *See* Karajala, *supra* note 21, at 2600-01.

[396] *See generally* ANN WELLS BRANSCOMB, WHO OWNS INFORMATION? (1994) (discussing privacy concerns regarding the buying and selling of personal information).

[397] *See generally* J.H. Reichman, *Legal Hybrids Between the Patents and Copyright Paradigms*, 94 COLUM. L. REV. 2432 (1994); Samuelson et al., *supra* note 54.

[398] *See* Karajala, *supra* note 21 (advocating a misappropriation statute that focuses on unfair methods of copying as market failure).

[399] *See id.* at 2604.

[400] *See id.*

[401] Directive 96/9/EC of the European Parliament and of the Council of the European Union of 11 March 1996 on the legal protection of databases, 1996 O.J. (L 77/20) [hereinafter EU Database Directive].

of the countries within the EU[402] concerning database[403] protection.[404] The EU Database Directive establishes a *sui generis* right, in addition to copyright, to prevent "the unauthorized extraction and/or reutilization of the contents of a database."[405] The *sui generis* right provides protection for a term of fifteen years[406] against acts of extraction and reutilization of the whole or of a substantial[407] part of the contents of a database.[408] The database must have been the result of a substantial investment in either obtaining, verifying, or presenting the contents of the database.[409] Specific exceptions to *sui generis* protection include: a) extraction the contents of a non-electronic database for private purposes; b) extraction for legitimate teaching or scientific purposes, if source acknowledgment is provided; and c) extraction or reutilization for purposes of public security or an administrative or judicial procedure.[410]

Another initiative is being proposed by the World Intellectual Property Organization ("WIPO"). The WIPO Diplomatic Conference held in Geneva on December, 1996, contained on its agenda discussions for a draft database protection treaty.[411] The WIPO Draft Database Treaty would require parties to the treaty to establish a *sui generis* form of protection, similar to that of the EU Database Directive, for the contents of databases. The WIPO Draft Database Treaty would establish the right to authorize or prohibit the extraction or utilization of a database's contents.[412] These rights would be given to the maker of a database which required "a substantial investment in

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[402] Member states of the EU are obligated to implement the EU Database Directive by January 1, 1998. Germany has enacted implementing legislation, while the other member states are in various stages of implementation. *See* COPYRIGHT OFFICE REPORT, *supra* note 24, at 50.

[403] The EU Database Directive covers hard copy and electronic databases. *See* EU Database Directive, *supra* note 401, art. (1), recital (14).

[404] *See* Mark Powell, *The European Union's Database Directive: An International Antidote to the Side Effects of Feist?*, 20 FORDHAM INT'L L.J. 1215 (1997) (discussing provisions of the EU Database Directive).

[405] EU Database Directive, *supra* note 401, recital (6). The different treatment of informational products under United States and EU law may lead to conflicts in cross border licensing on the Internet. *See* Raymond T. Nimmer, *Licensing on the Global Information Infrastructure: Disharmony in Cyberspace*, 16 NW. J. INT'L L. & BUS. 224, 228 (1995).

[406] *See* EU Database Directive, *supra* note 401, art. 10(1).

[407] "Insubstantial" portions of the database are precluded from *sui generis* protection. *Id.* art. 8(1).

[408] *See id.* art. 7(1).

[409] *See id.*

[410] *See id.* art. 9.

[411] *See* Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases to be Considered by the Diplomatic Conference, [hereinafter WIPO Draft Database Treaty].

[412] *See id.* art. 3.

the collection, assembly, verification, organization, or presentation" of its contents;[413] such rights would thereafter be freely transferable.[414]

The WIPO Draft Database Treaty proved to be very controversial, and the delegates at the WIPO conference did not meaningfully discuss the treaty proposal.[415] Member countries concluded that adoption of *sui generis* database protection was at that point premature.[416] Importantly, the treaty proposal sparked a vigorous debate within the United States about the proper measure of protection for the factual elements of databases.[417] Congress is currently considering whether a statute granting *sui generis* database protection should be enacted, and if so, what its proper scope of rights, exceptions, and remedies should be.[418] Such efforts illustrate that the problem of legal protection of hot news information, which misappropriation has perennially attempted to address, is better resolved through vigorous debate and consultation involved in the legislative process.

VII. CONCLUSION

Legal protection for time-sensitive, hot news information will continue to be a contentious topic, but for reasons which resonate from the conflicts inherent in granting legal rights or protections in intellectual property. The perennial question regarding the proper balance between unfettered access to information and incentive for innovation continues unabated. Common law misappropriation, because of its potential to interfere with access to public domain material, its discredited "sweat of the brow" theoretical justification, and its general amorphous nature, should be abolished in favor of a national statutory system which would take into account these concerns. As with other fields of the law which are grappling with the challenges the Internet is presenting,[419] laws which protect the provision of hot news information must

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[413] *Id.* art. 1.

[414] *See id.* art. 4.

[415] *See* COPYRIGHT OFFICE REPORT, *supra* note 24, at 55.

[416] *See id.*

[417] *See id.* at 54-55.

[418] In early 1998, the House of Representatives passed H. 2652, which would create a law providing database protection by amending Title 17 of the United States Code. *See Database Protection Bill Introduced in Senate, 7/22/1998* BNA PATENT, TRADEMARK & COPYRIGHT LAW DAILY d5. A companion bill (S. 2291) was introduced in the Senate in July, 1998, which would impose liability, based on unfair competition grounds, on anyone who extracts or uses in commerce all or a substantial part of a collection of information which harms the market for that product or service that contains the information. *Id.*

[419] *See* Reno v. American Civil Liberties Union, 117 S. Ct. 2329, 2346 (1997) (striking down Internet indecency law based on First Amendment concerns).

develop with deliberation to accommodate changing times and unchanging interests.

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When Children Prey on Children: A Look at Hawai'i's Version of Megan's Law and its Application to Juvenile Sex Offenders

"The portrait of the American sex offender increasingly bears the face of a juvenile."[1]

I. INTRODUCTION

Sex crimes, especially against children, present a disturbing reality facing society.[2] In the summer of 1994, 7 year-old Megan Kanka of New Jersey was sexually assaulted and brutally murdered.[3] Convicted sex offender Jesse Timmendequas allegedly lured Megan into his house, sexually assaulted her, and strangled her to death with a belt.[4] After the slaying, Timmendequas dumped the lifeless body in a nearby park and later joined a neighborhood search party to help find that missing child – Megan Kanka.[5] How could such a horrible crime occur in Megan Kanka's very own neighborhood? Unbeknownst to the neighborhood, Timmendequs was a twice-convicted child molester living with two other sex offenders.[6] Megan Kanka's murder was felt across the nation.[7] Statistics showing a high likelihood that released sex offenders will reoffend would later add fuel to the fire of public outcry.[8]

Consequently, public awareness of the dangers posed by previously convicted sex offenders[9] has increased dramatically.[10] Sexual offenses, unlike

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[1] Sander N. Rothchild, Comment, *Beyond Incarceration: Juvenile Sex Offender Treatment Programs Offer Youths a Second Chance*, 4 J.L. & POL'Y 719 (1996)(internal quotation marks omitted). In recent years, statistics display a dramatic increase in the occurrence of "sexual abuse by children against children." *Id.* at 720.

[2] *See* MICHELLE M. KUNITAKE ET AL., CRIME PREVENTION AND JUSTICE ASSISTANCE DIVISION, DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAI'I, CRIME TREND SERIES, FELONY SEXUAL ASSAULT ARRESTS IN HAWAI'I 2-3 (1997). From 1993 to 1996, more than 50% of the victim's of felony sexual assaults were younger than eighteen; of these, almost 70% of victims were thirteen years old or younger. *See id.*

[3] *See* James Popkin et al., *Natural Born Predators*, U.S. NEWS & WORLD REPORT, Sept. 19, 1994, at 66.

[4] *See id.*

[5] *See* Matt Bai, *A Report From the Front in the War on Predators*, NEWSWEEK, May 19, 1997, at 67.

[6] *See* Tracy L. Silva, Comment, *Dial "1-900-Pervert" and Other Statutory Measures that Provide Public Notification of Sex Offenders*, 48 SMU L. REV. 1961, 1962 (1995). At the time of Megan Kanka's murder, the State of New Jersey, as most states, did not require public notification of the release and location of previously convicted sex offenders. *See id.*

[7] *See* Popkin, *supra* note 3, at 66 (noting that state and federal legislation are "part of a national outcry" over the crimes committed by sex offenders).

[8] *See id.* A study taken by the Bureau of Justice Statistics suggests that freed rapists are likely to rape again and commit other serious non-sexual crimes. *See id.*

[9] *See* 42 U.S.C. § 14071(a)(1)(A)-(B) (1996). This section states, in pertinent part, that an individual subject to the provisions of the law is "a person who is convicted of a criminal

other serious crimes, have a far-reaching effect on the victims,[11] the victim's family,[12] the offender's family[13] and society in general.[14] Studies show that persons previously convicted of a sex offense have a high rate of recidivism.[15] Highly publicized sex crimes against children by these sex offenders have motivated lawmakers to enact some form of preventive protection.[16]

Within three months of Megan Kanka's death, the New Jersey Legislature enacted a protective measure known as "Megan's Law."[17] Megan's Law was clearly motivated by public outcry.[18] Megan's Law requires all sex offenders to register with the state and, through a public notification provision, law enforcement officials are mandated to alert the community when a convicted sex offender is released and intends to reside nearby.[19] As a remedy, Megan's Law attempts to address "those [sex] crimes to which the most vulnerable and defenseless were exposed—the children of society."[20]

A. The Juvenile Sex Offender

Would the presence of a previously convicted sex offender be any less threatening if that predator was under the age of eighteen—a juvenile? Keith,

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offense against a victim who is a minor or who is convicted of a sexually violent offense" or "a person who is a sexually violent predator . . . ." *See id.*

[10] *See* Doe v. Poritz, 662 A.2d 367, 375 (N.J. 1995). The court quoted the brief for the United States that stated "apart from the substantial personal trauma caused to the victims of such crimes, sexual crimes against children exact heavy social costs as well." *Id. See also infra* text accompanying note 16.

[11] *See id.* The court quoted the brief for the United States that expressed its concern over the "psychosocial" problems encountered by the victims of sexual assaults. *See id.*

[12] *See* Linda Hosek, *Man Who Assaulted Girl, 9, Gets Prison Term; He had Prior Record*, THE HONOLULU STAR-BULLETIN, July 17, 1997, at A3. The mother of the victim stated, "[e]motionally, we don't trust anyone anymore." *Id.*

[13] *See* Michael T. McCrocklin, *Juvenile Sex Offense*, PARADIGM, Summer 1997, at 13. The families of offending juveniles are usually "ill-equipped" to handle the emotional magnitude of such a crisis and little help is found from "friends, neighbors, and normal social circles." *Id.*

[14] *See supra* text accompanying note 10.

[15] *See Poritz*, 662 A.2d at 375. The likelihood of sex offender recidivism "compounds the problem" and the tendency to reoffend "persists over time." *Id.*

[16] *See id.* at 375-376. The enactment of "Megan's Law" was "[c]learly, [motivated by] both the Legislature's and the public's increasing awareness of the dangers posed by sex offenders . . . as the understanding of the problem was accelerated by the occurrence of highly publicized and horrific offenses." *Id.*

[17] *See* Silva, *supra* note 6, at 1963. Megan's Law was enacted into law in New Jersey, on October 31, 1994. *See id.*

[18] *See Poritz*, 662 A.2d at 375. "[A]wareness of the dangers posed by sex offenders [have clearly] triggered laws here." *Id.*

[19] *See* N.J. STAT. ANN. §§ 2C:7-1 to -11 (West 1996).

[20] *Poritz*, 662 A.2d at 376.

a twelve-year-old boy, sexually abused one of his victims behind a dumpster in a high school playground.[21] The victim was five years old.[22] Within three years, Keith also sexually abused his two nieces, ages six and seven.[23] He abused the six-year-old "nearly every day for more than a year."[24]

The issue of adolescent sex offenders "remains the least understood, least discussed, and perhaps most distressing area of child sex abuse."[25] Such acts of violence are hard to comprehend,[26] but the results of such abuse would be just as devastating to the victim regardless of the offender's age.

Society has paid little attention to juvenile sex offenders,[27] viewing such behavior as "misguided youthful experimentation."[28] Juvenile offenders, however, are capable of committing adult crimes in an adult fashion[29] and commit a large percentage of rapes and child molestations.[30] The current rise in juvenile sex offenses is coming to light due to better reporting and higher visibility of the problem.[31] In 1995, in the State of Hawai'i, juveniles accounted for approximately twelve percent of all "forcible rapes." [32]

Because of a juvenile's youth, the most common methods of addressing such incidents are rehabilitative in nature.[33] Relapse prevention is the primary focus to enable juvenile offenders to manage their criminal tendencies.[34] Is, however, any form of treatment or incarceration enough to protect the public from these juvenile sex offenders? One commentator has stated:

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[21] *See* Craig Horowitz, *Kids Who Prey on Kids*, GOODHOUSEKEEPING, Oct. 1996, at 94.

[22] *See id.*

[23] *See id.*

[24] *Id.*

[25] *Id.*

[26] *See* McCrocklin, *supra* note 13, at 13. It is hard for people to understand childhood sex offenses and what causes such offenses. Potential causes are not "entirely predictable." *Id.*

[27] *See* Rothchild, *supra* note 1, at 720.

[28] *Id.* (citing Kathryn Casey, *When Children Rape*, LADIES HOME J., June 1995, at 112).

[29] *See* McCrocklin, *supra* note 13, at 12 ("Basically, young offenders do what adult offenders do.").

[30] *See id.* Nationally, approximately "20 percent of all rapes and 30 to 50 percent of all child molestations are committed by adolescent males." *Id.* (citation omitted).

[31] *See* Horowitz, *supra* note 21, at 96. Reported juvenile sex offenses have increased due to higher visibility of juvenile sex offenses. *See id.*

[32] *See* CRIME PREVENTION AND JUSTICE ASSISTANCE, DEPARTMENT OF THE ATTORNEY GENERAL CRIME IN HAWAI'I 100 (1995). This data was compiled by the Department of the Attorney General, State of Hawai'i.

[33] *See* HOWARD N. SNYDER ET AL., NATIONAL CENTER FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 70 (1995). The traditional premise of the juvenile code of justice was judicial intervention and "treatment" for troubled juvenile individuals. *See id.*

[34] *See* McCrocklin, *supra* note 13, at 12.

> Sex offender behavior results from a range of influences that vary between individuals. These influences include, among others, a history of having been sexually victimized, conditioning that results from sexual pleasure and errors that offenders make in the way they react to the world. Options ranging from intensive residential treatment to outpatient treatment are available, *but there is no cure.*[35]

Thus, there are no quick and reliable answers to understand and address this problem accordingly.[36]

Most parents have strict rules concerning their children and the presence of an adult considered a stranger. By comparison, however, it would be natural for parents to allow their children to play with other neighborhood kids without that same concern. What if that other child is a prior sex offender? Should parents have the right to know so they can protect their children from harm, or does that other child deserve heightened protection because of his youth or immaturity?

Hawai'i's version of Megan's Law may be one possible solution.[37] Based on the threat of repeat juvenile sex offenders in the community, should Megan's Law also apply to juveniles despite the rehabilitative goals of the Juvenile Justice System?[38]

B. Scope of Comment

The question this Comment addresses is whether Hawai'i's version of Megan's Law applies to juveniles, and, if not, whether Hawai'i's Megan's Law should apply to juveniles. This Comment takes a practical look at Hawai'i's Megan's Law and the current status of Hawai'i's Juvenile Justice System.

Part II, of this Comment, provides the background behind the creation of Megan's Law, its statutory growth across the nation, and the constitutional challenges that the law has already withstood. Part III applies the constitution-

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[35] *Id.* (emphasis added). Michael McCrocklin has a doctorate in marriage and family therapy and has been counseling adolescent sex offenders since 1986. *See id.* at 21.

[36] *See id.* at 12.

[37] *See* Act 316, §§ 1-8, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 749-55.

[38] *See* HAW. REV. STAT. § 571-1 (1997). This chapter of the Hawaii Revised Statutes sets forth the purpose of Hawai'i's juvenile code of justice as:

> [A] system of family courts and it shall be a policy and purpose of said courts to promote the reconciliation of distressed juveniles with their families, foster the rehabilitation of juveniles in difficulty, render appropriate punishment to offenders, and reduce juvenile delinquency.

Id.

ality of Megan's Law to Hawai'i's State Constitution[39] focusing on the much-debated issue of personal privacy.[40] Part III then discusses the recent acceptance of Megan's Law by Hawai'i's lawmakers and provides a general overview of the enacted bill.

Shifting to whether Megan's Law applies to juveniles, Part IV looks at the development of the Juvenile Justice System both nationally and in Hawai'i, focusing on any inconsistencies it may have with the application of Megan's Law. Part V suggests alternatives to the strict application of Hawai'i's version of Megan's Law against juvenile sex offenders.

Part VI then looks at factors that may display a trend favoring the application of Megan's Law to juvenile sex offenders by the community, by state lawmakers, and by the court system. Finally, in conclusion, Part VII of this Comment sets forth a framework to successfully integrate the application of Megan's Law with Hawai'i's Juvenile Justice System.

This Comment concludes that Hawai'i's Juvenile Justice System, based on rehabilitation, is inconsistent with the requirements of Megan's Law. Treatment programs necessary to rehabilitate these juvenile sex offenders, however, are currently inadequate to protect the public. Because some of these offenders slip through the system and pose a threat to the community, certain serious or repeat juvenile sex offenders should be automatically subject to the provisions of Megan's Law. Until adequate treatment programs to rehabilitate juvenile sex offenders are successfully implemented, juvenile offenders must be monitored in order to protect the public. The policy behind the federal and state versions of Megan's Law would support such a conclusion.

II. MEGAN'S LAW: AN OVERVIEW

A. Background

The dangers posed by previously convicted sex offenders prompted New Jersey's legislature to introduce a bill known as "Megan's Law" within two weeks after Megan Kanka's death.[41] For the safety of children and other potential victims of violent sex crimes, the New Jersey State Legislature passed Megan's Law that same year.[42] As discussed above, Megan's Law

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[39] Constitutional challenges under ex post facto, double jeopardy, bill of attainder, and cruel and unusual punishment will not be discussed at length because these issues exceed the scope of this Comment.

[40] The Constitutional challenge under an individual's right to privacy will not be an exhaustive analysis that exceeds the scope of this Comment.

[41] *See* Silva, *supra* note 6, at 1963.

[42] N.J. STAT. ANN. §§ 2C:7-1 to -11 (West 1996).

requires previously convicted sex offenders to register and divulge relevant information with an appropriate state agency.[43] Upon the release of high-risk sex offenders, law enforcement officials are mandated to notify the community to prevent sex offenses in their neighborhoods.[44] The true success of Megan's Law, however, is yet to be ascertained.[45]

B. Federal Intervention

Across the nation, states have been following New Jersey's lead and enacting their own version of Megan's Law.[46] This movement, however, is largely attributable to federal intervention.[47] On September 13, 1994, the federal government enacted legislation that provided guidelines for states to enact their own versions of Megan's Law.[48] These guidelines, known as the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act[49] ("Jacob Wetterling Act"), covered sex offender determinations,[50] registration requirements,[51] penalty for sex offender violations,[52] release of information,[53] immunity for good faith conduct,[54] and compliance

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[43] *See* N.J. STAT. ANN. §§ 2C:7-1 to -5 (West 1996).

[44] *See* N.J. STAT. ANN. §§ 2C:7-6 to -11 (West 1996).

[45] *See* Silva, *supra* note 6, at 1979. Silva states, "[a]t this time, there is no solid research on whether the notification laws . . . prevent recidivism or protect the public." *Id.*

[46] *See* Mark J. Swearingen, Comment, *Megan's Law as Applied to Juveniles: Protecting Children at the Expense of Children*, 7 SETON HALL CONST. L.J. 526, 569 (1997).

[47] *See id.* at 568-69. States have enacted their own versions of Megan's Law to "receive the full amount of federal funding that they would otherwise be allocated." *Id.*

[48] *See* 42 U.S.C. § 14071(a) (1996). Otherwise known as the Violent Crime Control and Law Enforcement Act of 1994, section 170101-The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act-sets forth such guidelines. *See id.*

[49] *See* 42 U.S.C. § 14071 (1996); *see also* Carol Louise Lewis, Comment, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 HARV. C.R.-C.L.L. REV. 89, 89 (1996). The Act is named after an 11-year-old boy who was abducted at gunpoint and never heard from again. *See id.*

[50] *See* 42 U.S.C. § 14071(a)(1)(A)-(B) (1996). This section states, in pertinent part, that an individual subject to the provisions of the law is "a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense" or "a person who is a sexually violent predator . . . ." *Id.*

[51] *See* 42 U.S.C. § 14071(b) (1996). This section sets out the registration requirements of the law and the duties of public officials in obtaining those requirements. *See id.*

[52] *See* 42 U.S.C. § 14071(c) (1996). This section states, "a person required to register under a State program . . . who knowingly fails to so register and keep such registration current shall be subject to criminal penalties . . . ." *Id.*

[53] *See* 42 U.S.C. § 14071(d) (1996). Registration information may be released to law enforcement agencies for law enforcement purposes, government agencies conducting confidential background checks, and to the public when "necessary to protect the public

requirements.[55] To assure action by state legislators, the Jacob Wetterling Act threatened to withhold federal funding for non-compliance.[56] Therefore, every state, including Hawai'i, had a substantial interest in enacting a law that conforms to the federal requirements.

On May 17, 1996, Congress amended the Jacob Wetterling Act, now cited as Megan's Law,[57] to require the release of "relevant information . . . necessary to protect the public" by designated state agencies.[58] The release of registration information, or the requirement of notification provisions, was now mandated under the federal guidelines.

Because Hawai'i's legislature was aware of the "State's worsening economic condition,"[59] the legislature took "immediate action"[60] and enacted the proposed federal legislation by the stated deadlines. Public outcry for protection against repeat sex offenders, thus, was not the only motivation for the enactment of Hawai'i's version of Megan's Law. In drafting its version of Megan's Law, did the legislature have enough time to carefully consider the scope of Hawai'i's Megan's Law?[61] Hawai'i Senate Judiciary Committee Co-Chair Matt Matsunaga expressed the importance of preserving federal funds and meeting federal deadlines, "so long as we draft the bill so there are

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concerning a specific person." *Id.* § (d)(1)-(3).

[54] *See* 42 U.S.C. § 14071(e) (1996). Good faith conduct under this statute shall provide immunity to law enforcement agencies, employees of law enforcement agencies, and state officials. *See id.*

[55] *See* 42 U.S.C. § 14071(f)(1) (1996). This section states, "[e]ach state shall have not more than 3 years from the date of enactment of this Act in which to implement this section, except that the Attorney General may grant an additional 2 years to a State that is making good faith efforts to implement this section." *Id.*

[56] *See* 42 U.S.C. § 14071(f)(1) (1996).

[57] Section 170101 of the Violent Crime Control and Law Enforcement Act of 1994 was amended by Megan's Law, P.L. 104-145. The amendment now requires, for compliance with the act, that States "shall release relevant information that is necessary to protect the public . . . ." *Id.*

[58] 42 U.S.C. § 14071(d) (1996).

[59] *See* Act 316, § 1, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 749. The law states that "the legislature is painfully aware of the State's worsening economic condition and the competing demands for the limited funding available among so many critical needs." *Id.*

[60] *Id.* The Hawai'i legislature acknowledges the need to enact the bill stating "[t]he legislature finds that immediate action is necessary to ensure that the federal funds desperately needed by law enforcement agencies are not lost." *Id.*

[61] *See* Jean Christensen, *Bills Would Notify About Sex Offenders*, THE HONOLULU STAR-BULLETIN, Jan. 29, 1997, at A3. Deputy Attorney General, Kurt Spohn agrees with the concept of Megan's Law, but prior to the enactment of the law, stated that the bill must be "carefully drafted" for various protections. *Id.*

reasonable protections."[62] Does Hawai'i's Megan's Law apply to juvenile sex offenders? Did the legislature even consider this critical issue? This Comment discusses whether juvenile sex offenders are subject to Megan's Law since the enacted bill does not specifically exclude juveniles.[63]

C. Constitutional Challenges

The privacy interest of juvenile sex offenders is an inevitable concern if Megan's Law includes juveniles.[64] So far, Megan's Law has withstood various constitutional challenges,[65] including a challenge under the right to privacy.[66] To better understand this potential objection, we must look at recent holdings in other jurisdictions and current caselaw from Hawai'i's courts.

Megan's Law has been found to be constitutional in New Jersey courts.[67] In *Doe v. Poritz*,[68] the New Jersey Supreme Court held that, as a matter of policy, the need for public safety outweighed any detrimental effect that Megan's Law would have on previously convicted sex offenders.[69] Because the registration and notification provisions of Megan's Law were deemed "remedial" in nature, constitutional challenges of ex post facto, double jeopardy, bill of attainder, and cruel and unusual punishment were dismissed.[70]

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[62] Sandra S. Oshiro, *New Federal Mandate Spurs Change in Laws on Sex Offenders*, THE HONOLULU-ADVERTISER, Feb. 11, 1997, at B1. This statement displays the legislature's intent on passing some form of Megan's Law to keep federal funds. *See id.*

[63] *See* Act 316, §§ 1-8, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 749-55.

[64] *See* Smith v. Daily Mail Publishing Co., 443 U.S. 97, 107 (1979)(Rehnquist, J., concurring). A state's interest in preserving the anonymity of juvenile offenders is "of the highest order." *Id.*

[65] As stated above, constitutional challenges under ex post facto, double jeopardy, bill of attainder, substantive due process, cruel and unusual punishment will not be discussed at length.

[66] *See* Doe v. Poritz, 662 A.2d 367, 422-23 (N.J. 1995).

[67] *See id.* The court stated its holding and concerns as follows:

> What the government faced here was a difficult problem, a question of policy, and it understandably decided that public safety was more important than the potential for unfair, and even severe, impact on those who had previously committed sex offenses . . . . The constitutional and other attacks on the laws are rejected, except that upon application judicial review in accordance with this opinion shall be accorded prior to notification.

Id.

[68] 662 A.2d 367 (N.J. 1995).

[69] *See id.* at 422.

[70] *See id.* at 405.

In reaching its conclusion, however, the *Poritz* court held that there were privacy interests implicated by the notification provisions of Megan's Law.[71] Although disclosure of public information is not constitutionally protected, the disclosure of a sex offender's home address would implicate a privacy interest due to the court's reluctance to "disparage the privacy of the home."[72]

The *Poritz* court looked at the "totality" of the disclosed information required under Megan's Law.[73] The disclosure of an offender's home address coupled with other relevant information implicated a privacy interest.[74] Thus, although all the information required under the notification provision may be available to the public, the effects of the disclosure in its entirety raised an expectation of privacy protected under the Constitution.[75] The *Poritz* court's solution of balancing the competing interests was to require judicial review prior to public notification.[76]

III. MEGAN'S LAW IN HAWAI'I

A. Constitutionality Under Hawai'i's State Constitution

The Hawai'i State Constitution, unlike its federal counterpart, explicitly recognizes the protected right to privacy.[77] Because the Hawai'i State Constitution explicitly recognizes the right to privacy as a fundamental right,[78] the enactment of Megan's Law would probably implicate the privacy interest of all affected individuals.[79] To determine the scope of the interest protected by the Hawai'i State Constitution, there must be "due regard for the intent of the framers and the people adopting it."[80]

This section addresses the privacy interest of previously convicted sex offenders. It's important to keep in mind that, unlike an adult sex offender,

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[71] *See id.* at 408.

[72] *Id.*

[73] *See id.*

[74] *See id.* at 411. The court stated in pertinent part, "[w]e believe a privacy interest is implicated when the government assembles those diverse pieces of information into a single package and disseminates that package to the public." *Id.*

[75] *See id.*

[76] *See id.* at 423

[77] HAW. CONST. art. I, § 6. This section states in pertinent part, "[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." *Id.*

[78] *See* State v. Mueller, 66 Haw. 616, 626, 671 P.2d 1351, 1358 (1983) (quoting COMM. WHOLE REP. NO. 15, *reprinted in* I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 1024 (1980)).

[79] *See* HAW. CONST. art. I. § 6.

[80] State v. Kam, 69 Haw. 483, 492, 748 P.2d 372, 377 (1988).

the privacy interests of a juvenile sex offender may require greater protection against potential stigmatization.[81] Furthermore, the "confidentiality" aspect of the Juvenile Justice System is another factor to consider.[82]

The heightened privacy protection of Hawai'i's Constitution was introduced at the Constitutional Convention of Hawai'i of 1978.[83] The Constitutional Committee clearly acknowledged the privacy right concerning "possible abuses in the use of highly personal and intimate information in the hands of the government . . . ."[84] Although the source and existence of the right to privacy is clearly stated in Hawai'i's Constitution,[85] the right is not absolute.[86] Constitutional protection under the right to privacy may or may not be acknowledged by the courts' interpretation and enforcement of Hawai'i's Constitution.[87] Furthermore, the "intended scope of privacy protected by the Hawaii Constitution" is similar to privacy rights set forth by federal precedent.[88] Thus, the Hawai'i courts look to the Constitution's federal counterpart for guidance[89] and the extension of privacy protection parallels privacy matters concerning contraception,[90] procreation,[91] and marriage.[92]

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[81] *See* Swearingen, *supra* note 46, at 560. Swearingen discusses the impossibility of rehabilitation for a juvenile sex offender due to the effects of Megan's Law by "penaliz[ing] a juvenile [sex offender] throughout his life through isolation, the inability to make new acquaintances, the inability to participate in certain activities, and the reduced potential of gaining employment." *Id.*

[82] *See* Smith v. Daily Mail Publishing Co., 443 U.S. 97, 107 (1979)(Rehnquist, J., concurring). The confidentiality aspect of the Juvenile System of Justice was designed to prevent the "stigma of his misconduct." *Id.*

[83] *See* State v. Mueller, 66 Haw. 616, 624, 671 P.2d 1351, 1357 (1983) (quoting COMM. WHOLE REP. NO. 15, *reprinted in* I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. of 1978, at 1024 (1980)).

[84] *Id.* at 625, 671 P.2d 1351, 1357 (quoting COMM. WHOLE REP. NO. 15, *reprinted in* I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. of 1978, at 1024 (1980)).

[85] *See* HAW. CONST. art. I, § 6.

[86] *See Mueller*, 66 Haw. at 625, 671 P.2d at 1357 (quoting STAND. COMM. REP. NO. 69, *reprinted in* I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. of 1978, at 675 (1980)). The Constitutional Committee recognized the "right to be left alone," but also stated, "[w]hether an individual's desire to engage in a particular activity is protected by this aspect of the right to privacy, (the right to personal autonomy),' however, was deemed 'a matter for the courts.'" *Id.*

[87] *See* State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988).

[88] *See Mueller*, 66 Haw. at 625-26, 671 P.2d at 1358. The court extended the scope of the right to privacy to parallel that of the federal constitution. *See id.*

[89] *See id.*

[90] *See* Eisenstadt v. Baird, 405 U.S. 438, 444-445 (1972)(holding that the right to privacy extends to protect an unmarried couples right to purchase contraceptives).

[91] *See* Roe v. Wade, 410 U.S. 113, 154 (1973)(holding that the right to privacy extends to protect a woman's right to decide whether or not to have an abortion).

[92] *See* Griswold v. Connecticut, 381 U.S. 479, 485-486 (1965)(holding that the right to privacy extends to protect a married couples right to use contraceptives).

In *State v. Kam*,[93] the Hawai'i Supreme Court found that the Hawai'i Constitution, Article I, Section 6, encompasses and protects an individual's right to purchase, read, and view pornographic material in one's own home.[94] To justify any interference with this privacy right, the state must prove a compelling state interest.[95] Because the state's interest in regulating obscene material failed to satisfy the compelling state interest standard, the right to sell and distribute pornographic material for personal use was constitutionally protected.[96] Thus, the statute outlawing the "promoting [of] pornography"[97] was struck down as unconstitutional.[98] The court reasoned that the right to possess and view obscene material is a federally recognized fundamental right,[99] and the community would not be affected by the possession and viewing of pornography as long as one's taste for it is confined to "one's own home."[100]

In contrast, in *State v. Mueller*,[101] the Hawai'i Supreme Court held that the right to engage in sexual activities for hire in the privacy of one's own home was not a "fundamental right" protected by the state and federal constitution.[102] To be protected by the right to privacy under the state constitution, the right in question must be "'ranked as fundamental' in the concept of liberty that underlies our society."[103] The court explained that the designation of a fundamental privacy right must be supported by the existence of a federally recognized privacy right.[104] The *Mueller* court concluded that no fundamental

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[93] 69 Haw. 483, 748 P.2d 372 (1988).

[94] *See id.* at 495-96, 748 P.2d at 380.

[95] *See id.* at 495, 748 P.2d at 379.

[96] *See id.* at 496, 748 P.2d at 380.

[97] HAW. REV. STAT. § 712-1214(1)(a) (1985). A person commits the offense of "promoting pornography" if he "disseminates for monetary consideration any pornographic material." *Id.*

[98] *See Kam*, 69 Haw. at 496, 748 P.2d at 380. The statute prohibiting the sale of pornographic material was deemed unconstitutional since the material was meant to be viewed in the privacy of one's home. *See id.*

[99] *See* Stanley v. Georgia, 394 U.S. 557, 568 (1969)(holding that the state's power to regulate obscenity does not extend to the mere private possession of obscene material by an individual in the privacy of his own home).

[100] *See Kam*, 69 Haw. at 496, 748 P.2d at 380.

[101] 66 Haw. 616, 671 P.2d 1351 (1983).

[102] *Id.* at 630, 671 P.2d at 1360. The court stated, "[t]hus, a purpose to lend talismanic effect to 'the right to be left alone,' 'intimate decision,' or 'personal autonomy,' or 'personhood' cannot be inferred from the State provision, any more than it can from federal decisions." *Id.*

[103] *Id.* (citing Palko v. Connecticut, 302 U.S. 319, 325 (1934)(internal citations omitted)).

[104] *See id.* at 621, 671 P.2d at 1355. Federally recognized privacy rights ranked as fundamental include the right to marriage, procreation, and contraception. *See id.* The court only discussed privacy rights that were recognized by federal precedent. *See id.*

right existed to exact heightened privacy protection[105] and a lower standard of a "rational basis" sufficed.[106]

The *Mueller* court looked at the immoral and detrimental ramifications of prostitution on family life, community welfare, and the development of human personality.[107] Unlike *Kam*, the effect of prostitution went beyond the confines of one's home. The *Mueller* court held that it is "reasonable" to prohibit prostitution,[108] therefore, the decision to engage in sex for hire is not protected under the state constitution's right to privacy.[109]

Like *Mueller*, there would be detrimental ramifications if sex crimes were not prevented, therefore any privacy interests set forth by affected parties would not be fundamental to the concept of liberty. The scope of the Constitution's right to privacy would not encompass those adversely affected by Megan's Law, due to society's right to defend itself against the harsh reality of repeat sex offenders.

Also, like *Mueller*, the Hawai'i courts are likely to apply the "rational basis" test regarding the privacy interests of previously convicted sex offenders. Because it is "reasonable" to protect the public from previously convicted sex offenders, Megan's Law is likely to be deemed constitutional. Furthermore, because the individual privacy right of a sex offender is not federally recognized as "fundamental," Megan's Law would not be subject to "strict scrutiny."[110]

Although Hawai'i's Megan's Law is likely to pass constitutional muster, strict scrutiny will be applied to further the position and argument of this Comment. Thus, the strict scrutiny test will be applied and satisfied to comply with the heightened protection of the Hawai'i State Constitution.

1. Applying strict scrutiny

Strict scrutiny is used to determine the constitutionality of a statute that

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[105] *See id.* at 630, 671 P.2d at 1360 (1983). The court stated, "[w]e see no evidence that we are dealing with one [fundamental right]." *Id.*

[106] *See id.* at 628, 671 P.2d at 1359. The court explained that there was no reason to conclude that "a decision to engage in sex for hire at home should be considered basic to ordered liberty." *Id.* Therefore, the "validity of the [state] action, of course, is contingent upon the presence of a rational basis . . . ." *Id.*

[107] *See id.* at 629, 671 P.2d at 1360.

[108] *See id.* at 628-29, 671 P.2d at 1359-60 (1983). The court acknowledged the legislature's "reasonable" action in prohibiting prostitution due to "the need for public order." *Id.*

[109] *See id.* at 629-30, 671 P.2d at 1360.

[110] *See* HAW. CONST. art. I, § 6. Strict scrutiny is the state's burden of setting forth a "compelling state interest" to justify any form of government intrusion. State v. Kam, 69 Haw. 483, 493, 748 P.2d 372, 378 (1988) (quoting STAND.COMM.REP. NO. 69, *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII of 1978, at 674-75 (1980)).

implicates a fundamental privacy interest.[111] Because the fundamental right to privacy is "so important in value to society," the state must show a compelling state interest to justify any infringement of that right.[112] In addition, the state must use the least restrictive means possible.[113] Thus, the state must set forth a compelling state interest accomplished by the least restrictive means to constitutionally justify any governmental intrusions resulting from Megan's Law.

2. Compelling state interest

The stated purpose of Megan's Law is to address the problem of repeat sex offenders.[114] Statistics show a high rate of recidivism for sex offenders and the intervals between repeat offenses could be long.[115] The presence of sex offenders within the community, therefore, would expose the public to the ever-present danger of reoffense.[116]

Megan's Law was primarily created to address this problem, rather than to punish previously convicted sex offenders.[117] It provides the community with the information needed to protect itself from repeat sex offenders.[118] The New Jersey Supreme Court found that the state's interest in protecting the public outweighed any privacy interests in the nondisclosure of personal information.[119]

The need for a quick and effective remedy has been supported by federal legislation[120] and is based on society's concern for the safety of children and other defenseless victims of violent sex crimes.[121] Due to the realistic threat

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[111] *See* HAW. CONST. art. I, § 6. The article states in pertinent part that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." *Id.*

[112] *Kam*, 69 Haw. at 493, 748 P.2d at 378 (quoting STAND.COMM.REP. NO. 69, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII of 1978, at 674-75 (1980)).

[113] *See id.*

[114] *See* Doe v. Poritz, 662 A.2d 367, 373 (N.J. 1995).

[115] *See id.* at 374. Studies on recidivism show that "rapists recidivate at a rate of 7 to 35%; offenders who molest young girls, at a rate of 10 to 29%, and offenders who molest young boys, at a rate of 13 to 40%." *Id.* Interestingly, unlike other crimes, the propensity to reoffend "does not decrease over time." *Id.* One study displayed that "48% of the recidivist sex offenders repeated during the first five years and 52% during the next 17 years . . . ." *Id.*

[116] *See id.* at 375. Studies on recidivism show that "[r]eleased rapists were 10.5 times more likely to be rearrested for rape than were other released prisoners." *Id.*

[117] *See id.* at 372.

[118] *See id.* at 377.

[119] *See id.* at 412.

[120] *See* 42 U.S.C § 14071 (1996).

[121] *See Poritz*, 662 A.2d at 373.

of repeat juvenile sex offenders,[122] the basic purpose of Megan's Law is supported by a compelling state interest.

Advocates for the rights of convicted sex offenders, however, would point to the violation of privacy interests and the unreliability of statistics relied on by legislators.[123] Furthermore, the intrusive requirement of public notification would be punishment for a crime that has not occurred. Should society give juvenile offenders another chance at rehabilitation? Presumptions of guilt and reoffense allow little room for rehabilitation or any degree of self-worth for the offender. Unlike adult offenders, the complex issue of juvenile offenders must be looked at with a higher degree of sensitivity and hope.

Despite the detrimental effects to juvenile offenders, as a matter of public policy, there is a need for protection against the presence of juvenile sex offenders in the community. The *Kam* court held that the state could not demonstrate a compelling state interest to prohibit the sale of pornographic material due to the privacy interest of viewing pornographic material in one's home.[124] The ramifications of repeat sex offenders, however, extend far beyond the walls of one's home and well into society.

As stated in *Doe v. Poritz*, "[t]he state interest in protecting the safety of members of the public from sex offenders is clear and compelling."[125] The rationale in support of the state's interest is the "express public policy militating toward disclosure: the danger of recidivism posed by sex offenders."[126] Similarly, any consequence of Megan's Law in Hawai'i would probably be constitutionally justified by the compelling state interest in the health, safety, and welfare of its citizens.

3. Least restrictive means

The second factor in satisfying the strict scrutiny test is whether the "least restrictive means" possible is used.[127] To satisfy the least restrictive means

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[122] *See* U.S. DEPARTMENT OF JUSTICE, COMBATING VIOLENCE AND DELINQUENCY: THE NATIONAL JUVENILE ACTION PLAN 21 (1996). Unlike the Violent Crime Index of the arrest rate of adults for forcible rape, the juvenile arrest rate for forcible rape has increased since the mid-1970's. *See id.*

[123] *See* Horowitz, *supra* note 21, at 97 ("[S]tatistics can't tell the whole story. Professionals know that a lot of sexual abuse goes unreported. [I]t's still unclear whether young abusers go through a dormant period and then later . . . revert to old behavior.").

[124] *See* State v. Kam, 69 Haw. 483, 495, 748 P.2d 372, 379-80 (1988).

[125] *Poritz*, 662 A.2d at 412.

[126] *Id.*

[127] *Kam*, 69 Haw. at 493, 748 P.2d at 378 (quoting STAND.COMM.REP. NO. 69, *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII of 1978, at 674-75 (1980)). The report states, "in view of the important nature of this right [to privacy], the State must use the least restrictive means should it desire to interfere with the right." *Id.*

possible requirement, the legislature must limit the extent of notification to what is needed to satisfy the purpose of the statute.[128] Therefore, if the extent of notification exceeds the means necessary to protect the public from sex offenders, the bill will be struck down as unconstitutional.

In *Doe v. Poritz*, the public notification provision in the New Jersey statute provides three levels of notification that take into account the "likelihood that such [sex] offenders will commit another sex offense."[129] Public notification to the general members of a community would be required only if the "risk [of reoffense] is high."[130]

The *Poritz* court acknowledged the "far reaching" nature of Megan's Law, but "remain[ed] convinced that the statute [was] constitutional."[131] The court opined that the "potentially severe effect" of Megan's Law arose from the "nature of the remedy and the problem."[132] Moreover, the three-tier system of notification that requires public notification for only high-risk offenders "will be appropriately confined and applied . . . ."[133] As such, the compelling necessity for a quick and effective remedy against the extreme threat of sex offenders in society has prompted the federal government to act and state legislatures to follow. Rather than risk the safety of women and children, state legislatures, including Hawai'i's, would instead, risk the "far reaching" effects of Megan's Law. Like *Poritz*, the "least restrictive means" possible test would therefore be satisfied by policy considerations.

4. Recently passed legislation

Amidst the constitutional cloud hovering over the application of Megan's Law, the Hawai'i State Legislature has passed Hawai'i's version of Megan's Law under the premise of public safety, especially predatory crimes against children.[134] Prosecuting Attorney for the city of Honolulu, Peter Carlisle, recently stated that "[t]he absolute cornerstone of society is how you protect

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[128] *See id.*

[129] *Poritz*, 662 A.2d at 373. The court stated: "where the risk of such reoffense is low, only law enforcement authorities are notified; where it is moderate, institutions and organizations having the responsibility to care for and supervise children and women are notified; and where the risk is high, those members of the public likely to encounter the offender are notified." *Id.*

[130] *Id.*

[131] *Id.* at 422.

[132] *Id.* The "far-reaching" effect of Megan's Law "is an unavoidable consequence of the compelling necessity to design a remedy." *Id.*

[133] *Id.* The means used to satisfy the purpose of the statute "will operate as the Legislature intended." *Id.*

[134] *See* Act 316, §§ 1-8, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 749-55.

those who cannot protect themselves."[135] Does this seemingly constitutional law apply to juveniles? This question was not specifically addressed in the final version of Hawai'i's Megan's Law[136] despite the legislature's concern over juvenile crime expressed in other enacted bills.[137] The following subsection covers the recently enacted Hawai'i law referred to as Megan's Law.[138]

B. Hawai'i's Version of Megan's Law

In 1995, the Hawai'i State Legislature passed its first version of Megan's Law requiring previously convicted sex offenders to comply with registration requirements.[139] Two years later, the legislature repealed the law and passed Hawai'i's current version of Megan's Law that requires previously convicted sex offenders to comply with registration and notification provisions.[140] On July 1, 1997, Hawai'i's current version of Megan's Law went into effect.[141] On that day, approximately 550 previously convicted sex offenders were registered with the state.[142] Unlike some jurisdictions that provide active notification by state officials, Hawai'i requires affirmative steps by its citizens to obtain registry information.[143] To access registry information, citizens can access public computers which allow offender searches by name, street, or zip

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[135] Jim Witty, *Sex Predators Ruling Debated for Isles*, THE HONOLULU ADVERTISER, June 24, 1997, at A1. City Prosecutor Peter Carlisle supports a recent United States Supreme Court case allowing states to keep sex offenders after their prison terms expire if they are "mentally abnormal and likely to commit additional crimes." *Id.*

[136] *See* Act 316, §§ 1-8, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 749-55.

[137] *See* Act 318, § 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 758-60 (lowering the age in which juveniles may be transferred to criminal court); *see also* Act 317, §§ 1-7, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 755-57 (opening of juvenile records and proceedings permitted in certain instances).

[138] *See* Act 316, §§ 1-8, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 749-55.

[139] *See* HAW. REV. STAT. § 707-743 (1995). The statute only required previously convicted sex offenders to comply with registration provisions and did not include notification provisions. *See id.*

[140] *See* Act 316, §§ 1-8, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 749-55. It should be noted that the act applies retroactively to any acts committed prior to, on, or after its effective date, July 1, 1997. *See id.*

[141] *See* Sandra S. Oshiro, *550 on Hawaii Sex-Crime Register*, THE HONOLULU ADVERTISER, July 2, 1997, at A1.

[142] *See id.*

[143] *See* Sandra S. Oshiro, *Sex-Offender Registry Computerized*, THE HONOLULU ADVERTISER, Sept. 14, 1997, at A23.

code.[144] Public response to the system has been very positive[145]—people want to know who lives next door.

1. Procedure and requirements

Once deemed a sex offender,[146] a person must register with the State of Hawai'i for the rest of his or her life.[147] State agencies having proper jurisdiction must explain the registration and notification requirements of Megan's Law to convicted sex offenders prior to release.[148] Each sex offender "within three working days after release from jail"[149] must then register in person at the respective agency.[150] At which time, registrants must provide a recent photograph and medical information,[151] basic identifying information,[152] and other relevant information for notification purposes.[153]

Once the sex offender registers with the proper agencies, the public can access the information. Relevant information[154] is accessible to the public at

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[144] *See id.* Public access computers are located at the Hawai'i Criminal Justice Data Center at 465 S. King St., Honolulu Hawai'i. *See id.*

[145] Interview with Sergeant Robert Bohol, Honolulu Police Department Coordinator for Sex-Offense Registration, in Honolulu, Hawai'i (Aug. 17, 1997)[hereinafter Bohol Interview].

[146] *See* Act 316, § 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 750. The law states:

> Definitions . . . "sex offender" means:
>
> (a) Any person convicted of a "sexually violent offense" or a "criminal offense against a victim who is a minor"; or
>
> (b) Any person who is charged with a "sexually violent offense" or a "criminal offense against a victim who is a minor" and is found unfit to proceed or who is acquitted due to a physical or mental disease, disorder, or defect pursuant to chapter 704.

Id.

[147] *See id.* at 751. The law states that sex offenders must "register with the attorney general and comply with the provision of this chapter for life." *Id.*

[148] *See id.* at 752.

[149] *Id.* at 753. In addition to release from incarceration, this section also requires registration upon release from commitment, release on furlough, placement on parole, placement on probation, or within three days after arrival in new county. *See id.*

[150] *See id.*

[151] *See id.* at 751. Descriptive information includes: a recent photograph, verified fingerprints, a saliva sample, a blood sample, and DNA analysis. *See id.*

[152] *See id.* Identifying information includes: name and all aliases, date of birth, social security number, sex, race, height, weight, and hair and eye color. *See id.*

[153] *See id.* at 751-52. Other relevant information includes: address, telephone number, future or transient residences and phone numbers in which the stay exceeds 10 days, names and locations of employers, vehicle registration information, summary of criminal offenses which originally deemed the person a sex offender, and a recent photograph. *See id.*

[154] *See* Act 316, § 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 751-52. Public access to registration information is limited to information deemed to be "relevant." The law states:

the Hawai'i Criminal Justice Data Center[155] or at designated police stations.[156] Information is released for a reasonable fee and such information is available through registration file folders or an electronic database via an interactive computer-based system, i.e., the Internet.[157]

To continually monitor the location of released sex offenders, the attorney general will mail a "nonforwardable verification form" every three months for the sex offender to verify residence, report any changes to registration information, and send the form back within ten days after receipt.[158] Effective July 1, 1998, failure to send the verification form within ten days to the attorney general will be in violation of this chapter.[159] This mechanism provides an added safeguard against transient sex offenders.

To date, a high percentage of previously convicted sex offenders have complied with the requirements of Megan's Law.[160] There has been a problem, however, in tracking down sex offenders that were convicted in the

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Access to registration information . . . "relevant information that is necessary to protect the public" means:

> (a) Name and all aliases used by the sex offender or under which the sex offender has been known;
> (b) The street name and zip code where the sex offender resides and how long the sex offender has resided there;
> (c) The street name and zip code where the sex offender is staying for more than ten days, if other than the stated residence;
> (d) The future address and telephone number, if known, where the sex offender is planning to reside, if other than the stated residence;
> (e) The street name and zip code of the sex offender's current locations of employment;
> (f) Vehicle registration information of all vehicles currently owned or operated by the sex offender;
> (g) A brief summary of the criminal offenses against victims who were minors and the sexually violent offenses for which the sex offender has been convicted or found unfit to proceed or acquitted pursuant to chapter 704;
> (h) A recent photograph of the sex offender

Id.

[155] The Hawai'i Criminal Justice Data Center is a state agency under the Attorney General's Office.

[156] *See* Act 316, § 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 752. The law states in pertinent part that "the release of information that is necessary to protect the public shall be accomplished by public access to a file containing relevant information of each registered sex offender." *Id.*

[157] *See id.* Either the chief of police or attorney general shall provide the information "upon payment of reasonable fees" and information may also be "released from an electronic data base maintained by the respective law enforcement agencies . . . ." *Id.*

[158] *See id.* at 753.

[159] *See id.*

[160] Bohol Interview, *supra* note 145.

distant past.[161] Attempts have been made to locate these offenders and once they are adequately notified, penalties shall result from non-compliance.[162]

Penalties for failure to comply with the requirements of Hawai'i's version of Megan's Law varies. Factors include the extent of the failure and whether it was the first offense or a repeat offense.[163] The difference between the extent of possible punishment is high, ranging from a mere misdemeanor to a class C felony.[164]

Despite sex offender compliance, the success of Megan's Law is unascertainable at this juncture. Ideally, Hawai'i's version of Megan's Law can accomplish the purpose of protecting the community against sexual predators. If so, extending the statute's provisions to juveniles would be more compelling.

2. *Purpose and intent*

In determining whether Hawai'i's version of Megan's Law extends to juveniles, the legislative intent of its framers must be considered. Because sex crimes cause continuing "fear and intimidation" that later results in long-term harm to its victims and to society, the legislature responded.[165] To "balance the scales of justice between the rights of offenders and rights of victims," the state legislature drafted Hawai'i's version of Megan's Law.[166]

The overall purpose of Hawai'i's Megan's Law was "to require strict

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[161] *See id.*

[162] *See id.* Before penalties can be issued, previously convicted sex offenders must receive proper notice. *See id.* Most offenders receive proper notice upon release from incarceration. *See id.*

[163] *See* Act 316, § 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 754. (penalty for non-compliance).

[164] *See* Act 316, § 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 754. The law states:

> Penalty . . . (1) For a first offense:
>
> (a) Any person required to register under this chapter who recklessly fails to comply with any of the requirements of this chapter shall be guilty of a misdemeanor; and
>
> (b) Any person required to register under this chapter who intentionally or knowingly fails to comply with any requirements of this chapter shall be guilty of a class C felony.
>
> (2) For any second or subsequent offense, any person required to register under this chapter who recklessly, intentionally, or knowingly fails to comply with any of the requirements of this chapter shall be guilty of a class C felony.

Id.

[165] *See* Act 316, § 1, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 749.

[166] *Id.*

registration requirements of sex offenders and ensure the release of relevant information concerning the presence of a sex offender necessary to protect the public."[167] Additionally, the state needed to take "immediate action" to avoid the loss of desperately needed federal funding.[168] Hence, Megan's Law was enacted because of: 1) the compelling state interest of "protecting the public from sex offenders and in protecting children from predatory sexual activity"; 2) the state's "current economic crisis"; and 3) the "ever present concern over crime." [169] Notwithstanding economic reasons, the legislature clearly stated their concern and intent to protect the community.

IV. HAWAI'I'S VERSION OF MEGAN'S LAW AS APPLIED TO JUVENILES

A. The Juvenile Justice System

"We as a Nation have failed the juvenile justice system, which, in turn is failing us."[170] Such a serious statement targets "a system" that has seemingly been unable to "fulfill its role in securing community safety."[171]

The Juvenile Justice System is a relatively new concept that changed the perception of offending juveniles as being "miniature adults" to, instead, "persons with less than fully developed moral and cognitive capacities."[172] The first juvenile court was established in Cook County, Illinois with the enactment of the Juvenile Court Act of 1899.[173] The main theory behind the juvenile court was "parens patriae"[174]—the state as parent.[175] Analogous to the responsibility of a child's parent, the court's role was expressed by the Illinois Supreme Court in 1882 by stating:

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[167] *Id.* at 750.

[168] *Id.* at 749. "Failure to comply with these [Jacob Wetterling] requirements by September 1997, will result in a ten per cent reduction in State's Byrne Formula Grant funding (§ 506 of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3756)." *Id.*

[169] *Id.*

[170] U.S. DEPARTMENT OF JUSTICE, COMBATING VIOLENCE AND DELINQUENCY: THE NATIONAL JUVENILE ACTION PLAN 19 (1996).

[171] *Id.*

[172] SNYDER ET AL., *supra* note 33, at 70.

[173] *See* Swearingen, *supra* note 46, at 549.

[174] *See* SNYDER ET AL., *supra* note 33, at 70. The doctrine of "parens patriae" was the rationale for the "right of the State to intervene in the lives of children in a manner different from the way it intervenes in the lives of adults." *Id.* Under the doctrine, the State had the power and responsibility to provide protection for delinquent children through judicial intervention. *See id.*

[175] *See* Rothchild, *supra* note 1, at 721 (The "traditional" model of the Juvenile Justice System refers to the "state's protective role as 'sovereign and guardian of persons under legal disability . . . .'").

> It is an unquestioned right and imperative duty of every enlightened government, in its character of parens patriae, to protect and provide for the comfort and well-being of such of its citizens as, by reason of infancy, defective understanding, or other misfortune or infirmity, are unable to take care of themselves. The performance of this duty is justly regarded as one of the most important of governmental functions, and all constitutional limitations must be so understood and construed so as not to interfere with its proper and legitimate exercise.[176]

For the purpose of protecting society's youth, the Juvenile Justice System focused on rehabilitation rather than punishment; on the offender rather than the offense; and on all the relevant factors rather than just the legal ones.[177] As such, "the best interests of the child" was foremost[178] and sentencing was focused on avoiding "the stigma of adult prosecutions."[179]

Confidentiality to protect the anonymity of the juvenile offender is one of the hallmarks of the Juvenile Justice System.[180] Failure to shield juveniles from such publicity "seriously impair[s] the rehabilitative goals of the juvenile justice system."[181] Because juveniles are afforded these protective measures, certain due process protections granted to adult offenders in criminal proceedings were "deemed unnecessary."[182]

A series of Supreme Court decisions, however, have acknowledged that the juvenile courts are becoming increasingly similar to adult courts.[183] The courts, however, still maintain some key differences.[184] Generally, the applicable standard in juvenile proceedings is "the essentials of due process and fair treatment."[185]

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[176] ALBERT R. ROBERTS, JUVENILE JUSTICE: POLICIES, PROGRAMS, AND SERVICES, 320 (1989).

[177] *See* SNYDER ET AL., *supra* note 33, at 70.

[178] *Id.* at 71. The author discusses a broad range of options available to the system to help problem juveniles. *See id.* Such options were "tailored to the best interests of the child." *Id.*

[179] Swearingen, *supra* note 46, at 550.

[180] *See* Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979)(explaining that the state interest in protecting the anonymity of juvenile offenders did not outweigh the right to publish lawfully obtained information); *see also* HAW. REV. STAT. § 571-41 (1965). Section (b) states, "[t]he general public shall be excluded" from juvenile proceedings." *Id.*

[181] *Smith*, 443 U.S. at 107-08 (Rehnquist, J., concurring).

[182] *See* SNYDER ET AL., *supra* note 33, at 75. For instance, the constitutional right to a jury is not guaranteed to juvenile offenders. *See id.*

[183] *See id.* at 71.

[184] *See id.* There "were enough 'differences of substance between criminal and juvenile courts . . . .'" *Id.*

[185] *See* Kent v. United States, 383 U.S. 541 (1966)(holding that a juvenile court's waiver of jurisdiction of a juvenile offender to criminal court must be supported by reasonable grounds); *see also In re* John Doe, 70 Haw. 32, 36, 761 P.2d 299, 302 (1988)(holding that a hearing to determine juvenile delinquency must meet due process standards).

In *In re Gault*,[186] the Supreme Court held that juveniles shall be afforded the due process protections of the right to notice, to counsel, to question witnesses, and protection against self-incrimination when proceedings may result in a commitment to an institution.[187] The *Gault* Court stated that, "[the] Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[188] Despite the good intentions of the Juvenile Justice System, there is a need for added due process safeguards in the juvenile courts.

Three years later, in *In re Winship*,[189] the United States Supreme Court raised the burden of proof in delinquency adjudications from "preponderance of the evidence" to "proof beyond a reasonable doubt."[190] The *Winship* Court dismissed any arguments that proof beyond a reasonable doubt "would risk destruction of [the] beneficial aspects of the juvenile process."[191] The Court emphasized the need to avoid the unfair result of "subjecting [a] child to the stigma of a finding that he violated a criminal [adult] law" with proof "insufficient to convict him were he an adult."[192]

Interestingly, despite the holdings of *Gault* and *Winship* that provided juveniles greater constitutional protection, in *McKeiver v. Pennsylvania*,[193] the Court held that the constitutional right to a jury trial is not required in juvenile courts.[194] The *McKeiver* Court refused to equate juvenile proceedings with criminal proceedings by stating, "[i]f the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence."[195] Furthermore, unlike *Gault*

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[186] 387 U.S. 1 (1967).

[187] *See id.* at 30-31. The *Gault* Court held that a "juvenile court adjudication of delinquency" is also covered by the Due Process Clause of the Fourteenth Amendment of the Constitution. *See id.*

[188] *Id.* at 18.

[189] 397 U.S. 358, 368 (1970)(holding that a case against a juvenile offender subject to confinement must be proved "beyond a reasonable doubt").

[190] *Id.*

[191] *Id.* at 366. The Court stated:

> Use of the reasonable-doubt standard during the adjudicatory hearing will not disturb . . . policies that a finding that a child has violated a criminal law does not constitute a criminal conviction, that such a finding does not deprive the child of his civil rights, and that juvenile proceedings are confidential. Nor will there be any effect on the informality, flexibility, or speed of the hearing at which the fact-finding takes place.

Id.

[192] *Id.* at 367. Here the Court discusses the similarities of juvenile and adult courts in regards to the deprivation of liberty by institutional confinement. *See id.*

[193] 403 U.S. 528 (1971).

[194] *See id.* at 545 (holding that jury trials are not constitutionally required in the adjudicative stage of juvenile court hearings).

[195] *Id.* at 551.

and *Winship* in which the Court emphasized due process interests in fact-finding procedures such as the right to notice, the use of a jury is not necessarily a "component of accurate factfinding."[196] The Court opined that a jury trial in juvenile court would entail "the delay, the formality, and the clamor of the adversary system and, possibly, the public trial."[197]

The Court's decision to not require a jury trial in juvenile proceedings displays its reluctance to make available to juveniles all the constitutional rights afforded to adults.[198] Also, the *McKeiver* Court draws a line that separates the juvenile court and criminal court. Although similar to criminal courts in many instances, juvenile courts still provide juveniles added protection[199] without requiring all the necessary due process rights afforded to adults.

Despite the compassionate philosophy behind the traditional Juvenile Justice System, the public perception of juvenile delinquents has changed dramatically.[200] Due to an increase in juvenile crime,[201] the waning public perception of the current Juvenile Justice System may effect the fate of its existence.[202] To secure community safety, the juvenile justice system "is in the midst of a revolutionary period of change."[203]

This change includes the current trend of removing more serious, violent, and chronic offenders from the juvenile system and referring such matters to the criminal courts.[204] Such a change displays the notion that although most juvenile offenders are adequately handled by the juvenile court system, the

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[196] *Id.* at 543.

[197] *Id.* at 550.

[198] *See id.* at 533. The Court "has not yet said that all rights constitutionally assured to an adult accused of crime also are to be enforced or made available to the juvenile in his delinquency proceeding." *Id.*

[199] *See* HAW. REV. STAT. § 571-41(a) (1997). Hawai'i's Juvenile System of Justice is based on informal proceedings. *See id. See also* HAW. REV. STAT. § 571-31.4(a)-(d) (1997). Prior to formal action by the court, "informal adjustment" may be provided by a duly authorized officer in which suitable methods, programs, and procedures are prescribed for rehabilitative purposes. *See id.*

[200] *See* Rothchild, *supra* note 1, at 721-22. The author states "[m]any states now scramble for 'lock-'em-up-and-throw-away-the-key' measures to deal with juvenile sex offenders, rather than channel their resources toward effective rehabilitation programs." *Id.*

[201] *See* Barbara Gilleran Johnson & Daniel Rosman, *Recent Developments in Nontraditional Alternatives in Juvenile Justice*, 28 LOY. U. CHI. L.J. 719, 719 (1997). In the past 10 years, juvenile crime has risen at an alarming rate. *See id.* Consequently, "[t]he national mood demands a rigid posture toward juvenile offenders." *Id.*

[202] *See* Meda Chesney-Lind, *Justice for Young Criminals*, THE HONOLULU ADVERTISER, Aug. 17, 1997, at B6. The public perception of juvenile crime, as well as recent federal and state initiatives are signaling the "dismantling of the juvenile justice system." *Id.*

[203] U.S. DEPARTMENT OF JUSTICE, COMBATING VIOLENCE AND DELINQUENCY: THE NATIONAL JUVENILE ACTION PLAN 19 (1996).

[204] *See id.* There was a 39 percent increase in the number of juveniles "transferred to, convicted in, or sentenced in criminal courts" from 1988 to 1990. *Id.*

more serious offenders may not be "amenable to the rehabilitation in the juvenile justice system."[205] Hence, this small percentage of serious juvenile offenders[206] have a devastating effect on the public's concern with safety and should be dealt with appropriately.[207]

On the other hand, getting tougher on juveniles runs the risk of "turning treatable juveniles into hardened criminals."[208] At this point, the family court system has the responsibility to determine juvenile offender treatability.[209] With this current trend in mind, Megan's Law must be placed on one side of the fence. Should Megan's Law apply to the Juvenile Justice System as part of this "revolution of change" to hold juveniles accountable? Or, should Megan's Law only apply in a criminal context, leaving juvenile sex offenders virtually unaffected unless the offender is transferred out of the juvenile system?[210] Clearly, the rehabilitative theory behind the Juvenile Justice System directly contradicts the far-reaching registration and notification provisions of Megan's Law. The policy behind the Juvenile Justice System, however, may be outweighed by the policy behind the overall protection of the public. Mere inconsistency should not deter sound policy.

B. Hawai'i's Juvenile Justice System

1. The current system

The Hawai'i Juvenile Justice System,[211] like most modern juvenile systems, sets forth a "system of family courts."[212] The policy and purpose of the

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[205] *Id.*

[206] *See id.* at 20. The article states that serious juvenile offenders only make up six to eight percent of all offenders, however, this group accounts for a substantially large number of offenses. *See id.*

[207] *See id.*

[208] *Id.* at 21.

[209] *See* HAW. REV. STAT. § 571-31.2(a)(3) (1997). The statute states in pertinent part, "[t]he court or other designated agency shall . . . [i]nvestigate, evaluate, make necessary determination, and take appropriate action . . . ." *Id.*

[210] *See* HAW. REV. STAT. § 571-22 (1997). The statute allows the court to "waive jurisdiction" and order a transfer of a juvenile to criminal proceedings. *See id.*

[211] THE JUVENILE JUSTICE PLAN, STATE LAW ENFORCEMENT PLANNING AGENCY, STATE OF HAWAI'I IX (1979). Hawai'i's Juvenile System of Justice is:

> [A] descriptive term used to describe the agencies and the interrelationship among them in dealing with the juvenile who has committed a law violation, who is deprived of services or who is in need of supervision. Such agencies include police departments, the offices of the prosecuting attorneys, the public defender, the family court, the Department of Social Services and Housing, and other private agencies which administer programs affecting juveniles.

Id.

[212] HAW. REV. STAT. § 571-1 (1997).

system is to promote the rehabilitation of juveniles in difficulty, the appropriate punishment, and the reduction of juvenile delinquency.[213] Based on this policy, once juveniles are held to be responsible for any offense, they "shall receive dispositions that provide incentive for reform or deterrence from further misconduct, or both."[214] Thus, the management of juvenile offenders may be based on either rehabilitation or deterrence, or both.

Hawai'i's Juvenile Justice System displays an intent by its drafters to issue an appropriate disposition for serious sex crimes.[215] This intent is displayed by the two options the law provides the family court system.[216] Dispositions shall "provide incentive for *reform or deterrence* from further misconduct."[217] Here, the family court is provided with an affirmative grant to "formulate a plan . . . [for] the necessary protection of the community."[218] To deter future juvenile sex offenses and protect the community, Megan's Law is consistent with Hawai'i's Juvenile Justice System.[219] Contrary to the basic model of juvenile justice, rehabilitation is not the primary goal of the Hawai'i system. Arguably, Megan's Law could apply to juvenile sex offenders in this context.

The system, however, precludes any juvenile adjudication to "[be] deemed a conviction . . . [to] impose any civil disability ordinarily resulting from a conviction . . . [and] no child shall be found guilty or be deemed a criminal by reason of such adjudication."[220] Because Megan's Law is premised on criminal convictions, opponents will dismiss its application to juvenile sex offenders.[221] To exclude the application of Megan's Law because a juvenile

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[213] *See id.* The statute also states that the policy and purpose of the system is to "promote the reconciliation of distressed individuals with their families." *Id.*

[214] *Id.*

[215] *See* SEN. CONF. COMM. REP. NO. 84-80, 10th Leg., Reg. Sess. (1980) *reprinted in* HAW. SEN. J. 999 (1980). The Committee Report states in pertinent part:

> [A]lthough the intent of [the bill] . . . is to clearly afford extensive opportunity and programs for rehabilitating juveniles in trouble, its thesis also includes the position that our laws are intended to have substantial preventive influence by their inherent punishment that is sufficiently buttressed by certainty of imposition.

Id. at 1000.

[216] *See* HAW. REV. STAT. § 571-1 (1997).

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

[218] *Id.*

[219] *See id.* SEN. CONF. COMM. REP. NO. 84-80, 10th Leg., Reg. Sess. (1980) *reprinted in* HAW. SEN. J. 999 (1980). The Committee "recognize[d] the legitimate role of punishment in deterring those juveniles who would resist rehabilitation from harming the innocent." *Id.*

[220] HAW. REV. STAT. § 571-1 (1997).

[221] *Cf. In re* B.G., 674 A.2d 178, 185 (N.J. Super. 1996)(finding that the requirements of Megan's Law do not terminate on a juvenile's eighteenth birthday). "[T]he requirements of Megan's Law do not constitute a 'disposition' entered in accordance with the Code of Juvenile Justice." *Id.* The court justified its assertion by the presumption that the Legislature "know[s]

"disposition" differs from a criminal "conviction" cuts against the policy of Megan's Law—the protection of children. Thus, although juvenile offenders may be considered an "unlikely target" for the requirements of Megan's Law, they should be included for "remedial protective purposes."[222]

In any case, the application of Megan's Law and the purpose of the Juvenile Justice System are competing interests that this Comment attempts to balance. Statutory interpretation of Hawai'i's version of Megan's Law and other versions in other jurisdictions must be considered before a thorough analysis can be made. Notwithstanding adherence to the Juvenile Justice System, what does the enacted statute actually tell us? Are juveniles included?[223]

2. Reformation of the current system

The State of Hawai'i, as well as the federal government are in an "accountability mode" to address juvenile crime.[224] As such, the reformation of Hawai'i's Juvenile Justice System is a hotly debated and complex issue.[225] The need for a change is gaining public attention as the perception of juvenile crime worsens.[226]

Senior Family Court Judge Michael Town supports the current system that provides for "community safety . . . , accountability . . . , and long-range, competency-building services."[227] The majority of juvenile offenders respond well to probation and the services provided by the family court.[228] However, the small percentage of "violent or repeat youthful offenders" may require stiffer penalties such as incarceration[229] or waiver to adult court.[230] Judge

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the provisions of the Juvenile Code, and it nonetheless provided for continuing application of Megan's Law to juvenile offenders." *Id.*

[222] *See* Doe v. Poritz, 662 A.2d 367, 404 (N.J. 1995).

[223] *See infra* Parts IV.C.

[224] Interview with Peter Carlisle, Prosecuting Attorney for the city of Honolulu, in Honolulu, Hawai'i (Sept. 22, 1997)[hereinafter Carlisle Interview].

[225] *See* Iwalani White, *Prevention, Rehab, Incarceration All Needed*, THE HONOLULU ADVERTISER, Aug. 17, 1997, at B6. Ms. White is the first deputy Prosecuting Attorney of the city of Honolulu. *See id.*

[226] *See* Chesney-Lind, *supra* note 202, at B6. Media coverage and federal and state initiatives are giving "citizens the idea that [juvenile] crime in their communities is much worse than a decade earlier." *Id.*

[227] Michael Town, *Most Young Offenders Respond Well to Services*, THE HONOLULU ADVERTISER, Aug. 17, 1997, at B6.

[228] *See id.*

[229] *Id.*

[230] *See id.* Waiver to adult court is "possible only if the youth is 14 or over and a felony is charged. Waiver is considered on a case-by-case basis after a full hearing before a family court judge. The issue is community safety vs. treatability." *Id. See also* HAW. REV. STAT. § 571-22 (1997).

Town has expressed his concern regarding the lack of intermediate care facilities for "specialized treatment" of certain juvenile offenders.[231] This concern directly relates to the possible treatment of juvenile sex offenders.[232]

The current system, therefore, provides a second chance to juvenile offenders through the services imposed by the courts. In some cases, however, the system instead provides an opportunity for serious offenders to recidivate.[233] It only takes one serious offender to slip through the system and shatter the lives of his victim and the victim's family. Focusing on this small percentage of serious juvenile offenders, commentators are concerned about the increasingly violent crimes juveniles are committing at a younger age.[234] Due to overcrowded juvenile prison facilities, a "revolving-door juvenile justice system"[235] prematurely releases juvenile offenders "inappropriately and without any supervision."[236] In addition to incarceration inadequacies, there is a "complete lack of secure, residential treatment programs for . . . juvenile sex offenders . . . ."[237] Therefore, the State of Hawai'i is in desperate need of adequate correctional facilities and effective treatment programs "that can [concurrently] operate without endangering the safety of the community."[238]

Due to the inadequate handling of serious juvenile sex offenders, the application of Megan's Law is a mechanism to help fill in the gaps. When juvenile sex offenders are released into the community, Megan's Law acts as a safety net to protect the public. Until incarceration facilities can hold these sex offenders or treatment programs can rehabilitate these sex offenders, the community will be in jeopardy. Without Megan's Law, the heinous capabilities of a released juvenile sex offender may go unnoticed, untreated, and unsupervised.

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[231] *See* Town, *supra* note 227, at B6.

[232] *See infra* Part V.A.

[233] *See* Ken Kobayashi & Jean Christensen, *Inside the Juvenile Justice System: Justice Without an Attitude*, THE HONOLULU ADVERTISER, Nov. 23, 1997, at A1. Iwalani White, deputy prosecuting attorney for the city of Honolulu, stated that "the lack of facilities to treat young sexual offenders . . . in a secured residential setting" leads to a high recidivism rate. *Id.* at A10.

[234] *See* Peter B. Carlisle, *Reform the Juvenile Justice System*, THE HONOLULU ADVERTISER, May 28, 1996, at A8.

[235] *Id.* Mr. Carlisle also pointed out that a majority of adult repeat offenders have extensive juvenile records. *See id.*

[236] White, *supra* note 225, at B6 ("In 1996, more than 200 juveniles were sent to HYCF by the Family Court. Due to the 30-bed limit, many of these juveniles were released into our community . . . .").

[237] *Id.* Because the system only provides "out-patient" treatment of these juveniles, the community is in "jeopardy." *See id.*

[238] *Id.* Ms. White stated: "Many people think that treatment and incarceration are incompatible methods of dealing with juvenile offenders. In fact, they are different sides of the same coin – one without the other renders the coin without value." *Id.*

C. Statutory Construction

The federal government required states to pass legislation in accordance with the guidelines of Megan's Law[239] or face the loss of federal funding.[240] The guidelines set by the federal government provided "wide latitude" for states to enact their own versions of Megan's Law.[241] Consequently, each state had the discretion to extend its version of Megan's Law to include or exclude juvenile sex offenders.[242]

Currently,[243] thirty-two states do not subject juvenile sex offenders to their versions of Megan's Law.[244] Five of these states contain language that

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[239] *See* 42 U.S.C. § 14071(a) (1996). The "[State] Attorney General shall establish guidelines for State programs . . . ." *Id.* at § (a)(1).

[240] *See* 42 U.S.C. § 14071(f) (1996). "A State that fails to implement the program as described . . . shall not receive 10 percent of the funds . . . otherwise . . . allocated to the State." *Id.* at § (2)(A).

[241] 61 Fed. Reg. 66, 15112 (1996). The Act gives states "wide latitude to designing registration programs that best meet their public safety needs." *Id.*

[242] *See id.* Although the Jacob Wetterling Act does not specifically address the inclusion of juvenile sex offenders, the guidelines provided by the Act "constitute a floor for state registrations systems, not a ceiling . . . . For example, a state may have a registration system that covers a broader class of sex offenders . . . ." *Id.*

[243] Because statutory schemes are subject to change due to the controversial nature of this issue, it is impossible to provide a timely and complete analysis of the various statutes in other jurisdictions.

[244] *See* Swearingen, *supra* note 46, at 569 n.253. Swearingen lists the states which exclude juveniles from the provisions of their versions of Megan's Law. Not including Hawai'i, the states are: Alabama (ALA. CODE §§ 13A-11-200 to -203 (Michie 1975)); Alaska (ALASKA STAT. §§ 12.63.010 to .63.100 (Michie 1996)); Arkansas (ARK. CODE ANN. §§ 12-12-901 to -909 (Michie 1995)); Connecticut (CONN. GEN. STAT. ANN. § 54-102r (West Supp. 1996)); Delaware (DEL. CODE ANN. tit. 11, § 4120 (Supp. 1996)); Florida (FLA. STAT. ANN. § 775.21 (West Supp. 1997)); Georgia (GA. CODE ANN. § 42-1-12 (Supp. 1996)); Idaho (IDAHO CODE § 18-8303 (Supp. 1996)); Illinois (730 ILL. COMP. STAT. 150/2-150/10.9 (West Supp. 1996)); Kansas (KAN. STAT. ANN. §§ 22-4901 to -4910 (1995)); KENTUCKY (KY. REV. STAT. ANN. §§ 17.510 to .540 (Michie 1996)); Louisiana (LA. REV. STAT. ANN. §§ 15:542 to :549 (West Supp. 1997)); Maine (ME. REV. STAT. ANN. tit. 34-A, §§ 11101-11144 (West Supp. 1996)); Maryland (MD. ANN. CODE, art. 27, § 792 (1957)); Missouri (MO. ANN. STAT. §§ 566.600 to .625 (West Supp. 1997)); Montana (MONT. CODE ANN. §§ 46-23-501 to -508 (1995)); Nevada (NEV. REV. STAT. ANN. §§ 207.151 to .155 (Michie Supp. 1995)); New Hampshire (N.H. REV. STAT. ANN. §§ 632- A:12 to A:17 (1996)); New Mexico (N.M. STAT. ANN. §§ 29-11A-1 to -11A-8 (Michie 1996)); New York (N.Y. CORRECTION LAW §§ 168-a to 168-v (McKinney Supp. 1997)); North Carolina (N.C. GEN. STAT. §§ 14-208.5 to -208.13 (Supp. 1996)); North Dakota (N.D. CENT. CODE § 12.1-32-15 (Supp. 1995)); Ohio (OHIO REV. CODE ANN. §§ 2950.01-2950.99 (Anderson 1996)); Oklahoma (OKLA. STAT. ANN. tit. 57, §§ 581-587 (West Supp. 1996)); Pennsylvania (42 PA. CONS. STAT. ANN. §§ 9791-9799 (West Supp. 1996); Rhode Island (R.I. GEN. LAWS § 11-37.1 (West Supp. 1996)); South Dakota (S.D. CODIFIED LAWS §§ 22-22-30 to -22-41 (Supp. 1996)); Tennessee (TENN. CODE ANN. §§ 40-39-102 to -39-108 (Supp. 1996)); Utah (UTAH CODE ANN. § 77-27-21.5 (1996)); Vermont (VT. STAT. ANN. tit. 13, §§ 5401-5413 (Supp.

specifically excludes juvenile offenders from their versions of the law.[245] On the other side of the spectrum, New Jersey and sixteen other states have opted to include juvenile sex offenders under their versions of the law.[246] Hawai'i's version of Megan's Law neither specifically includes nor excludes juvenile sex offenders.[247]

To determine the scope of Hawai'i's version of Megan's Law, analysis of the statute itself and of the legislative intent behind the statute is needed.[248] This Comment also looks at other jurisdictions for guidance in determining the scope of Megan's Law in Hawai'i.

1. New Jersey law

New Jersey enacted the nation's toughest version of Megan's Law that clearly extends to juvenile sex offenders.[249] New Jersey's strict version of the law found its strength from its compelling purpose—to protect children like Megan Kanka from sex crimes.[250] To achieve this goal, New Jersey's version of Megan's Law specifically applies to juveniles by including "any person

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1996)); West Virginia (W. VA. CODE §§ 61-8F-1 to -8F-9 (Supp. 1996)); and Wyoming (WYO. STAT. §§ 7-19-301 to -306 (1977)). *See id.* at 569 n.253.

[245] *See id.* at 596 n.254. The states are: Alabama (ALA. CODE §§ 13A-11-200 to -203 (Michie 1975)); Kansas (KAN. STAT. ANN. §§ 22-4901 to -4910 (1995)); Kentucky (KY. REV. STAT. ANN. §§ 17.510 to .540 (Michie 1996)); Louisiana (LA. REV. STAT. ANN. §§ 15:542 to :549 (West Supp. 1997)); and Wyoming (WYO. STAT. §§ 7-19-301 to -306 (1977)). *See id.*

[246] *See id.* at 596 n.255. Excluding New Jersey, the states are: Arizona (ARIZ. REV. STAT. ANN. §§ 13-3821 to -3825 (West Supp. 1996)); California (CAL. PENAL CODE § 290 (West Supp. 1997)); Colorado (COLO. REV. STAT. ANN. § 18-3-412.5 (West Supp. 1996)); Indiana (IND. CODE ANN. §§ 5-2-12-1 to -12-13 (West Supp. 1996)); Iowa (IOWA CODE ANN. §§ 692A.1-692A.15 (West Supp. 1996)); Massachusetts (MASS. GEN. LAWS ANN. ch. 22C, § 37 (West 1994)); Michigan (MICH. COMP. LAWS ANN. §§ 28.721 to .732 (West Supp. 1996)); Minnesota (MINN. STAT. ANN. §§ 243.165 to .166 (West 1996)); Mississippi (MISS. CODE ANN. §§ 45-33-1 to -19 (Supp. 1996)); Oregon (OR. REV. STAT. §§ 181.585 to .602 (1995)); South Carolina (S.C. CODE ANN. §§ 23-3-400 to -490 (Law. Co-op. Supp. 1995)); Texas (TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (West Supp. 1996)); Virginia (VA. CODE ANN. §§ 19.2-298.1 to -298.3 (Michie 1996)); Washington (WASH. REV. CODE ANN. § 9A.44.130 (Supp. 1997)); and Wisconsin (WIS. STAT. ANN. § 175.45 (West Supp. 1996)). *See id.*

[247] *See* Act 316, § 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 750.

[248] *See* Mathewson v. Aloha Airlines, 82 Hawai'i 57, 71, 919 P.2d 969, 983 (1996). The court stated, "[w]hen construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself." *Id.*

[249] *See* Swearingen, *supra* note 46, at 570. Juvenile sex offenders in New Jersey are subject to the "most strict requirements of any [other] state." *Id.*

[250] *See* Doe v. Poritz, 662 A.2d 367, 376 (1995). As discussed above, Megan's Law was the result of public outcry from the heinous murder of Megan Kanka. *See id.*

who has been . . . *adjudicated delinquent* . . . for the commission of a sex offense . . . ."[251]

In *In re B.G.*,[252] the Superior Court of New Jersey affirmed the lower court's ruling that juvenile sex offenders are subject to the requirements of Megan's Law.[253] B.G., a juvenile, was "adjudicated delinquent" for sexual contact[254] with his eight-year-old step-brother.[255] In addition to being sentenced to three years of probation and sixty days of incarceration, B.G. was ordered by the lower court to register under Megan's Law.[256]

On appeal, B.G. argued the inapplicability of Megan's Law due to: 1) the misapplication of Megan's Law "contrary to the philosophy of the juvenile code"; and 2) in the alternative, if Megan's Law is applicable to juveniles, then any requirements must "terminate on his eighteenth birthday."[257] The appellate court dismissed all of B.G.'s contentions without much mention of either policy or the rehabilitative nature of the Juvenile Justice System.[258]

In dismissing the first contention, the court held that the requirements of Megan's Law applied to juveniles despite any possible inconsistency with "the philosophy of the Juvenile Code."[259] The court noted that, under *Doe v. Poritz*,[260] the registration requirement applies to "all convicts, all juveniles, no matter what their age, found delinquent because of the commission of those offenses . . . ."[261] In addition to unambiguous statutory construction, the *B.G.* court looked at the intent of Megan's Law to justify the inclusion of juveniles.[262] Due to specific statutory construction and the furtherance of public safety, the court found that Megan's Law was applicable to juveniles for "remedial protective purposes."[263]

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[251] N.J. STAT. ANN. §§ 2C:7-2 (West 1996)(emphasis added).

[252] 674 A.2d 178 (N.J. Super. 1996).

[253] *See id.* at 184. The court noted that it "fail[s] to see how the Court could have arrived at any other interpretation . . . ." *Id.*

[254] *See id.* at 180. The sexual contact would have constituted second degree sexual assault if committed by an adult. *See id.*

[255] *See id.* B.G. was 12 years old when the offense occurred. *See id.*

[256] *See id.*

[257] *Id.* at 184-85.

[258] *See id.* at 182-85.

[259] *See id.* at 184. The court did not specifically address B.G.'s argument that the "philosophy of the Juvenile Code" was violated. *Id.* Rather, the court broadly stated that the registration requirements applied. *See id.*

[260] 662 A.2d 367 (N.J. 1995)

[261] *In re* B.G., 674 A.2d at 184 (citing Doe v. Poritz, 662 A.2d 367, 377 (N.J. 1995)).

[262] *See id.* at 184-85 (citing Doe v. Poritz, 662 A.2d 367, 377 (N.J. 1995)). The *Doe* court explained that the policy reason for Megan's Law was "to give people a chance to protect themselves and their children; as such, the laws are designed not to punish the criminals, but to protect society." *Id.*

[263] *See id.* at 184.

In dismissing the second contention, the court held that the applicability of Megan's Law would not terminate on a juvenile's eighteenth birthday.[264] Because the requirements of Megan's Law did not constitute a "disposition" under the Juvenile Code,[265] the law requiring disposition termination when a juvenile attains the age of eighteen[266] was inapplicable. The court afforded great deference to the legislature by presuming that "the provisions of the Juvenile Code" were known to the legislature and "[the legislature] nonetheless provided for continuing application of Megan's Law to juvenile offenders."[267]

In New Jersey, the provisions of Megan's Law apply to juvenile sex offenders by statutory mandate.[268] The clear language of the statute provides such an interpretation. Hawai'i's version of Megan's Law, however, does not provide similar clarity. The following section attempts to interpret the scope of Hawai'i's Megan's Law through the language of the statute itself and the underlying intent of the statute.

2. Hawai'i law

Hawai'i's version of Megan's Law divides the term "sex offender" into two categories.[269] First, it includes any person convicted of a sexually violent offense.[270] Second, it includes a criminal offense against a victim who is a minor.[271]

The language of the Hawai'i statute, unlike the statute involved in *B.G.*, does not specifically include juvenile sex offenders "adjudicated delinquent."[272] If Hawai'i's version of Megan's Law is to apply to juveniles,

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[264] *See id.* at 185.

[265] *Id.*

[266] N.J. STAT. ANN. § 2A:4A-47 (1994). The law states: "[a]ny order of disposition entered in a case under this act shall terminate when the juvenile who is the subject of the order attains the age of 18, or 1 year from the date of the order whichever is later . . . ." *Id.*

[267] *In re* B.G., 674 A.2d 178, 185 (N.J. Super. 1996). The court's interpretation of the statute was supported by the assertion that Megan's Law is not a disposition "under 'this act,' i.e., the Code of Juvenile Justice." *Id.*

[268] *Id.* at 184 (citing Doe v. Poritz, 662 A.2d 367, 377 (1995)).

[269] *See* Act 316, § 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 750 (definition of "sex offender"). The act also includes "any person who is charged with a sexually violent offense or a criminal offense against a victim who is a minor and is found unfit to proceed or who is acquitted due to a physical or mental disease, disorder, or defect pursuant to chapter 704." *Id.* This classification is not discussed because it is not pertinent to the scope of this Comment.

[270] *See id.*

[271] *See id.*

[272] *See In re* B.G., 674 A.2d 178, 184 (N.J. Super. 1996); *see also* N.J. STAT. ANN. § 2C:7-2 (West 1996).

a juvenile offender must first be classified as a "sex offender" in accordance with the statute.[273]

In Kansas, a juvenile adjudication is not considered a criminal conviction for the purposes of that state's Habitual Sex Offender Act.[274] Under the Act, a habitual sex offender required to register with authorities[275] is defined as "any person who, after the effective date of this act, is convicted . . . of any . . . sexually violent crime . . . ."[276] Because the plain language[277] of the Juvenile Justice System provides that "no [juvenile] case shall . . . be deemed or held to import a criminal act on the part of any juvenile,"[278] adjudications under the system are not criminal convictions.[279]

In contrast, in Washington, an appellate court upheld the application of a sex offender registration statute against juveniles on "review of the [statutory] language."[280] The use of the term "conviction" was intended to apply to both "adult convictions and juvenile adjudication for sex offenses."[281] The statute includes an "adult or juvenile . . . who has been found to have committed *or* has been convicted of any sex offense . . . ."[282]

In reaching its decision, the court pointed to the language of the statute in which an "adult or juvenile" shall be subject to the provisions of the statute.[283] More importantly, the statute is "not limited to defendants 'convicted' of a felony."[284] Rather, affected sex offenders are those found to have "committed" a sex offense or, in the alternative, "been convicted" for a sex offense.[285] Therefore, juvenile sex offenders that have "committed" a sex offense shall

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[273] *See* Act 316, § 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 750.

[274] State v. Ward, 886 P.2d 890 (Kan. App. 1994).

[275] *See id.* at 894. KAN. STAT. ANN §§ 22-4904 to -4905 requires "a habitual sex offender, after discharge from confinement, to register within 30 days with the sheriff of any county in which the offender resides for more than 30 days." *Ward*, 886 P.2d at 894.

[276] *Ward*, 886 P.2d at 894 (citing KAN. STAT. ANN § 22-4902(a) (Supp. 1993)).

[277] *See In re* Bernardino, 5 Cal.Rptr.2d 746 (Cal. App. 1992)(finding that the plain language of sex offender registration statute includes juveniles only if said juveniles are committed to Youth Authority); *see also* State v. S.M.H. 887 P.2d 903 (Wash. App. 1995)(finding that the sex offender registration statute is not applicable to juveniles found to have committed an offense with sexual motivation).

[278] KAN. STAT. ANN § 38-1601 (1993).

[279] *See Ward*, 886 P.2d at 895. The court further added that the legislature was aware of the differences between juvenile adjudications and criminal convictions. *See id.* "Had the legislature intended to include prior juvenile adjudications . . . such could have been done." *Id.*

[280] *See* State v. Acheson, 877 P.2d 217, 218-19 (Wash. App. 1994)(fourteen-year-old charged with first-degree molestation of three-year-old).

[281] *Id.* at 219.

[282] WASH. REV. CODE ANN. § 9A.44.130 (1) (West 1997)(emphasis added).

[283] *See id.*

[284] *Acheson*, 877 P.2d at 219.

[285] *See* WASH. REV. CODE ANN. § 9A.44.130 (1) (West 1997)

be subject to the sex offender statute.[286] In both cases, the inclusion or exclusion of juveniles was premised on the language of the statute.

Under the first classification provided by Hawai'i's version of Megan's Law, a sex offender subjected to the statute is "any person convicted of a sexually violent offense."[287] The question is, therefore, whether a juvenile that is "adjudicated delinquent"[288] of a sex offense in family court, equates to "any person convicted of . . ."[289] a sex offense in criminal court. In terms of policy, there is no difference.[290] In terms of statutory construction, the difference in language may exclude juveniles by its plain meaning.[291] The term "convicted of" precludes the inclusion of juvenile sex offenders under Hawai'i's law because an adjudication by the family court system "shall not be deemed a 'conviction.'"[292] If a juvenile sex offender is adjudicated delinquent of a sex offense covered by Megan's Law, that juvenile will not be subjected to its provisions under Hawai'i's first classification of "sex offender."

Under the second classification, a closer interpretation is needed. The statute states: "Sex offender means: Any person convicted of a 'sexually violent offense' *or* a 'criminal offense against a victim who is a minor.'"[293] The statute goes on to define a "criminal offense" which includes various crimes against children.[294] Clearly, this classification is specifically intended

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[286] *See Acheson*, 877 P.2d at 219.

[287] *See* Act 316, § 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 750.

[288] *See* HAW. REV. STAT. § 571-1 (1997).

[289] *See* Act 316, § 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 750.

[290] *See In re* B.G., 674 A.2d 178, 184 (N.J. Super. 1996). The court justified its decision to subject juveniles to the provisions of Megan's Law by pointing to the purpose of the law "to give people a chance to protect themselves and their children . . . ." *Id. See also* State v. Toyomura, 80 Hawai'i 8, 19, 904 P.2d 893, 903 (1995). "[W]e must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose." *Id.*

[291] *See* State v. Toyomura, 80 Hawai'i 8, 19, 904 P.2d 893, 903 (1995)("Where the language of the statute is plain and unambiguous, our only duty is to give effect to its plain meaning.").

[292] HAW. REV. STAT. § 571-1 (1997). The statute states, in pertinent part:

> The court shall conduct all proceedings to the end that no adjudication by the court of the state of any child under this chapter shall be deemed a conviction; no such adjudication shall impose any civil disability ordinarily resulting from conviction; no child shall be found guilty or be deemed a criminal by reason of such adjudication.

Id. But see In the Matter of Juveniles A, B, C, D, E, 847 P.2d 455, 457 (Wash. 1993). The court refused to rely on the "technical" meaning of the term "convicted" to preclude juvenile sex offenders from the requirements of HIV testing. *See id.* The court justified its holding on the use of the term "conviction" to apply to both adult and juvenile offenders. *See id. See also* HAW R. EVID. 609(c) (1994). Regarding the admissibility of evidence, the rule refers to juvenile proceedings as "juvenile convictions" in which evidence of such "juvenile convictions is admissible to the same extent as are criminal convictions . . . ." *Id.*

[293] *See* Act 316, § 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 750.

[294] *See id.* The statute states:

> Definitions . . . A '[c]riminal offense against a victim who is a minor' means any criminal

to protect children. Looking at the language of the statute, it is possible to construe its application against juveniles.

First, unlike the first classification, the term "convicted of" is not statutorily attached to the "criminal offense" classification of sex offender.[295] Precluding juveniles on the assumption that such a term is meant for both classifications is problematic because it is based on ambiguity. Furthermore, the term "criminal offense against a victim"[296] may be interpreted to include offenders that have committed but not necessarily been "convicted of" these offenses against children.[297]

Second, one category under the "criminal offense" definition specifically excludes juvenile offenders when "[sexual] conduct that is criminal only because of the age of the victim . . . [and] if the perpetrator is eighteen years of age or younger."[298] In other words, for instances of statutory rape involving two minors, Megan's Law does not extend to juveniles. All the other criminal offense categories against minors, however, such as kidnapping and imprisonment, do not specifically exclude or include juvenile offenders.[299] Therefore, under the "criminal offense" classification, it is possible to interpret the statute to apply to juvenile offenders, unless specified otherwise.

Third, the policy of Megan's Law tends to support the inclusion of juvenile sex offenders. Whether the perpetrator is an adult or a juvenile, the child victim has still suffered harm. Under Hawai'i's version of Megan's Law, all "sex offenders that prey on children"[300] should be considered an "extreme

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offense that consists of:

(a) Kidnapping a minor except by a parent;

(b) Unlawful imprisonment in the first degree of a minor, except by a parent;

(c) Criminal sexual conduct toward a minor;

(d) Solicitation of a minor who is less than fourteen years old to engage in sexual conduct;

(e) Use of a minor in a sexual performance;

(f) Solicitation of a minor to practice prostitution;

(g) Any conduct that by its nature is a sexual offense against a minor, but excludes conduct that is criminal only because of the age of the victim, as provided in section 707-730(1)(b) or section 707-732(1)(b) if the perpetrator is eighteen years of age or younger; or

(h) Any state, federal, or military law similar to paragraphs (a) through (g).

Id.

[295] *See id.*

[296] *Id.*

[297] *Cf.* State v. Acheson, 877 P.2d 217, 219 (Wash. App. 1994)(finding that requirements of registration statute not limited to "convicted" sex offenders).

[298] *See* Act 316, § 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 750.

[299] *See id.*

[300] *See* Act 316, § 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 749. The legislature pointed to the "devastating" effects that sex crimes have on its victims, including

threat to public safety."[301]

When a statute is ambiguous, the court must look to the legislative intent of its drafters.[302] The statute's legislative intent of "protecting children from [all] predatory sexual activity"[303] would be satisfied by its application against all dangerous sex offenders, including juveniles. One senate committee report, however, did refer to the exclusion of juveniles from the requirements of Megan's Law.[304] This issue of juvenile exclusion, however, was not addressed in any other committee report and the enacted bill does not specifically exclude juveniles.[305]

In any case, despite the possibility of statutory exclusion of juvenile sex offenders from the requirements of Hawai'i's Megan's Law, the primary policy behind the statute provides otherwise. Criminal laws motivated by public outcry are premised on public safety and are result-oriented. They are enacted quickly to accomplish a goal. The goal of protecting the public from sex predators is furthered by the inclusion of juvenile sex offenders.

D. Foreseeable Criticism

The majority of society agrees that sex offenders like Jesse Timmendequas, the predator who raped and murdered Megan Kanka, should be subject to the requirements of Megan's Law. What about previously convicted sex offenders undergoing treatment to control their deviant impulses? Should Megan's Law cast a shadow over these offenders as well?

1. Vigilantism

Affected sex offenders may suffer from potential acts of vigilantism.[306] This concern, however, must be balanced with the rights of the potential

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repeated patterns of behavior. *See id.*

[301] *Id.*

[302] *See* State v. Toyomura, 80 Hawai'i 8, 18, 904 P.2d 893, 903 (1995). The court stated, "when construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature." *Id.* "[Courts] may resort to extrinsic aids in determining legislative intent." *Id.* at 19, 904 P.2d at 904. "One avenue is the use of legislative history as an interpretive tool." *Id.*

[303] *See* Act 316, § 1, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 749.

[304] SEN. STAND. COMM. REP. NO. 1125, 19th Leg., Reg. Sess. at 2 (1997). The Senate Committee agreed that the requirements of Megan's Law should "apply only to convicted sex offenders and not to juveniles adjudicated of sexual offenses in Family Court." *Id.*

[305] *See* Act 316, § 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 750.

[306] *See id.* Doe v. Poritz, 662 A.2d 367, 430-431 (N.J. 1995)(Stein, J., dissenting). Justice Stein illustrates the potential for vigilantism by listing past injuries and harassment of released sex offenders that were subjected to the provisions of Megan's Law. *See id.*

victims that Megan's Law is meant to protect.[307]

Commentators in opposition of Megan's Law argue that affected individuals are "branded" as sex offenders which, in turn, provokes a "vigilante mentality."[308] In rebuttal, the misuse of information made available by Megan's Law has no bearing as to what the law accomplishes.[309] The Hawai'i legislature considered the ramifications of all interested parties and passed its version to "balance the scales of justice."[310] In regards to vigilantism, like any other group of criminals, those who commit illegal acts of vigilantism are susceptible to criminal punishment. In fact, some jurisdictions have enacted measures to address the misuse of sex offender information by enhanced sentencing.[311]

The *Poritz* court addressed the potential harm toward affected individuals by concluding that Megan's Law is characterized as being "remedial" without the intent to punish.[312] Moreover, the *Poritz* court asserted that the adverse affects are an "unavoidable consequence" and refused to "prejudge society with the ogre of vigilantism and harassment."[313] To sustain a remedy, the *Poritz* court supported the law. Thus, the mere possibility of hostility toward affected individuals is unconvincing.

Unlike other jurisdictions,[314] Hawai'i's version of Megan's Law only provides "public access" to sex offender information.[315] An affirmative step must be taken by the community to obtain sex offender information. Rather than "put a flier on a pole, [which] invites vigilante action," Hawai'i has the

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[307] *See* Kirsten R. Bredlie, *Keeping Children Out of Double Jeopardy: An Assessment of Punishment and Megan's Law in Doe v. Poritz*, 81 MINN. L. REV. 501, 540 (1996). Upholding the notification provisions of Megan's Law rests on policy considerations that examine the legislative purpose behind the statute and whether the effects of the statute exceed that purpose. *See id.*

[308] *See* Silva, *supra* note 6, at 1983. A 1993 Washington study showed that 26% of the sex offenders that were subjected to the requirements of Megan's Law were "harassed." *See id.*

[309] *See* Daniel L. Feldman, Comment, *The "Scarlet Letter Laws" of the 1990s: A Response to Critics*, 60 ALB. L. REV. 1081, 1114 (1997).

[310] *See* Act 316, § 1, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 749.

[311] *See* CAL. PENAL CODE § 290(q) (West 1997). The misuse of sex offender information to commit a felony shall "be punished, in addition and consecutive to any other punishment, by a five-year term of imprisonment . . . ." *Id.*

[312] *See* Doe v. Poritz, 662 A.2d 367, 388 (N.J. 1995).

[313] *Id.* at 422. Potential harm against released offenders was acceptable to the court since "[the] government ha[d] done all it can to confine that impact . . . ." *Id.*

[314] *See* Silva, *supra* note 6, at 1983. In Seattle, Washington, the sheriff's department passed out 1,000 flyers identifying a released sex offender. *See id.* The sex offender's house was burned down by vigilantes three days later. *See id.*

[315] *See* Act 316, § 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 751.

"best sex offender [statute] in the country."[316] Public response to sex offenders within the community cannot overshadow the threat these predators pose to unknowing victims.

2. False sense of security

Because Megan's Law does not completely guarantee protection against sex offenders, some commentators argue that its provisions promote a false sense of security.[317] Commentators also argue that because most victims know their attackers, Megan's Law will provide little added protection.[318] Both arguments provide practical assertions which fail to consider those victims, although small in number, the law attempts to protect.

While supporting Megan's Law, both the legislature and the public have never claimed that Megan's Law has "panacea status."[319] Hawai'i's version of Megan's Law is one safeguard for the prevention of sexual assaults. Although not perfect, the notification provisions provide the public with information to protect themselves. The public is well aware that the existence of sex offenders in the community is still a major problem. An author of a Law Review article in support of Megan's Law states, "[t]he existence of statutes that criminalize murder and rape, provides little solace to the victims of these horrible crimes, but that is no reason to eradicate those laws from the statute books."[320] Megan's Law is a "good start," although by no means perfect.[321]

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[316] Vik Jolly, *Sex Offender Plan Seeks Balance*, THE HONOLULU ADVERTISER, May 31, 1997, at A1. Dr. Barry Coyne of the Department of Public Safety, expressed his support for the means by which sex offender information is provided to the public under Hawai'i's version of Megan's Law. *See id.*

[317] *See* Connie Brinton & Tom Heinrich, *Now That Hawaii has Megan's Law . . . It Gives False Security*, THE HONOLULU ADVERTISER, July 20, 1997, at B3. The authors also point to other potential inadequacies in the law including simplicity, probability of mistakes, and criminal flight. *See id.*

[318] *See id.* Kathy Shimata, *Now That Hawaii has Megan's Law . . . Little Will Change*, THE HONOLULU ADVERTISER, July 20, 1997, at B3. Shimata mentions a study done by the Attorney General's Office that showed 85% of the victims of sexual assaults knew their attackers. Of these, family members and acquaintances accounted for a large percentage. *See id.*

[319] *See* Feldman, *supra* note 309, at 1108. Similar to Hawai'i, the authors of New York's version of Megan's Law never claimed that the law was perfect. *See id.*

[320] *Id.*

[321] *See* Silva, *supra* note 6, at 1984. Kansas's Attorney General, Bob Stephan, admits that their laws are not perfect, but any disagreement by opponents could be solved by leaving that jurisdiction. *See id.*

V. ALTERNATIVES

A. Rehabilitative Treatment

The "treatment" approach to juvenile sex offenders prior to and after release could be an alternative means of handling juvenile sex offenders.[322] Although some juvenile sex offenders are deemed to be "non-treatable,"[323] many offenders could receive successful "cognitive-behavioral" treatment including empathy training, relapse prevention, education, and social and life skills development.[324] Research has shown that "approximately eighty-five to ninety-five percent of the juvenile offenders enrolled in treatment programs . . . are rehabilitated through psychological treatment."[325] Moreover, studies display decreased recidivism rates for juvenile offenders that receive treatment.[326] Thus, given the statistical success of treatment, an increased availability of treatment programs to rehabilitate juvenile sex offenders is a reasonable alternative to the application of Megan's Law. Additionally, since a high percentage of adult sex offenders are prior juvenile offenders,[327] early intervention to rehabilitate these juveniles would prevent "career sex offenders."[328] This intervention gives the juvenile courts an opportunity "at a time when problems are apparent and with the authority to affect change."[329]

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[322] *See* Feldman, *supra* note 309, at 1104. The author says the "treatment" approach to sex offenders avoids the conflict between the rights of the sex offender and the safety concerns of the community. *See id.*

[323] *See* State v. Kuahuia, 1 Haw. App 226, 230, 617 P.2d 826. 829 (1980) The court states in pertinent part that: "the [juvenile defendant] was not treatable in any available institution or facility within the State designed for the care and treatment of children . . . ." *Id.*

[324] *See* Rothchild, *supra* note 1, at 747-748. Ninety-six percent of all sex offender treatment programs incorporate "cognitive-behavioral therapies." *See id.*

[325] *Id.* at 746.

[326] *See* Eric Lotke, *Sex Offenders, Does Treatment Work?*, CORRECTIONS COMPENDIUM, May 1996, at 3. Juveniles respond well to treatment, indicating that treatment could prevent further offenses. *See id.*

[327] *See* Rothchild, *supra* note 1, at 722. The article states, "experts estimate that [sixty] to [eighty] percent of adult sex offenders start as juveniles." *Id.* (citation omitted); *see also* Advertiser Staff, *Most of States Assault Victims are Minors, Know Attackers*, THE HONOLULU ADVERTISER, Feb. 2, 1997, at A25. The average age of a sex offender in prison is 24. *See id.* Dr. Barry Coyne, of the State Department of Public Safety, states, "[t]hese guys are committing offenses at a relatively young age." *Id.* "If we could have gotten to them earlier, we might have been able to do something." *Id.*

[328] Carlisle Interview, *supra* note 224.

[329] U.S. DEPARTMENT OF JUSTICE, COURT CAREERS OF JUVENILE OFFENDERS 66 (1988). The author, Howard N. Snyder, concludes that courts should intervene to rehabilitate youths early in their careers to prevent further court proceedings. *See id.*

Realistically, however, despite all the "good intentions" of treatment programs for juveniles, the only factor to consider is whether these programs are successful.[330] Here, wishful thinking toward the efficacy of treatment programs won't solve the problem of dangerous predators in the community. In fact, some commentators question the reliability of statistics that support the use of treatment programs to rehabilitate sex offenders.[331]

The National Institute of Corrections considers Hawai'i's treatment and management of adult sex offenders to be the "best"[332] in the nation.[333] Such a ranking is attributable to the establishment of the "Sex Offender Treatment Team" that provides uniform treatment practices, supervision of sex offenders, and monthly evaluations of their practices.[334] The legislature has successfully taken affirmative steps to treat adult offenders.[335] Affirmative steps should be taken to treat juvenile sex offenders as well.

In comparison to an adult sex offender, a juvenile sex offender's "deviant patterns are less deeply ingrained and are therefore easier to disrupt . . . ."[336] Children are "remarkably resilient"[337] and attempts should be made to turn them around. Under the current system, however, programs and facilities to successfully monitor and rehabilitate juvenile sex offenders are wholly inadequate.[338] Treatment programs can strike a balance between giving juvenile offenders a second chance and protecting the public through

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[330] Carlisle Interview, *supra* note 224. Mr. Carlisle stressed that the importance of treatment is the "success" of such treatment. *See id.* Further, there is no such thing as a "pill for rehabilitation." *Id.*

[331] *See* Feldman, *supra* note 309, at 1104. Credible evidence "supports the conclusion that there is no reliable treatment program currently available." *Id.*

[332] SEX OFFENDERS IN HAWAI'I: AN INFORMATIONAL WORKSHOP JANUARY 28, 1997, OVERVIEW OF SEX OFFENDER MANAGEMENT IN HAWAI'I 1, Jan. (1997). Since 1992, Hawai'i has displayed the best overall treatment and management of sex offenders in the nation. *See id.* Hawai'i, at one time or another, has displayed: the lowest recidivism rate for sex offenders in the nation; the highest percentage of sex offenders undergoing treatment in the nation, the highest conviction rates for sex crimes in the nation; and the highest success rate of registering known convicted sex offenders. *See id.*

[333] *See id.*

[334] *Id.* In 1991, the legislature passed Act 164 which established the "Sex Offender Treatment Team." *See id.*

[335] *See* HAW. REV. STAT. § 353E-1 (1994). This statute establishes a "statewide program" to treat sex offenders through a cooperative effort by "the department of public safety, the judiciary, and the Hawai'i paroling Authority . . . ." *Id.*

[336] Rothchild, *supra* note 1, at 751.

[337] Horowitz, *supra* note 21, at 96. Experts argue that treatment can help in even the worst cases of abuse received by the juvenile offender. *See id.*

[338] White, *supra* note 225, at B6; *see also* Kobayashi & Christensen, *supra* note 233, at A10. Due to the lack of treatment facilities, at least 15 juvenile law violators have been sent to "secured mental health and sex offender facilities" in other states. *Id.* This drastic measure is costly but necessary in certain instances. *See id.*

preventive on-going therapy. At this point in time, such an alternative is visionary. Until Hawai'i can provide proper treatment for juvenile sex offenders, added protection is necessary. The provisions of Megan's Law would, therefore, provide for the temporary protection of the public until the needed changes are made.

B. Statutory Inclusion of Serious Juvenile Offenders

Serious juvenile offenders account for a very small percentage of juvenile delinquents.[339] It is hypothesized, however, that serious offenders are responsible for a significant percentage of juvenile crime.[340] To address the heart of the problem, the application of Megan's Law against only serious juvenile sex offenders will focus on this small group of individuals not readily amenable to rehabilitation. The notification provisions of Megan's Law should, therefore, be implemented against these offenders for the safety of the community. New Jersey achieves this balance by their "three-tier classification system" which provides limitations to their notification provisions based on the probability of reoffense.[341]

Similarly, the federal government, through "get tough" reform measures, is focusing on chronic offenders and thus implying "the futility of rehabilitation and the desirability of punishment."[342] Appropriately, serious juvenile offenders are being treated more seriously.

Hawai'i's version of Megan's Law should be amended to specifically include juvenile sex offenders that commit serious sex offenses or less serious repeat offenses. Arguably, the family court system already provides a mechanism of "judicial waiver"[343] that automatically subjects serious juvenile offenders to criminal court in extreme instances.[344] If subjected to the crimi-

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[339] *See* Town, *supra* note 227, at B6. Violent or repeat juvenile offenders are a "very small percentage of the youth we see in court." *Id.*

[340] *See* THE JUVENILE JUSTICE PLAN SUPPLEMENT NO. 1, STATE LAW ENFORCEMENT PLANNING AGENCY C-1 (1979). In a famous study tracing 10,000 juveniles, six percent had committed five or more offenses prior to the age of 18 which accounted for two-thirds of all violent crime committed by the entire study group. *See id.*

[341] *See* Doe v. Poritz, 662 A.2d 367, 373 (N.J. 1995). New Jersey has a three-tier system based on the "likelihood that such offenders will commit another sex offense . . . where the risk is high, those members of the public likely to encounter the offender are notified." *Id.*

[342] ROBERTS, *supra* note 176, at 321-22.

[343] *See* HAW. REV. STAT. § 571-22 (1997).

[344] *See* HAW. REV. STAT. § 571-22(c)(1)-(2) (1997). The statute states:

> (c) If, incident to a hearing at which the person's prior court record under section 571-11(1) is established, the court determines that a minor of at least the age of sixteen has been charged with an act which would constitute murder in the first degree or attempted murder in the first degree, murder in the second degree or

nal court system, the provisions of Megan's Law shall apply to juvenile sex offenders as if they were adult offenders.[345]

This process of judicial waiver is usually performed at the discretion of the court on a case-by-case basis.[346] The court shall, however, be mandated to waive their jurisdiction if a juvenile offender is found to have committed serous criminal acts.[347] Such waiver of jurisdiction either by discretion or mandate rarely occurs.[348]

Moreover, regarding sex offenses, mandated waivers only occur if a juvenile offender commits two felony sex offenses which include at least one charge of sexual assault in the first degree involving sexual penetration of a person "fourteen years or younger" or of any person "by strong compulsion."[349] Furthermore, mandated waivers do not apply to juveniles that are sixteen or younger.[350] Hence, a 15-year-old juvenile can sexually assault a 10-year-old victim by force and still not be monitored upon release. This process cannot adequately protect the community when these juvenile offenders are allowed so many chances despite the extent of their crimes.

Serious juvenile sex offenders should be statutorily mandated to comply with the provisions of Megan's Law. This statutory scheme should recognize the difference between a sex predator and a sex offender.[351] For instance, a

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> attempted murder in the second degree, or a class A felony if committed by an adult and that the person is not committable to an institution for the mentally defective or retarded or mentally ill, the court *shall* waive jurisdiction and order the minor held for criminal proceedings, if such minor has been previously determined by a court to be a law violator by:
>
> (1) Committing any act involving force or violence or the threat of force or violence and which is prohibited by law as being a murder in the first degree, attempted murder in the first degree, murder in the second degree, attempted murder in the second degree or a class A felony; or
>
> (2) Committing two or more acts within the two years preceding the date of the offense for which the person is presently charged which are each prohibited by law as being a felony.

Id. (emphasis added).

[345] Carlisle Interview, *supra* note 224. If juvenile sex offenders are waived to criminal court, the provisions of Megan's Law shall apply as if that juvenile was an adult. *See id.*

[346] *See* HRS § 571-22 (a) (1997). Under the statute the family court has the discretion to waive its jurisdiction. *See id.*

[347] *See* HAW. REV. STAT. § 571-22(c)(1)-(2) (1997).

[348] Carlisle Interview, *supra* note 224. Kobayashi & Christensen, *Minors Face Lighter Penalties Than Adult Offenders Do*, THE HONOLULU ADVERTISER, Nov. 23, 1997, at A10. From 1995 to 1996, 12,370 juveniles were arrested; of these, 30 juveniles were tried as adults. *See id.*

[349] HAW. REV. STAT. § 707-730 (1996).

[350] *See* HAW. REV. STAT. § 571-22(c)(1)-(2) (1997).

[351] *See* Silva, *supra* note 6, at 1988. Distinctions between such offenders are typically made in sentencing. *See id.*

juvenile that commits aggravated rape should be differentiated from a juvenile convicted of indecent exposure. Juveniles automatically subject to Megan's Law should include all offenders that commit sexual offenses based on violence or lesser repeat offenses. This way, the law clearly focuses on the extent or recidivism of the offenses committed and their harsh effects on the victims. Danger posed by any individual reflects that individual's present disposition to offend, not the mere age of that individual.

VI. CURRENT TRENDS

Does the protection of the community and its children outweigh the protection of juvenile sex offenders? Lawmakers across the country are "redefining" the purpose of their juvenile system of justice by putting less emphasis on the traditional model of "rehabilitation."[352] In Hawai'i, besides the enactment of Megan's Law, other relevant criminal measures were passed during the 1996 Hawai'i Legislative Session.[353] These measures favor the protection of the community over any privacy or rehabilitative protection afforded to juvenile delinquents.

A. Juvenile Offenders Subject to Adult System

Juveniles as young as fourteen, under a recently passed bill, can now be tried as adults if accused of committing an offense which would be classified as a felony.[354] In other words, this law lowers the age in which a juvenile can

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[352] *See* Rothchild, *supra* note 1, at 735 n.75. Ten state statutes that have modified the role of "rehabilitation" in their juvenile court system include: ARK. CODE ANN. § 9-27-302 (Michie 1993); CAL. WELF. & INST. CODE § 202 (West 1984 & Supp. 1996); FLA. STAT. ANN. § 39.001(2)(a) (West 1988 & Supp. 1996); HAW. REV. STAT. § 571-1 (1993); IND. CODE ANN. § 31-6-1-1 (Burns Supp. 1995); MINN. STAT. ANN. § 260.011(2) (West 1992); TEX. FAM. CODE ANN. § 51.01(2) (West 1986); VA. CODE ANN. § 16.11-227 (Michie 1988); WASH. REV. CODE ANN. § 13.40.010(2) (West 1993); W. VA. CODE § 49-1-1(a) (1995). *See id.* (citation omitted).

[353] *See* Act 318, § 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 758-60 (lowering the age in which juveniles may be transferred to criminal court); *see also* Act 317, §§ 1-7, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 755-57 (opening of juvenile records and proceedings in certain instances).

[354] *See* HAW. REV. STAT. § 571-22(b)(1)(A)-(C) and (2) (1997). The amended statute states:

> The court may waive jurisdiction and order a minor or adult held for criminal proceedings if, incident to a hearing, the court finds that:
>
> (1) The person during the person's minority, but on or after the person's fourteenth birthday, is alleged to have committed an act that would constitute a felony if committed by an adult and either:
>
> (A) The act resulted in serious bodily injury to a victim;
>
> (B) The act would constitute a class A felony if committed by an adult; or

be transferred out of the Juvenile Justice System and all its added protection.

In reaching its decision, the legislature emphasized the "grossly inadequate"[355] prison terms for juveniles that have committed serious crimes. The legislature felt it was time to make "responsibility, deterrence, accountability, and appropriate punishment basic components of Hawai'i's Juvenile Justice System." [356] Here, any inconsistency with the rehabilitative premise of Hawai'i's Juvenile Justice System would be a moot issue.

The legislature clearly acknowledges the need for accountability measures regarding serious juvenile offenders. This intent, although not explicitly expressed, would favor the application of Megan's Law against juvenile sex offenders. By lowering the age in which a juvenile can be transferred to adult court, the legislature is providing a means for the court to treat certain juvenile offenders as adults. The application of Megan's Law provides similar results.

B. Confidentiality of Juvenile Records and Proceedings

Juvenile confidentiality is "rooted in the principle that [the] court serve as a rehabilitative and protective agency of the State."[357] Juvenile records, therefore, have been historically kept confidential for two reasons: 1) that publicizing juvenile records would be a form of punishment inconsistent with the Juvenile Justice System; and 2) that keeping such records confidential would avoid the harmful effects of stigmatization on the juvenile.[358] Mindful of these concerns, the Hawai'i State Legislature recently passed a bill allowing the records and proceedings of juveniles adjudicated of serious crimes to be open to the public.[359] As discussed above, the legislature points to the increasing crime rate of juvenile offenders. This legislation was intended to "maintain public safety, to restore public confidence in the juvenile justice system, and to send a message to certain juvenile law violators

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(C) The person has more that one prior adjudication for acts which would constitute felonies if committed by an adult; and

(2) There is no evidence the person is committable to an institution for the mentally defective or retarded or the mentally ill.

Id.

[355] H.R. 106, 19th Leg. 1st Sess., § 1 (1997)(H.D. 1).

[356] *Id.*

[357] Smith v. Daily Mail Publishing Co., 443 U.S. 97, 107 (1979)(Rehnquist, J., concurring).

[358] Gregory W. O'Reilly, Comment, *Illinois Lifts the Veil on Juvenile Conviction Records*, 83 ILL. B.J. 402, 403. (1995). The relaxation of juvenile confidentiality has spread across the nation in an attempt to deter juvenile delinquency by the "embarrassment and humiliation of publicity." *Id.* at 402.

[359] *See* 1997 Haw. Sess. Laws Act 317, § 1 at 755. The purpose of this act is "to eliminate the confidentiality of certain records of juvenile law violators adjudicated for *serious, repeat, or violent offenses*." *Id.* (emphasis added).

that their actions will be treated seriously."[360]

The legislature attempts to "balance the principles of protection and rehabilitation."[361] The law achieves this in its limited application to juvenile offenders who commit "serious, repeat, or violent offenses."[362] The law also provides juvenile records and proceedings to remain confidential if "significant and compelling circumstances" are shown.[363]

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[360] *Id.*

[361] *Id.* at 756. This chapter states, "[w]hile continuing to support the rehabilitative approach to juvenile justice, the legislature also recognizes that public safety and waning public confidence in the juvenile justice system necessitate the development of a legislative policy which balances these concerns with the principles of protection and rehabilitation." *Id.*

[362] *See* Act 317, § 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 755-57. The statute is limited in its application to serious juvenile offenders by stating in pertinent part:

> Juvenile law violators . . . :
>
> (b) Notwithstanding any other law to the contrary, in any proceeding in which a minor age fourteen years of age or older has been adjudicated by the court under section 571-11(1) for an act that, if committed by an adult would:
>
> (1) Be murder in the first degree or second degree or attempted murder in the first degree;
>
> (2) Result in serious bodily injury to a victim;
>
> (3) Be a class A felony; or
>
> (4) Be a felony and the minor has more than one prior adjudication for acts which would constitute felonies if committed by an adult;
>
> all legal records related to the above stated proceeding shall be open for public inspection . . . .
>
> (c) Notwithstanding any other law to the contrary, in any case in which a minor age sixteen years of age or older comes within section 571-11(1) is taken into custody for an act that, if committed by an adult would:
>
> (1) Be murder in the first degree or second degree or attempted murder in the first degree;
>
> (2) Result in serious bodily injury to a victim;
>
> (3) Be a class A felony and the minor has one or more prior adjudications for an act which would constitute a felony if committed by and adult; and
>
> (4) Be a class B or C felony and the minor has more than one prior adjudication for acts which would constitute felonies if committed by an adult;
>
> all legal proceedings related to the above stated case shall be open to the public . . . .

Id.

[363] *Id.* The law states in pertinent part:

> [The statute applies] unless the administrative judge of the family court or the judge's designee finds in writing that there are *significant and compelling circumstances* peculiar to the case of such a nature that public inspection would be inconsistent with or defeat the express purpose of this section.

Id. (emphasis added).

Analogous to the statute discussed above, the application of Megan's Law against serious juvenile offenders will also balance the principles of protection and rehabilitation. Because public safety and confidence in Hawai'i's Juvenile Justice System are valid concerns, serious juvenile sex offenders must be subjected to the requirements of Megan's Law and the possibility of stigmatization. In line with legislative reasoning, Megan's Law should apply to serious juvenile sex offenders.

C. Public Perception of Serious Juvenile Offenders

Recently, a highly publicized incident involving a Hawai'i juvenile and an off-duty police officer created numerous public perceptions on how the state should handle juvenile offenders.[364] On October, 27, 1997, Gabriel Kealoha, a minor, exchanged more than words with an off-duty police officer.[365] The officer fell to his death off a freeway overpass that day, allegedly at the hands of Kealoha. [366] The media was quick to present a youthful and innocent image of Kealoha,[367] in comparison to the off-duty police officer that was legally intoxicated at the time of the incident.[368] Who was the real victim, however, the juvenile or the decedent?

When legal proceedings were made public, the community's perception of Kealoha instantly changed from sympathetic to disgusted.[369] Kealoha had a "dark side" involving anger problems and other documented altercations.[370] For the public to make a reasonable decision regarding Kealoha's disposition,

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[364] *See* Editorial, *Juvenile Court: A Time for Openness*, THE HONOLULU ADVERTISER, Apr. 17, 1997, at A8. A "certain amount of mystery" will always surround the case of Gabriel Kealoha due to the "shroud of secrecy" around juvenile proceedings. *Id.*

[365] *See* Kim Murakawa, *Police Death Case in Youth Court*, THE HONOLULU ADVERTISER, Mar. 19, 1997, at A1. Kealoha allegedly shoved off-duty policeman Arthur Miller to his death during a scuffle on the H-1 viaduct. *See id.*

[366] *See id.* Juvenile offender, Gabriel Kealoha faced a "charge of manslaughter in a confidential juvenile court proceeding." *Id.*

[367] *See* Darren Pai & Kim Murakawa, *Suspect Portrayed as Good Student*, THE HONOLULU ADVERTISER, Oct. 30, 1996, at A1. Kealoha's school friends portrayed Kealoha as a good student who "turned his life around" and Kealoha's neighbor called him a "hero" who recently helped police nab a car thief. *See id.*

[368] *See* Murakawa, *supra* note 365, at A1. Officer Miller's blood-alcohol content was 0.16%, twice the legal limit. *See id.* at A11.

[369] *See* Darren Pai, *Kealoha is Denied Release*, THE HONOLULU ADVERTISER, June 28, 1997, at A1. Youth prison administrator John Shinkawa's "perspective changed" when he learned what the punishment for Kealoha's alleged offense was if Kealoha was tried as an adult. *Id.* at A2.

[370] *See id.* at A1. Judge Darryl Choy denied Kealoha's release from incarceration to attend the University of Hawai'i. *See id.* The judge pointed to Kealoha's "dark side that is sinister and became lethal" during his scuffle with Officer Miller. *Id.*

the public needed more information. As a matter of policy, information must be set forth to better serve the public when compelling issues arise. This lack of information creates false perceptions. Consequently, the scales of justice begin to falter.

Similarly, regarding previously convicted sex offenders, the public needs more information. Once informed, the public can then, and only then, make a reasonable decision regarding their safety. Despite the young age of juvenile sex offenders, their presence is both threatening and realistic. No difference should be made between adults and juveniles when their victims suffer the same fate.

It is clear that the legislature is taking a close look at juvenile crime in Hawai'i. It is also clear that other state agencies are interested in tracking juvenile offenders.[371] Looking at this direction, despite the probable harm juvenile sex offenders will encounter from the provisions of Megan's Law, the scales of justice will tip in favor of the victim.

"There is no greater right than a parent's right to raise a child in safety and love."[372]

VII. CONCLUSION

Concern over the devastating effect of sex crimes has risen to display an urgent need for a remedy. Megan's Law was created to require strict monitoring of previously convicted sex offenders.[373] At first glance, the clear language of Hawai'i's version of Megan's Law does not include previously convicted juvenile sex offenders.[374] Furthermore, the application of Megan's Law against juveniles is inconsistent with the rehabilitative philosophy of Hawai'i's current Juvenile Justice System.[375] The restrictive nature of the registration and notification provisions would have a severe impact on the lives of all affected juvenile sex offenders.[376]

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[371] *See* Rod Ohira, *Hawaii to Track Juvenile Offenders*, THE HONOLULU STAR-BULLETIN, Oct. 14, 1997, at A1. The article states: "Hawai'i is aiming to become the first state to set up a juvenile justice tracking network based on current data provided by police, prosecutors, Family Court, and correctional staff." *Id.* at A1. The system is meant to provide timely and accurate information to agencies and researchers which includes: arrest, charge, disposition, status and background information. *See id.* at A1, A8.

[372] STAND. COMM. REP. No. 379, 19th Leg., Reg. Sess. (1997)(citing President Clinton as he signed the federal sex offender measure into law).

[373] *See* N.J. STAT. ANN. §§ 2C:7-1 to -11 (West 1996).

[374] *See* Act 316, §§ 1-8, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 749-55.

[375] *See* HAW. REV. STAT. § 571-1 (1997).

[376] *See supra* text accompanying note 306.

In the interest of public policy, however, measures must be set forth to protect the public from serious juvenile sex offenders. Such reasoning is based on the policy behind Megan's Law and is recognized by both federal and state regimes. The law was motivated by public outcry and premised on the compelling interest of public safety.[377] At this juncture, the mere definition as to what constitutes a sex offender seems trivial. To protect the public from serious juvenile sex offenders, this Comment proposes the following.

Rehabilitative treatment is a reasonable alternative to the application of Megan's Law and a way to give juvenile offenders a second chance. Unlike adults, the success rate of rehabilitating juvenile sex offenders is much higher. The state must intervene early and provide adequate treatment programs which include both out-patient and secured residential programs. By doing so, the prevention of future adult offenders will also be achieved. Unfortunately, Hawai'i, like many other jurisdictions, does not have the funds to provide such treatment. Until such rehabilitative programs are implemented, the application of Megan's Law is another means of protecting the public. Consequently, a balance will be struck between the rights of the public and the individual rights of affected juveniles because of the given circumstances.

The second suggestion is to limit the scope of Megan's Law to certain juvenile sex offenders. The legislature should amend Hawai'i's current version of Megan's Law to specifically include serious juvenile sex offenders. The classification of a "serious juvenile sex offender" should be clearly set out by the extent of the offense or the number of repeat offenses. The recent trend of Hawai'i's legislature treating serious juvenile offenders in a non-rehabilitative manner supports this suggestion.

Similar to the three-tier system of New Jersey, subjecting only the high-risk juvenile offenders will target the heart of the problem—serious juvenile offenders that are accountable for the majority of violent crimes.[378] Limiting Megan's Law to serious juvenile offenders also parallels federal and state legislation that requires stiffer penalties for serious juvenile offenses. The Juvenile Justice System would still serve its rehabilitative purpose for most juveniles, however, the serious offenders will be held more accountable.

In consideration of a juvenile's age, the lifetime requirements of Hawai'i's Megan's Law should be subjected to judicial review after a certain time period.[379] Serious juvenile sex offenders, at some point in their lives, may

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[377] *See* Doe v. Poritz, 662 A.2d 367, 375 (N.J. 1995). The court stated, "[c]learly, both the Legislature's and the public's increasing awareness of the dangers posed by sex offenders triggered laws here, and elsewhere . . . ." *Id.*

[378] *See supra* note 340 and accompanying text.

[379] *See* COLO. REV. STAT. ANN. § 18-3-412.5(7) (West Supp. 1996). In Colorado, sex offenders are provided a second chance according to the extent of the offense. *See id.* Persons subject to the requirements of Megan's Law may petition the court for an order to discontinue

deserve a second chance. Any second chance, however, must be justified by clear and convincing evidence of rehabilitation and approved upon a judicial hearing.

Despite arguments of displaced policy, a citizen's ability to protect himself and his family is a right,[380] not a privilege. The mechanism provided by Megan's Law to warn the public regarding the existence of serious juvenile sex offenders, although not perfect, supports this inherent right.

Carter Allen Lee[381]

registration requirements. *See id.* The seriousness of the offense shall determine when the sex offender may petition the court. *See id.* For serious felonies, the sex offender can petition 20 years "from the date of such person's final release"; for less serious felonies it drops to 10 years; and for misdemeanors its five years. *See id.*

[380] *See* Doe v. Poritz, 662 A.2d 367, 373 (1995). The court stated, "society has the right to know [the] presence [of sex offenders] not in order to punish them, but in order to protect itself." *Id.*

[381] Class of 1999, William S. Richardson School of Law. The author would like to thank his family for their patience, love, and support.

Searching for Confidentiality in Cyberspace: Responsible Use of E-mail for Attorney-Client Communications

I. INTRODUCTION: DOES E-MAIL PROVIDE A SOLUTION TO AN ATTORNEY'S COMMUNICATION NEEDS OR DOES IT OPEN THE DOOR TO MORE PROBLEMS?

Imagine yourself as member of a law firm which represents ABCD Incorporated in a major products liability case. ABCD maintains a web site for advertising purposes,[1] and lists an electronic mail ("e-mail") address therein for customer contact.[2] For the convenience of its executive officers, who are frequently occupied or away on travel, ABCD opens an e-mail account for you using its own Internet Service Provider.[3] This account enables you to provide the periodic updates on legal affairs that the executives desire. For example, one recent e-mail states:

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[1] *See* Edias Software International v. Basis International, 947 F. Supp. 413, 420 (D. Ariz. 1996). A Web site is an information screen located at a specific Internet address which may be accessed by users to exchange information with a particular host. *See id.*

[2] *See id.* at 419. Similar to other forms of communication, e-mail users have unique computer addresses to which messages may be sent. Traditional mail requires a street address and telephone calls utilize an area code and phone number for the same purpose. *See id.*

[3] *See* Robert Carson Godbey, *Body Surfing on the Net*, HAWAII B. J., Aug. 1997, at 6-7. Godbey describes the Internet as "a public telephone network for your computer." The public domain of the Internet contrasts the "private telephone networks" for computers employed in large corporations for many years, and the "[p]assword protected networks, such as CompuServe and America Online." The Internet has a broader public reach and has served government and educational functions for the past twenty years. *See id.* at 7.

> We have completed a critical research memorandum which will be delivered to you tomorrow . . . note that we have concluded that arguments one and two mentioned in our prior discussions and memoranda are well supported, but case law contrary to the third argument could present problems.

On occasion, you also use the e-mail account for quick corresponce with other attorneys and parties involved in the ABCD litigation. After receiving a scheduling inquiry from you, opposing counsel notices that you and ABCD share Internet Service Providers as indicated by the common address extension. Your opponent then proceeds to request the production of all e-mail transmitted between your firm and ABCD. Upon your assertion that such information is privileged attorney-client communication, opposing counsel responds that any applicable privilege was waived by transmitting the messages over the public domain of the Internet, and the ability of your Internet Service Provider to inspect your correspondence.[4]

Would a judge protect the confidentiality of your e-mail? Has the door to prior discussions and memoranda referenced in the e-mail been opened? If you believe these questions are easily answered, and in the negative, you may be in for a rude and costly awakening about the realities of electronic communication.

II. THE ENTRY OF ATTORNEY-CLIENT COMMUNICATION INTO THE COMPUTER AGE.

Innovations in communication are among the many new electronic technologies which are fundamentally changing the legal industry.[5] Just as attorneys have embraced express mail and wireless telephone service as indispensible means of communicating in practice, they will continually be offered new means for responding to clients with increasing promptness and

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[4] *See* Wendy R. Leibowitz, *"Can We Talk?" E-Mail is Ethics Maze*, THE NAT'L L.J., Aug. 18, 1997, at A1. Hypothetical presented here is adapted from a "nightmare scenario" offered by attorney Daniel Joseph, litigation partner and ethics officer in the Washington, D.C. office of Akin, Gump, Strauss, Hauer & Feld L.L.P. Mr. Joseph contemplates a seemingly bland message—"A new draft of the brief will be delivered to you tomorrow. We reversed Points One and Two because we think argument two is stronger" being somehow intercepted by opposing counsel. Mr. Joseph hypothesizes that the opposing side could argue that privilege was waived for all e-mail relevant to the issue by virtue of the above message being sent in unencrypted form. *See id.*

[5] *See* Thomas L. Sager, *Paradigm Shifts that Will Transform the Legal Industry*, CORP. LEGAL TIMES, Mar. 1997, at 14. In addition to WAN (wide area network) capabilities, Sager refers to "globalization, value billing, convergence, diversity, metrics, . . . strategic partnerships and collaboration" as innovations which are reshaping the practice of law. *See id.*

diligence.[6] Each novel technology is a further departure from simpler times when attorney and client communication consisted of face-to-face conferral between the two.[7]

Historically, each new development in communication technology has required examination by the courts to determine how established core legal concepts would be applied to it.[8] For example, the issue of whether Fourth Amendment protection extended to telephone calls was open to debate between the invention of the telephone until 1967, when the United States Supreme Court held that a reasonable expectation of privacy exists for parties to telephone calls.[9] The Court examined the technology involved and considered the manner in which it had been used—and misused—with respect to communicating private information.[10]

Judges, practitioners, and commentators have begun the process of applying established legal principles to the relatively new communication medium of e-mail.[11] E-mail allows people to send and receive messages incorporating text, graphics, and/or sounds via computer to others with e-mail accounts.[12]

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[6] *See* Mary Frances Lapidus, *Using Modern Technology to Communicate with Clients: Proceed with Caution and Common Sense*, HOUS. LAW., Sept.-Oct. 1996, at 39. Telephone and facsimile service are already regarded as necessities in the practice of law, while cellular telephones and e-mail are increasingly viewed as integral tools of the responsive practitioner. *See id.*

[7] *See* JACOB PALME, ELECTRONIC MAIL 5 (1995)(identifying ordinary face-to-face meetings as being "same time/same place" in usage, video and audio conferences as being "same time/different place" in usage, and electronic mail, voice mail, and computer conferencing as usually being "different time/different place" in usage).

[8] *See* United States v. Maxwell, 45 M.J. 406 *available in* LEXIS at *6 (U.S. Armed Forces 1996). "New technologies create interesting challenges to long established legal concepts." Fourth Amendment privacy concepts must be reexamined in light of the proliferation of networked computers, just as when the telephone, automobile, and cellular telephone came into widespread use. Moreover, the court recognized that its opinion and the others sure to follow will affect each of us who logs onto the "information superhighway." *Id.*

[9] *See* Katz v. United States, 389 U.S. 347, 360 (1967). Where government officials electronically listened to and recorded the words spoken by the defendant into a telephone reciever in an enclosed booth, the Court held that the surveillance violated the privacy upon which the defendant justifiably relied, and thus constituted an unlawful "search and seizure." The fact that the electronic device used by the government did not penetrate the walls of the telephone booth was of no consequence. *See id.* at 353.

[10] *See id.*

[11] *See* Lee Batdorff, *Untangling the Web: Online Commerce Boom Creates New Legal Chaos*, CRAIN'S CLEVELAND BUS., Mar. 3, 1997, at 19 (quoting attorney Wilton Sogg's view that society's response to technological advances such as e-mail is neither immediate nor thought out by the participants).

[12] *See* William P. Matthews, *Encoded Confidences: Electronic Mail, The Internet, and the Attorney-Client Privilege*, 45 U. KAN. L. REV. 273, 274-75 (1996). E-mail is composed on a computer, typically using software which allows the user to use word processing features such as spell checking. E-mail messages may also include the transmission of graphics, sounds,

Millions of people use e-mail service every day for both business and personal reasons.[13] The legal community has found e-mail to be a valued vehicle for quick, inexpensive communication of messages of all sorts.[14] Given the potential of e-mail to replace paper in correspondence and court filings, it is almost inevitable that the use of electronic communication will become universal throughout the legal profession.[15] As the number of e-mail users multiplies,[16] an increase in cases where the content and discoverability of e-mail messages prove critical to the outcome of the case would be expected.[17]

The rapid growth in popularity of e-mail use has revealed some of its hidden pitfalls to unwitting users.[18] All too often, messages containing sensitive or improper material are sent to unintended addressees with a simple

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movies, and other digitally encoded materials instead of or in addition to simple text messages. *See id.*

[13] *See* Reno v. American Civil Liberties Union, 117 S. Ct. 2329 (1997). At the time of the 1996 trial, the number of Internet users was estimated at 40 million people, with that number expected to grow to 200 million by 1999. *See id.* at 844.

[14] *See* John Montana, *Legal Issues in EDI*, RECORDS MANAGEMENT QUARTERLY, July 1996, at 39. "Electronic Data Interchange," or EDI, has been responsible for a substantial decrease in the use of paper documents for the exchange of information. The electronic exchange brings numerous benefits, including: reduced costs; faster, more complete data interchange; and quicker availability and access to information. *See id.*

[15] *See* Charles R. Merrill, *E-mail for Attorneys from A to Z*, 443 PRACTISING LAW INSTITUTE/PATENTS 187, Dec. 1996, at 189. The relevant question is when, not whether, e-mail will become universal among all attorneys, their clients, and judges. Merrill believes e-mail will overcome the natural tendency to resist new technology and is destined to become an indispensible communication tool in the legal profession. *See id.*

[16] *See Symposium, Lawyers Online: Discovery, Privilege, and the Prudent Practitioner*, 3 B.U.J. SCI. & TECH. L. 5 (1997)(mentioning studies suggesting that the growth in e-mail popularity has caused a decline in business-to-business traditional postal mail of 35% over the past seven years, with e-mail volume predicted to reach 60 billion messages sent in the year 2000)[hereinafter *Symposium*].

[17] *See What You Need to Know About Recent E-mail Cases*, THE INTERNET NEWSL., June 1997, at 10. Now that practitioners have discovered that discovery of e-mail can be a "gold mine—or a nightmare," e-mail messages are appearing more frequently in litigation and playing a part in court decisions. *Governors of U.S. Postal Serv. v. U.S. Postal Rate Comm'n*, 654 F.2d 108 (D.C. Cir. 1981) is recognized as the first published case in which e-mail played a significant role. *See id.*

[18] *See* James E. Reynolds, *A Tasteless E-Mail Cost This 11-Year Employee His Job*, MONEY, Aug. 1997, at 109. An engineer at the University of Oklahoma's power plant lost his job due to a tasteless e-mail sent at work. The engineer intended to send a message to a friend which included an explicit reference to a dirty practical joke the two had played involving a crude photo of a nude woman. The e-mail address of the intended recipient was misspelled, and the undeliverable message was directed to the power plant's postmaster. The postmaster then forwarded the message to twelve university officials, who decided that the engineer should be terminated. *See id.*

click of the "send" button.[19] Even e-mail long forgotten and believed deleted has been known to reappear unexpectedly,[20] leaving its sender in an extremely compromising position.[21] A well-documented example was the assortment of Iran-Contra-related e-mail correspondence generated by Oliver North, portions of which became public in Senate hearings and subsequent litigation.[22] Another noteworthy case was *Siemens Solar Industries v. Atlantic Richfield Company*,[23] in which an internal e-mail message discovered by the plaintiff revealed the secret belief of Atlantic Richfield Company ("ARCO") that the new technology of a subsidiary purchased by Siemens was not commercially viable.[24] Once revealed, a "smoking gun" e-mail message can be used to the overwhelming advantage of an adverse party.[25] Clearly the vast majority of

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[19] *See* Alan Stern, *Electronic Mail Raises Thorny Legal Questions*, THE DENVER POST, Apr. 8, 1996, at C-12. The speed and ease of e-mail encourages quick, reactionary communication and creates the false impression that the parties are engaged in a private conversation. Once the composer "presses the 'send' button" or "send[s]" the message, he or she has no control over who else may subsequently receive and read it. *See id.*

[20] *See id.* The computer system backup procedures typically employed by companies to preserve important data save copies of e-mail data as well. Furthermore, a file thought to be "deleted" on a personal computer actually remains stored on disk until overwritten, and can be retrieved quite easily by an experienced user. *See id.*

[21] *See* Wendy J. Rose, *The Revolution of Electronic Mail*, THE LEGAL INTELLIGENCER, Jan. 21, 1997, at 9. Minutes after an altercation between motorist Rodney King and members of the Los Angeles Police Department, Officer Laurence Powell sent a flippant e-mail message stating, "Oops, I haven't beaten anyone so bad in a long time." *Id.*

[22] *See* Armstrong v. Executive Office of the President, 97 F.3d 575, 577 (D.C. Cir. 1996). Plaintiff Armstrong sought all documents found in the Professional Office System ("PROFS") maintained by the Executive Office of the President and National Security Council. PROFS contained e-mail correspondence, memoranda, and calendars. *See id.*

[23] No. 93-1126, *available in* WESTLAW, 1994 WL 86368, at *1 (S.D.N.Y. Mar. 16, 1994). The allegations brought by the plaintiff Siemens were based, for the most part, on the opinions of ARCO officials ascertained from the e-mail. However, even the telling e-mail messages were not enough to overcome the plaintiff's failure to comply with applicable statutes of limitations of three years from the date of violation, or one year from plaintiff's discovery of the same. Nevertheless, the lawsuit would probably not have been filed at all if not for the revelation provided by the sensitive e-mail message thought by its sender to be private. *See id.*

[24] *See id.*

[25] *See* Michelle Singletary, *Loose Lips an E-Mail Hazard*, THE WASH. POST, Apr. 6, 1997, at F12. The article quotes New York labor attorney Stephen L. Shienfeld as stating "[c]laimants are now searching the e-mail systems looking for smoking guns." With well-publicized messages entitled "Why Beer is Better than Women" and "Ebonics 101" floating around computer networks everywhere, evidence of hostile working environments is readily available. *See id. See also* Kelly Vogel, *E-mail Users Beware*, NORTH DAKOTA EMPLOYMENT LAW LETTER, June 1996. Employers are urged to take steps to ensure that electronic communication does not come back to haunt them in wrongful discharge or other employment litigation. E-mail can serve as evidence of discrimination, particularly if it contains obscenities or admissions of a supervisor's intent to create a hostile or discriminatory work environment. Vogel suggests that

e-mail users are communicating with a highly overestimated sense of security.[26] The problem of sensitive e-mail intended to be private becoming public is generally the result of the senders' mistaken perception that the message is informal, confidential, and not permanent.[27] E-mail software is very versatile, providing the capability of forwarding messages, addressing multiple parties, and storage of messages with remarkable ease.[28] These same easy features can lead to confidential information being obtained, examined, and saved by parties unknown to the original sender.[29] Correspondence may even be forwarded to third-parties with tremendous ease and without the permission or knowledge of the original sender.[30]

Many users are inclined to believe that their messages are "ephemeral" and incorporeal in nature, only existing as electronic impulses.[31] However, e-mail

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all employees be informed of the public nature of the information entered into their computers and educated to prevent inflammatory language contained in e-mail from later finding its way into evidence. *See id.*

[26] *See Symposium*, *supra* note 16, at 5. "From a technical and a legal standpoint, the attitude of the majority of e-mail users is wrong. When asked why they use e-mail, most answer that it replaces the telephone. What we have in today's environment are people bringing an informal, telephone call mentality into a medium that has permanent, or at best, semi-permanent retention." *Id.*

[27] *See* Samuel A. Thumma & Patricia Hubbard, *E-Mail Can Deliver Legal Problems*, ARIZ. BUS. GAZETTE, Oct. 17, 1996, at 15 (noting that employees have a tendency to treat e-mail akin to "water-cooler gossip," when in actuality, the inaccuracies and exaggerations which are frequently a part of such conversations may be recorded permanently when communicated as an electronic message).

[28] *See* PALME, *supra* note 7, at 35. The sender of e-mail is able to input the names of one or more recipients to whom the message is to be sent. Once recipients have read the message, they are given the opportunity to perform various actions, such as writing a reply to the sender, writing a reply to all other recipients of the message, forwarding the message to one or more new recipients, archiving the message, and/or removing the message from their own mailbox. *See id.*

[29] *See Privileged Communications*, TEX. LAW., Mar. 31, 1997, at 22. The article offers excerpts from an online discussion relating to the experiences of in-house attorneys in communicating with co-workers about privileged information via voice mail. Josh King, attorney for Cellular One wrote: "I responded via the voice mail system to a request from a sales manager for legal advice relating to a distributor. The next day, he sent me a message thanking me for the advice and informing me that he had forwarded my voice mail to a half-dozen or so employees—and to the distributor in question!" Voice mail and e-mail messages are both electronic files on a computer which can be sent, stored, and forwarded in a similarly convenient fashion. *See id.* Voice mail systems are defined as "electronic mail systems for spoken messages." PALME, *supra* note 7, at 38.

[30] *See* United States v. Maxwell, 45 M.J. 406 at *8; *see also* Gary M. Stern, *The Era of E-Mail*, LEGAL ASSISTANT TODAY, Sept.-Oct. 1996, at 45-47.

[31] *See* Betty Ann Olmsted, *Electronic Media: Management and Litigation Issues When "Delete" Doesn't Mean Delete*, DEF. COUNS. J., Oct. 1996, at 523. Even mere electronic impulse constitute legal documents in the eyes of a court, and can be subpoenaed and seized,

has greater potential for permanence than most other forms of communication, as both senders and recipients of e-mail are able to save the messages on disk, tape, or hardcopy[32] and make seamless modifications.[33] Furthermore, the use of telephone lines for computer communication leaves open the potential for the interception of transmitted messages.[34]

Legislators have become increasingly aware of the need for privacy and security in electronic communication, and have broadened statutory protection against the interception of communication to include e-mail.[35] Nevertheless, the regulation of new technology is by nature reactionary, rather than preventive.[36] Typically, lawmakers and even the inventors themselves are unable to foresee the flaws of innovation, and are forced to take subsequent measures to correct problems and abuses.[37] Thus, until legislatures and the judiciary address the evidentiary parameters of e-mail, attorneys will await direction as to when e-mail is an appropriate vehicle for communication with their clients.[38]

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no matter how meaningless or trivial. *See id.*

[32] *See* Thumma & Hubbard, *supra* note 27, at 15 (identifying the likely sources of preserved e-mail as the sender's computer, the company's computer network, the recipient's computer, or a printout; "the more important, spicy or inflammatory . . . the message, the more likely it will be retained").

[33] *See* Montana, *supra* note 14, at 39. Large documents can be sent electronically across the world in a matter of minutes, in a form which can be edited and printed by the recipient. In contrast, transmission of a paper document across the country is at least an overnight process, at a substantially higher cost. Furthermore, corrections to paper documents involve more difficulty and delay. *See id.*

[34] *See* Leibowitz, *supra* note 4, at A1. According to Kevin J. Connolly, counsel to New York's Eaton & Van Winkle, some liken the expectation of privacy in e-mail to that of a telephone or fax because e-mail traverses identical wires. Implicitly, the chance of e-mail interception would thus be comparable to that of a wired telephone call being intercepted by wiretap or other means. *See id.*

[35] In 1986, Congress passed the Electronic Communications Privacy Act (ECPA), 18 U.S.C. §§ 2510-2520 (1994), discussed *infra* at Part IV. The legislation prohibits uauthorized interception of e-mail and unauthorized accession of e-mail stored in a computer's memory. *See id.*

[36] *See* Lee Batdorff, *supra* note 11, at 19 (noting that the use of e-mail in the legal community, analogized to pending litigation, will "take[] 3, 5, [or] 7 years before it works through the [legal] system").

[37] *See* Alan Stern, *supra* note 19, at C12. As with many new technologies, e-mail has infiltrated our culture faster than the law has been able to keep up with. Many businesses may not realize that their use of e-mail treads on the edge of surrendering confidentiality, as the scope of legal protection is yet undetermined. *See id.*

[38] *See* PALME, *supra* note 7, at 177. Even with the ongoing adoption of legislation, the field of electronic communication represents an emerging field which resists being fully controlled by law. Palme notes that laws attempting to control a technology under development "will easily be antiquated and can even cause more harm than benefit." *Id.*

The attorney who incorporates e-mail into her practice must consider the evidentiary issues, professional responsibilities, and her ethical obligations associated with its use.[39] She should decide whether a duty exists to explain to a client the limitations of the attorney-client privilege and the possibility that their use of e-mail could destroy the privilege.[40] Her responsibility may even extend to ensuring that her computer system and software meet a minimum threshold of security sophistication.[41] Such an obligation would demand that practitioners keep abreast of developments in technology as well as the law.[42] With respect to the use of e-mail and the Internet to communicate sensitive information, the current state of the law presents more questions than answers.[43]

The objective of this Article is to determine whether an attorney may form the requisite reasonable expectation of confidentiality in e-mail transmitted via the Internet to assert the attorney-client privilege. The doctrine of privilege is intended to serve justice and the public interest by facilitating communication between attorneys and clients.[44] However, any expectation of confidenti-

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[39] *See* William C. Smith, *Offering Legal Advice Over Internet May Lead to Cyber-Malpractice*, THE LEGAL INTELLIGENCER, May 19, 1997, at 6. Whether communicating with clients in person, by telephone, or electronically via the Internet, lawyers remain bound by ethical and professional responsibilities. Villanova law professors Catherine J. Lanctot and James E. Maule advise practitioners not to avoid the new technologies, but to use them with old-fashioned common sense. *See id.*

[40] *See* Steven A. Heinrich and Roxana Dastur Malladi, *Security, The Internet and the Networked Office—Problems for Law Offices*, OR. ST. B. BULL., Dec. 1995, at 15, 18. Until the courts provide answers to these questions of an attorney's obligations, practitioners must interpret for themselves the scope of their duties in protecting their clients' confidentiality and avoiding malpractice claims. *See id.*

[41] *See id.* at 16. The article suggests that the security system installed on an attorney's Internet-linked computer should meet some threshold of sophistication if the attorney intends to store confidential client information therein. The only foolproof safeguard against unauthorized intrusion is an "air gap" separating office computers from the Internet and phone system. *See also* Montana, *supra* note 14, at 30. From legal and commercial standpoints, implementation of any security scheme could, in many cases, impose costs that far outweigh the benefits. *See id.*

[42] *See* Leibowitz, *supra* note 4, at A1. Attorney Daniel Joseph warns that by the time the issue of e-mail waiver of attorney-client privilege is brought before a judge, technological norms may have further evolved. For example, encryption may become more widespread, thus transforming an attorney's reasonable standard of care. *See id.*

[43] *See* Smith, *supra* note 39, at 6. Despite the lack of established definitive rules from courts and ethics board relating to lawyers' use of the Internet, many practioners "are not waiting for a roadmap before embarking on their legal adventures on the Internet." *Id.*

[44] *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)(noting that the purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy depends upon the lawyer's being fully informed by the client").

ality and privilege would not be reasonable unless the technical process of transmitting an e-mail message was found to be private and secure.[45]

Comments in the popular media have suggested that encryption or some other security precaution must be employed to preserve the privilege.[46] State bar associations have also entered the debate by publishing ethics opinions which attempt to guide attorneys in the use of technology, but their positions have been met with criticism.[47] These published recommendations remain speculative at best because courts have not opined on the issues of confidentiality and privilege for Internet e-mail.[48] This Article anticipates the judiciary's answer to the question of whether privilege may extend to e-mail, based on the reasonableness of an expectation of confidentiality.

An e-mail user's expectation of confidentiality in communications would be primarily based on technological and statutory protections against unauthorized access.[49] Part III of this discussion explores the technology of e-mail, its capabilities, and the practical limitations which give rise to questions about security and confidentiality. In Part IV, the existing statutory framework governing the protection and accession of private communications is examined for its ability to ensure confidentiality.

Then, in Part V, the parameters of the attorney-client privilege will be evaluated to determine whether e-mail is likely to meet the requisite standard of confidentiality. Part VI complements the privilege discussion with consideration of an attorney's ethical obligations, which should influence the use of e-mail in practice as much as the legal limitations do.

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[45] *See* Matthews, *supra* note 12, at 279. E-mail transmission over the Internet faces various security risks; some risks are unique to e-mail, others are more common to many other forms of communication. All, however, "pose the danger that confidential information will be read, altered, or blocked by a third party." *Id.*

[46] *See* Gary Stern, *supra* note 30, at 45-47. The article warns that consequences of sending unencrypted e-mail could prove disastrous. The author speculates that information previously protected by the privilege could be discovered by opposing counsel. *See id.*

[47] *See* Leibowitz, *supra* note 4, at A1. Vermont, Illinois, South Carolina, New York, and Iowa have issued opinions supporting privilege and an expectation of privacy in unencrypted communication, although Iowa requires a client's consent to his/her attorney's sending confidential information by e-mail. Some of the advisory opinions have been criticized as contradicting each other, and some appear to be specific to the current technology and unable to adapt to advancements. *See id.*

[48] *See* Alan Stern, *supra* note 19, at C-12. As is typical with new technologies, the law has not been able to keep pace with the ever-increasing use of e-mail. Therefore, many people and businesses are using e-mail without realizing that the legal parameters applicable to the medium are far from settled. *See id.*

[49] *See* Reno v. American Civil Liberties Union, 117 S. Ct. 2329, 2336 (1997). An accurate assessment of Internet security is complicated by the fact that no single organization owns or controls the network. There is no central location from which web access or services can be blocked. *See id.*

III. THE TECHNOLOGY OF ELECTRONIC MAIL COMMUNICATION OFFERS VIRTUALLY INSTANTANEOUS TRANSMISSION ACROSS THE GLOBE, BUT NOT WITHOUT SOME SACRIFICE IN SECURITY

As the name suggests, e-mail bears many similarities to traditional mail delivered by the postal service,[50] which is replaced in the electronic context by a network service provider.[51] Each e-mail message bears the unique addresses of the sender and recipient, a postmark, and the body.[52] Like postal mail, an e-mail is stored in a "mailbox" until opened by its recipient.[53] The figurative storage containers are located in the memory of computers belonging to the network service provider.[54] Typically, an electronic mailbox is more secure than its old-fashioned counterpart, as e-mail account holders are required to enter a secret, personal password to access the messages in storage.[55]

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[50] *See* Matthews, *supra* note 12, at 274. *See also* PALME, *supra* note 7, at 9. Ironically, despite the similarities between postal mail and e-mail, research shows that only 6% of e-mail is sent as a substitute for postal mail. 27% of e-mail replaces phone calls and face-to-face meetings combined, and 65% of e-mail is new communication altogether. *See id.*

[51] *See* American Civil Liberties Union v. Reno, 929 F. Supp. 824, 833 (E.D. Penn. 1996). "Service providers" are commercial and non-commercial entities which offer telephone modem or direct cable access to a computer or network linked to the Internet. *See id.*

[52] *See* PALME, *supra* note 7, at 4. Other modern new communication modes, such as facsimiles and voice mail, which attach data including the sender's and recipient's addresses and a time/date postmark to the message body, could conceivably be interpreted as "electronic mail". *See id.* In the case of Internet e-mail, there are means for sending anonymous messages through one of a number of anonymous remailers. Remailers work by receiving e-mail and then forwarding it to the intended recipient using a pseudonym. Proponents of anonymity argue that it benefits the free exchange of communications, while opponents believe that irresponsible behavior is a result. *See id.* at 49-50.

[53] *See id.* at 41. Most message storage systems are equipped with a temporary database, often called a mailbox, for the proper organization of messages received. Some systems also include an advanced information retrieval system, through which documents are archived according to keywords or other important characteristics for later use. *See id.*

[54] *See id.* at 274-75; *see also* United States v. Maxwell, 45 M.J. 406 at *8 (U.S. Armed Forces 1996). Commercial service provider America Online ("AOL") stores e-mail in its central computer for access and retrieval for five weeks to allow for the possibility of vacations and extended trips, and then messages are purged from the system. *See id.*

[55] *See* William A. Hodowski, *Comment: the Future of Internet Security: How New Technologies Will Shape the Internet and Affect the Law*, 13 COMPUTER AND HIGH TECH. J. 217, 273 (1997). Strong password access systems on computers and network accounts are recognized as indispensible components to maintaining a "chain of security" in protection of Internet communications. *See id.*

However, e-mail differs so completely from postal mail in quality and transmission that the two are arguably not even competing media.[56] In light of these stark functional and technological contrasts, the question of whether the evidentiary treatment of e-mail messages should mirror that of postal letters remains unanswered in the courts and legal community.[57] Commentators have expressed their fear that the inability of judges to understand the technology may lead to misguided decisions on evidentiary issues pertaining to e-mail.[58] Hence, a discussion of the physical components and the process involved in the transmission of e-mail is necessary in determining the level of security to be expected.[59]

A. Networks of Connected Computers Provide Both Intended and Unintended Public Access to Information

The most fundamental requirement for electronic communications is a group of linked computer terminals, called a "network."[60] The computers must be linked by either direct cable or telephone lines and share a common protocol, or conversational format.[61] Private companies of all sizes have

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[56] *See* PALME, *supra* note 7, at 24. Electronic mail messages can be written in an average of four minutes because the computer supports the writing and reading, and the messages tend to be more informal. E-mail is also available to the recipient within a few seconds or minutes after being sent. On the other hand, postal letters require an average of half an hour to compose, and reach their destination in a matter of days. Postal letters also have the capability for the signing of letters and support the production of formal letters with higher demands on correctness and neatness. The difference in quality between the media precludes a meaningful comparison. *See id.*

[57] *See* Leibowitz, *supra* note 4, at A1. There is significant concern and confusion in the legal community as to how secure electronic communication technology is. Attorney Daniel Joseph is quoted as saying that "[p]eople are worried about unintentional waiver [of privilege] and a wacky judge." *Id.*

[58] *See id.* Attorney Daniel Joseph warns that at some time in the future, a judge who has read about potential insecurity of electronic communication may be presented with the issue of whether the attorney-client privilege was unintentionally waived by transmission of e-mail over the Internet. By then, encryption may be more widely used, and the judge may decide that unencrypted e-mail does not bear the requisite expectation of confidentiality. *See id.*

[59] *See* Charles R. Merrill, *How to Ensure Security in Electronic Communication; Connecting With Confidence*, NEW JERSEY L.J., Nov. 13, 1995, at S2. Even the "nontechnical business lawyer" should have some working knowledge of the terminology and basic concepts involved in the transmission of messages and techniques to keeping messages secure. *See id.*

[60] *See* American Civil Liberties Union v. Reno, 929 F. Supp. 824, 830 (E.D. Penn. 1997).

[61] *See* Matthews, *supra* note 12, at 275. In order for e-mail messages to be transmitted between computers, the network on which the messages are transmitted must support common "protocols," or specifications of conversational rules by which two different systems are to communicate. *See id.*

utilized in-house networks, or "Intranets," as the perfect medium for their internal communications.[62]

The advantages of networked computers include the exchange of data files and messages within the network, along with the sharing of resources such as software and printers.[63] Some Intranets are entirely internal within a corporation or work group, and unconnected to other computers or networks outside the immediate group.[64] So configured, a network would remain insulated from outsiders and warrant a high expectation of privacy.[65] However, the finite size of the internal network eliminates the opportunity for external communication and transmission of data.[66]

Many networks are externally linked to other computers or networks, which in turn are linked to still other networks in a web of connections referred to as the Internet.[67] This immense network affords each affiliated computer the capability of communicating with any of the other computers within the system.[68] The Internet encompasses computers numbering in the tens of millions, located around the world.[69] Users are able to browse the wealth of information maintained on the many servers[70] located throughout the global

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[62] *See* Giuliano Chicco, *Quietly, Intranets Boom*, THE NAT'L L.J., May 13, 1996, at C1 (noting that a private network is presently in the operational or development stage at every Fortune 500 company).

[63] *See id.* at C1. Users of a corporate network have the ability to access current corporate communications, such as job postings, standard procedures, and forms. A document stored on an intranet location may be downloaded anywhere in the world, ready to be used, in a matter of seconds, allowing the company to freedom to decentralize. The computer system may also be used as a powerful data collection tool to elicit information from users. *See id.*

[64] *See American Civil Liberties Union*, 929 F. Supp. at 831.

[65] *See* John Janes, *Responding to the Age of Cyberspace*, LAW TECH. PROD. NEWS, Mar. 1997, at 40. Internet access continues to present security concerns which hinder its use in law firms and other commercial functions. The perception of insecurity has fueled the popularity of Intranets, "where security is easier to accomplish because physical access can be restricted and firewall sytems are available." *Id.*

[66] *See* Curt A. Canfield & Joseph Labbe, *Web or Windows?: Planning for Internet/Intranet Technology*, N.Y. L.J., Jan. 21, 1997, at S2. Intranets are "internal Webs—for private access only," as opposed to a computer or network connected to the public online community. While users of an internal network receive the benefit of their data being protected from unauthorized access, they are deprived access to the wealth of public information and marketplace of ideas available via external networks. *See id.*

[67] *See American Civil Liberties Union*, 929 F. Supp. at 831.

[68] *See id.*

[69] *See* Chris Katopis, *Searching Cyberspace: The Fourth Amendment and Electronic Mail*, 14 TEMPLE ENVTL. L. & TECH. J. 175, 179 (1995). Katopis adds that it is difficult to ascertain an exact figure due to the lack of a central registration system, among other factors. *See id.*

[70] *See* Reno v. American Civil Liberties Union, 117 S. Ct. 2329, 2335 (1997). The World Wide Web is one means of communication over the Internet, by which users are able to retrieve information stored on computers throughout the network. Each of the electronic documents has

network.[71] Furthermore, e-mail may be transmitted to any address linked therein.[72]

Published estimates suggest that by the year 1999, some 200 million people will be Internet users, including a significant number of attorneys and law firms.[73] Along with the increasing integration of network technology comes increased vulnerability of files and networks to outside tampering and other breaches of privacy.[74] Maintaining a link to the Internet unlocks the door to hackers who may invade and terrorize entire computer systems with notorious ease.[75] While that mode of computer crime is beyond the scope of this paper, the possibility that hackers may access files and information thought to be secure is relevant to a study of e-mail privilege.[76]

Still another networking alternative is the recent development of the "Extranet," which offers a compromise between the external communication

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its own unique address similar to a telephone number. Users may either enter the address of a known document or search the Web by keywords to locate documents of interest. *See id.*

[71] *See Document: ITAA Discussion Paper, 'Intellectual Property Protection in Cyberspace: Towards a New Consensus', available in* WEST'S LEGAL NEWS 13241, 1996 WL 710185, *11 (Dec. 12, 1996)(referring to the Internet as "a global 'network of networks;" and "a vast international collection of networks, computers and software, all working together to form the world's first digital information infrastructure"), copy on file with author.

[72] *See* PALME, *supra* note 7, at 1. Many of the electronic mail systems are currently networked together, so that users can typically send mail to each other regardless of which mail system each is connected to. When connected, the aggregate of individual electronic mail systems behave as one large system. *See id.*

[73] *See American Civil Liberties Union*, 929 F. Supp. at 831.

[74] *See* Monty D. Kaufman, *Warding Off the Dark Side of Cyberspace*, MASS. LAW. WKLY., Oct. 14, 1996, at 29. The future success or failure of law firms may depend on their adoption of new technology into their practice. Kaufman warns that "[a]ttorneys who cling exclusively to manual typewriters, paper-based research and traditional methods of commmunication have a better chance of making it to the Smithsonian than making it to a courtroom." *Id.* Nevertheless, the technology inevitably carries with it the potential for greater vulnerability. Effective use of the technology includes developing "a thorough understanding of the best and the worst that it has to offer." *Id.*

[75] *See* Richard Behar, *How We Invaded a Fortune 500 Company*, FORTUNE, Feb. 3, 1997, at 58 (documenting an demonstration by the WheelGroup Corp., a San Antonio security firm that conducts "external assessments" of computer system security, in which the firm was given permission to attack the computer network of a guinea pig corporation and was able to hack deep into the company's system).

[76] *See* Arthur L. Smith, *E-Mail and the Attorney-Client Privilege* (visited Nov. 25, 1996, copy on file with author) <http://www.abelaw.com/bamsl/lpm/email.htm>. There is a real risk of interception of Internet e-mail communications passing through the "hands" of several service provider systems en route to its destination. "Such interception is, of course, a criminal act; however, the criminality of the interception of cellular phone calls or of the theft of documents from a lawyer's briefcase is not enough to prevent a loss of privilege in those circumstances." *Id.*

capabilities of the Internet with the limited public access of an Intranet.[77] An Extranet is "a third-party network that houses the information or database servers between two or more parties who want to share data and applications with a higher level of security than the [I]nternet can provide."[78] As an example, an Extranet linking a corporate legal department and outside counsel would provide a useful, dedicated avenue of communication.[79] Although Extranet communication may be better protected from the general public, the presence of a third-party network service provider between the communicants clouds the issue of attorney-client privilege.[80]

As the above description indicates, there are marked differences between the security levels of an Intranet, Extranet, and the Internet. It logically follows that different expectations of confidentiality would appropriately be associated with e-mail sent via each type of network. Therefore, the technology utilized to transmit electronic communication is a fundamental consideration in confidentiality expectations.

B. Electronic Mail Transmission: the Obvious Benefits and Unseen Dangers

The many advantages of e-mail make it the communication vehicle of choice some 200 million times per day.[81] The process of sending e-mail

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[77] *See* Janes, *supra* note 65, at 40. 1997 marks the year of the "Extranet." As a compromise of sorts between the internal network functions of an Intranet and the external public network access of the Internet, the Extranet is well suited to applications which involve private communications between specific parties. *See id.*

[78] *Id.*

[79] *See id. See also* Canfield & Labbe, *supra* note 66. Extranets are still fairly new to the legal profession, but have been credited with improving the quality of work product, streamlining the exchange of substantive and financial information, and allowing firms to work more closely with their clients. Presently, legal Extranets are typically used for document exchange, online discussion, and e-mail. However, Extranets are beginning to handle more advanced litigation functions, including case management, litigation support, electronic forms, and billing. *See* Canfield & Labbe, *supra* note 66, at 52.

[80] *See* Janes, *supra* note 65, at 40. The greater security offered by Extranets should serve as a boost to electronic commerce. *See id.* One may infer that if the technology may reasonably be viewed as sufficiently secure to conduct financial transactions and transmit credit card numbers, then there would also be an expectation of confidentiality to support an attorney-client privilege.

[81] *See* Richard Behar, *Who's Reading Your E-mail?*, FORTUNE, Feb. 3, 1997, at 58. *See also* PALME, *supra* note 7, at 31. In addition to potential savings in money and time, there are several other significant advantages of electronic mail. First, the ability to receive and send information at the user's convenience eliminates interruptions and allows communication when one may be otherwise unreachable. Next, e-mail allows the transmission of precise factual information in a useful, written form. Thirdly, there is greater equality among users and opportunity to voice one's opinion in an e-mail discussion than in an in-person meeting. *See*

through the Internet is similar to traditional "snail mail," but there are important differences.[82]

Similar to most paper letters generated today, e-mail typically begins with text composition using a word processing function of a workstation or personal computer.[83] The user attaches to the message the names of one or more intended recipients and a command that the e-mail be delivered.[84] The sender's computer retains the original file and transmits a copy of the original electronic document to its network server.[85] The server is a "hub" computer responsible for managing the requests of its attached clients to retrieve or send mail, among other tasks.[86] In the e-mail transmission, the server stores the file it receives and forwards another copy to a series of intermediate servers, or stations, en route to the intended address.[87]

The "store and forward" method serves the interest of efficient transmission, but also significantly reduces the security of messages because the technology involves the copying of messages.[88] The process is intended to efficiently route the message through the path of servers providing the least obstruction, thereby minimizing transmission time.[89] However, with each "handling" by an intermediate server, the message is copied and stored,

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PALME, *supra* note 7, at 31.

[82] *See* Robert L. Jones, *Client Confidentiality: A Lawyer's Duties with Regard to Internet E-Mail* (as modified Aug. 16, 1995, copy on file with author) <http://www.computerbar.org/netethics/bjones.htm> (noting that since the advent of the Internet, "snail mail" has been commonly used to refer to postal delivery provided by the U.S. Postal Service).

[83] *See* PALME, *supra* note 7, at 4.

[84] *See id.* at 35.

[85] *See* Olmsted, *supra* note 31, at *2.

[86] *See* Ng Ken Boon, *Networking; The Setting Up of a Home Network*, THE NEW STRAITS TIMES, June 23, 1997, at 58. A "server" services many needs of a group of attached "client" computers within a network. In addition to being a mail server, a server may act as a file server providing and controlling access to the files stored on the network, a print server directing print requests to a shared printer, and a web server providing access to the Internet. *See id.*

[87] *See* PALME, *supra* note 7, at 60. The sending computer transmits the electronic message to the nearest intermediate station, where it is copied to secure memory. Once the entire message has been stored in the intermediate station, the sending computer receives confirmation. The intermediate station thereby accepts responsibility for transferring the message in the same way to the next station until the message arrives at the receiving computer. *See id.*

[88] *Id.* Direct connections offer a distinct advantage in security and reliability, as the sender and recipient are separated only by cable, and not intermediate servers. With the store and forward method, messages are susceptible to loss due to technical failures at intermediate stations. *See id.*

[89] *See* Matthews, *supra* note 12, at 278. An intermediate station will initially attempt to forward the message via the most direct route. But, in the event of blockage, the transmitting intermediate station will find an alternative next station so that the message is effectively routed around problems on the Internet. *See id.*

leaving a trail of copies on the servers through which it has passed.[90] An increased number of intended addressees therefore multiplies the replication and retention of residual copies.[91]

Once a message is received by the addressee, he or she may read and delete that copy.[92] However, each copy deposited on intermediate servers remains intact until individually erased or overwritten. The stored copies of the original file are accessible to the owners of the intermediate machines with minimal recovery effort. Even after "deleted" from memory, backup procedures may capture the entire purged file onto an archive tape if the file had not yet been overwritten, thus leaving a copy of the file recoverable and discoverable.[93] As this summary of the technical process of e-mail transmission indicates, the medium is susceptible to infringements on confidentiality at several stages in the delivery process.

Other distinctions between e-mail and "snail mail" place the confidentiality of electronic messages further into question. First, users commonly address e-mail by selecting an entry in a personal address book corresponding to an individual or group of e-mail addresses.[94] Thus, simply highlighting the wrong entry could mean mistakenly sending the message intended for a confidant to the network media with the click of a button.[95] Secondly, during its traverse of telephone lines and computer cables in the form of electronic

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[90] *See* Olmsted, *supra* note 31, at 523 (noting that the number of copies generated and stored is at least equal to the number of intermediate servers, but may increase exponentially with each additional recipient of the message; depending on the network structure, the message may go through two or many more servers).

[91] *See id.*

[92] *See* Geanne Rosenberg, *Electronic Discovery Proves an Effective Legal Weapon*, N.Y. TIMES, Mar. 31, 1997, at D5. Even executing the typical "delete" function on a computer or network typically does not actually remove the file from memory. "Delete" merely moves the document to idle locations on the hard drive. *See id.*

[93] *See* Thumma & Hubbard, *supra* note 27, at 15 (noting that the contents of many computer systems are retained in archives which may not be cleared for months or years in the absence of a formalized, effective procedure to properly erase them).

[94] *See* Paul Fasciano, *Internet Electronic Mail: A Last Bastion for the Mailbox Rule*, HOFSTRA L. REV. 971, 990 n.66 (1997). The cumbersome task of typing in each recipient's unwieldy e-mail address can be avoided by storing frequent correspondents' addresses in a computer address book. Stored addresses may be grouped, such as "All Employees," and the group could be selected as the recipient of a message. *See id.*

[95] *See* George Mannes, *The 5 Sins of E-Mail*, DAILY NEWS, Apr. 13, 1997, at 36. Twenty-four years ago, before the invention of e-mail, TV newsperson Linda Ellerbee discovered the hazards of electronic communication. While working in the Dallas bureau of the Associated Press, Ellerbee used one of the company's new word processors to type a personal letter to a friend. In that letter, she insulted many people, including her boss. Ellerbee pressed the wrong button on her computer, and rather than print out one copy of the letter for herself, she accidentally sent it to newspapers, television, and radio outlets in four states! *See id.*

impulses, the typical Internet e-mail message has been likened to a postcard or unsealed envelope sent via the postal service.[96]

C. The Encryption Alternative Provides Some Measure of Security for Messages Transmitted over the Internet

One possible means by which e-mail users may effectively seal their unsealed envelope of e-mail communication is through encryption.[97] Encryption utilizes a key of mathematical algorithms to scramble a message through encoding by the sender, rendering it unreadable except to the holder of a secret decryption key.[98] The e-mail is encrypted prior to transmission, which means that all copies routed and stored on network stations are the processed version of the message.[99] Upon receipt by the addressee, a decryption key consisting of a series of binary digits specific to the encoding key is used to transform the message back into useful form.[100]

Encryption appears to be a viable solution to the dilemma of e-mail confidentiality, but there are obstacles to its use. First, the keys must be kept secure and changed frequently to maintain security.[101] The transfer of secret keys between the two designated users is a potential point of vulnerability, as the transfer must occur outside the unsecured channel which is sought to be protected by the encryption.[102] Secondly, encryption software currently on the domestic commercial market contain algorithms so powerful that the United States Government has prohibited the export of such devices.[103] Thus,

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[96] *See Electronic Mail's as Private as a Billboard on the Road; There Isn't Much Protection for E-Mail, and People are Finding Out They're Responsible For What They Send*, THE PLAIN DEALER, May 13, 1996, at 5D. Attorney David Sobel of the Electronic Privacy Information Center states, "[i]t's become a cliche that e-mail is more like a postcard than a letter in a sealed envelope." Moreover, Sobel compares e-mail to "a postcard that might be getting Xeroxed in every post office it might pass through." *Id. See also* Richard Behar, *supra* note 81, at 64.

[97] *See* Josh McHugh, *Politics for the Really Cool*, FORBES, Sept. 8, 1997, at 172 (describing encryption, or cryptography, as the "science of scrambling messages so they cannot be read by prying eyes. . . . [T]he lifeblood of telephone commerce—credit card verifications, bank teller machine transactions, [and] wire transfers").

[98] *See* Albert Gidari, *Privilege and Confidentiality in Cyberspace*, THE COMPUTER LAW., Feb. 1996, at 1.

[99] *See* PALME, *supra* note 7, at 76 (noting that encryption is particularly useful in there is are particularly unreliable phases of message handling, because processing of encrypted information is typically not possible prior to decryption).

[100] *See id.* at 77.

[101] *See id.*

[102] *See id.*

[103] *See* 22 U.S.C. § 2778 (1995). *See also* McHugh, *supra* note 97, at 172. Three years ago, Federal Bureau of Investigation Director Louis Freeh told members of the International

communication by encrypted e-mail with foreign clients may not be legally possible.[104] Nevertheless, these considerations should not prevent attorneys and clients from effectively implementing encryption protection into their domestic communication practices.

The narrow possibility exists that an unintended person with access to the intended recipient's computer could log in as the authorized user, thereby activating the decryption capabilities, and receive the message in its unencrypted form. Nevertheless, user passwords are generally recognized as a significant precaution in minimizing that possibility.[105] The district court in *United States v. David*[106] held that defendant's electronic memo book was analogous to a "closed container" by virtue of a password protecting the contents.[107] The court added that "unless the owner of the container voluntarily surrenders the key . . . finding the key does not, in itself, give . . . the right to use it."[108]

On balance, encryption seems to be a viable answer to the concern about insecurity on the Internet.[109] Encoding messages prior to placing them in the Internet domain appears to be a reasonable precautionary measure for attorneys and clients to take if the confidentiality of e-mail communication warrants protection.[110]

IV. STATUTORY BASES FOR AN EXPECTATION OF CONFIDENTIALITY AND FREEDOM FROM UNAUTHORIZED ACCESS TO COMMUNICATION

Since 1968, extensive statutory provisions have been adopted to protect the wire, oral, and electronic communication of individuals from unauthorized

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Cryptography Institute that the FBI is looking at kidnappers, terrorists, banking integrity, proprietary interests, and economic secrets in its examination of the ramifications of encryption technology. *See* McHugh, *supra* note 97, at 172.

[104] *See* McHugh, *supra* note 97 (noting that critics find the governmental restrictions to be more "ridiculous than pernicious"). Opponents to regulation of encryption devices scoff at the thought that terrorists would be deterred from using encryption because of a law. However, attorneys are firmly bound by the constraints placed on international export of encryption devices. *See id.*

[105] *See* Stern, *supra* note 30, at 47. Stern mentions the example of a paralegal who limits e-mail communication of specific information to her firm's internal system because of its series of passwords and sign-ons which are difficult to break through. *See id.*

[106] 756 F. Supp. 1385 (D. Nev. 1991).

[107] *Id.* at 1390.

[108] *Id.* at 1391.

[109] *See* American Library Ass'n v. Pataki, 969 F. Supp. 160, 165 (S.D.N.Y. June 20, 1997)("While first class letters are sealed, e-mail communications are more easily intercepted.").

[110] *See id.* ("Concerns about the relatively easy accessibility of e-mail communications have led bar associations in some states to require that lawyers encrypt sensitive e-mail messages in order to protect client confidentiality.").

intrusion.[111] While these laws support an expectation of confidentiality in communication, exceptions are provided to authorize providers of communication services to peer into the messages they handle.[112] Given those exceptions, the question remains as to whether it is reasonable to believe that such communications may be sufficiently confidential to uphold the attorney-client privilege despite their availability to the service provider.

A. Federal Prohibition of Interception under Title III

The federal statutory basis of protection against the interception of private communication is the Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III").[113] Title III, as originally adopted, prohibited the unauthorized interception of "wire and oral communications."[114] The statute and subsequent amendments[115] represent the attempts of Congress to balance the privacy rights of individuals in their communication against the needs of law enforcement.[116]

The initial legislative provisions were adopted in response to the definitive "expectation of privacy" case decided by the Supreme Court the previous year, *Katz v. United States*.[117] In *Katz*, the Court held that electronic surveillance of the defendant's telephone call violated the privacy to which he was entitled in a phone booth.[118] Subsequent to the *Katz* decision, Congress adopted the first statutory prohibitions on the unauthorized interception of communication.[119]

The practical definition of "interception" as opposed to seizure was recently clarified by the Oklahoma Court of Appeals in *State v. One Pioneer CD-ROM Changer*.[120] In a forfeiture case involving the seizure of a computer containing 150,000 e-mail messages, the owner's contention that the seizure was an "interception" of his communication in violation of Title III was rejected.[121] The court held that the lawfully executed seizure was not within the definition

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[111] *See* 18 U.S.C. §§ 2510-2522, 2701-2711 (1994).

[112] *See* 18 U.S.C. § 2511(2)(a)(i) (1994); 18 U.S.C. § 2702(b) (1994).

[113] *See* Federal Wiretap Act §§ 2510-2520, 18 U.S.C. §§ 2510-2520 (1994). 18 U.S.C. § 2521 was added as part of the Electronic Communications Privacy Act of 1986 ("ECPA"), and 18 U.S.C. § 2522 was added in 1994.

[114] *See* 18 U.S.C. § 2511(1)(a) (1968).

[115] Significant amendments to Title III occurred in 1994, 1990, 1988, 1986, 1978, and 1970.

[116] *See* Askin v. McNulty, 47 F.3d 100, 101 (4th Cir. 1995).

[117] *See* Katz v. United States, 389 U.S. 347 (1967).

[118] *See id.* at 354.

[119] *See* 18 U.S.C. §§ 2510-2520 (1968).

[120] 891 P.2d 600 (Okla. Ct. App. 1994).

[121] *See id.* at 605-06.

of interception prohibited under Title III.[122] Title III is significant as the initial recognition by Congress of the need for statutory assurances of privacy in communication. Civil and criminal cases continue to arise out of the Title III provisions, which have been amended over the nearly thirty years of their existence to accommodate further advances in communication technology.[123]

B. Electronic Communications Privacy Act of 1986 Addresses the Protection Accorded All Electronic Communication Against Intrusion

The Electronic Communications Privacy Act of 1986 ("ECPA"),[124] an amendment to Title III, broadened the scope of prohibition to include the interception of "electronic communication," which clearly includes e-mail.[125] The ECPA defines electronic communication in a broad fashion to maximize its coverage of existing and developing electronic data technology.[126] The definition provided for interception is similarly broad, referring to "acquisition" without requiring that it be simultaneous to the actual transmission.[127]

Under the amended statute, private individuals and the government are restrained from intercepting or disclosing the contents of protected wire, oral, or electronic communication under threat of criminal or civil penalty.[128] Moreover, the use or disclosure of information, with knowledge or reason to know that the information was obtained by unlawful interception, is prohibited under the statute.[129] A limited exception is carved out for the interception,

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[122] *See id.* The court cites 18 U.S.C. § 2510(4), which defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." *See* 891 P.2d at 606 n.5.

[123] *See* 1986 U.S.C.C.A.N. 3555, 3555-57 (declaring the purpose of the ECPA amendment as being "to update and clarify Federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies").

[124] Pub. L. No. 99-508, 100 Stat. 1848 (codified as amendments at 18 U.S.C. § 2510-2520).

[125] *See* 18 U.S.C. § 2511 (1994).

[126] *See* 18 U.S.C. § 2510(12) (1994). Title III as amended by the ECPA defines "electronic communication" as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce." *Id.*

[127] For the language of section 2510(4), see *supra* note 122.

[128] *See* 18 U.S.C. § 2511(1) (1994). Under the Communications Assistance for Law Enforcement Act ("CALEA") amendments to Title III, "any person who— (a) intentionally intercepts . . . (b) intentionally uses . . . or (e)(i) intentionally discloses . . . the contents of any wire, oral, or electronic communication . . . shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5)." *Id.*

[129] *See* 18 U.S.C. § 2511(1)(c) (1994).

use, or disclosure by authorized service provider personnel[130] acting within the scope of their employment.[131]

Given the strong public policy against the interception of communications, Congress decided to eliminate the evidentiary usefulness communication obtained by means made unlawful by the ECPA. Hence, "[w]henever any wire[132] or oral[133] communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial . . . if the disclosure of that information would be in violation of this chapter."[134]

The provision which leaves privilege undisturbed is significant to this discussion because it demonstrates Congress' belief that we should be able to use electronic communications without fear of waiving rights of confidentiality. The possibility that electronic communication may be illegally intercepted does exist, yet in light of 18 U.S.C. § 2515, the threat of criminal acts should not deter confidential communication. Nevertheless, depending on the nature and sensitivity of a particular message, the parties may be more concerned with preserving absolute secrecy than with privilege.[135] In that case, extreme caution should be exercised to ensure that the electronic mode of communication is absolutely secure before transmission.

C. Communications Assistance for Law Enforcement Act of 1994 Extends Protection of Communication to Modern Technology

The most recent article of major legislation relating to electronic communication is the Communications Assistance for Law Enforcement Act (CALEA),

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[130] *See* 18 U.S.C. § 2511(2)(a)(i) (1994). Operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service. *See id.* An online service provider would qualify as the provider of electronic communication service.

[131] *See* 18 U.S.C. § 2511(2)(a)(i) (1994).

[132] *See* 18 U.S.C. § 2510(1) (1996). Since the CALEA amendments, Title III has defined "wire communication" as "any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception . . . furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate commerce and such term includes any electronic storage of such communication." *Id.*

[133] *See* 18 U.S.C. § 2510(2) (1996). An "oral communication" is "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication." *Id.*

[134] *See* 18 U.S.C. § 2515 (1994).

[135] *See* Leibowitz, *supra* note 4, at A1 (noting that an attorney's obligation extends beyond privileged information to protecting all secrets revealed by the client, particularly those which would be detrimental or embarrasing if revealed).

an amendment to the ECPA.[136] The CALEA was intended to broaden the ability of law enforcement officials to conduct surveillance of communication conducted via advanced technologies.[137] Included in the CALEA was an expansion of Title III privacy protection for cordless phones and radio-transmitted data communications.[138]

Congress considered the expanded definitions of protected communications to be necessary given the drastic growth in society's use of all types of electronic communications.[139] A House report recognized that cordless phones were widely used with the belief that such calls were "just like any other phone call" from a privacy standpoint.[140] The legislative reaction to new communication technology seems to be more related to the users' subjective expectation rather than the security of the technology. Thus, it can be inferred that Congress would likely seek to provide a high degree of protection and to preserve privileges in the case of Internet e-mail as well, based on the users' contemplation of security.

Recent court decisions indicate that the CALEA has effected a dramatic reversal of the previously non-existent expectation of privacy in cordless phone use. The *United States v. Mathis*[141] and *Askin v. McNulty*[142] holdings strongly suggest that following the CALEA amendments to Title III, even a publicly accessible cordless telephone call using the most primitive transmission technology would be protected from unauthorized interception, supporting the user's reasonable expectation of privacy.[143] Given the fact that a close correlation exists between wireless phone communication and e-mail in the eyes of Congress, it is reasonable to expect that they would be treated similarly by the judiciary.[144] Accordingly, the sender of unencrypted e-mail may also be entitled to an expectation of security in transmission of a message through the Internet just as a cordless phone user enjoys security in the radio waves broadcast through public airspace.[145]

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[136] *See* Pub. L. No. 103-414, 108 Stat. 4290, (tit. II, § 201(b)(3)) (1994).

[137] *See* H.R. REP. NO. 103-827(I) at *20.

[138] *See* Pub. L. No. 103-414, 108 Stat. 4290, (§ 202(a)) (1994)(eliminating provisions that excluded the radio portion of cordless phone communication from the definitions of "wire" and "electronic" communication).

[139] *See* H.R. No. 103-827(I), 103rd Cong., 2d Sess. 1994, 1994 U.S.C.C.A.N. 3489, 3497.

[140] *Id.*

[141] 96 F.3d 1577 (11th Cir. 1996), *cert. denied*, 520 U.S. 1213 (1997).

[142] 47 F.3d 100 (4th Cir. 1994), *cert. denied* 116 S. Ct. 382 (1995).

[143] *See Mathis*, 96 F.3d at 1583; *Askin*, 47 F.3d at 104.

[144] *See* 18 U.S.C. §§ 2510-2511 (1994).

[145] The rationale supporting such an argument is that airspace is significantly more public and more difficult to restrict than are private computer cables and telephone lines.

D. Service Provider Right of Access to Communications Places the Confidentiality of E-mail in Doubt.

From a practical standpoint, any entity engaged in the business of delivering electronic communication requires some degree of access to the messages it brokers. Congress' recognition of that necessity led to provisions embedded in both Title III and the Stored Communications Act affording the service provider lawful access to the electronic communication which it is responsible to transmit.[146] Notwithstanding the fact that exceptions granting access to the service provider are designed to ensure the maintenance of the communication system, and are unrelated to the content of the message, practitioners must nevertheless be cognizant that there are third parties legally authorized to read client e-mail.

1. Service provider authorization to intercept communications in transmission does not preclude confidentiality

One of the limited exceptions to the Title III prohibition on interception and disclosure of wire, oral, or electronic communication is found in 18 U.S.C.§ 2511(2)(a)(i), which removes the duties of switchboard operators and service providers of the communication from the scope of prohibited conduct.[147] The intercepted communication must be used only "in the normal course of his employment," and in an "activity which is a necessary incident to the rendition of his service . . . ."[148]

Considering the express language of the statute restricting the intercepted information to use in necessary business activities, a service provider's authorization to access communication should not foreclose the possibility of privilege. This reasoning is closely paralleled by the district court holding in *People by Vacco v. Mid Hudson Medical Group*.[149] In that case, transcripts of telephone conversations between a deaf medical patient using a teletype

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[146] *See* 18 U.S.C. § 2511(2)(a)(i) (1994) deemes it lawful "for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, . . . to intercept, disclose, or use that communication in the normal course of his employment." *Id.* 18 U.S.C. § 2701(c)(1) provides an exception for access by "the person or entity providing a wire or electronic communications service." *Id.*

[147] *See* 18 U.S.C. § 2511(2)(a)(i)(1994)(recognizing that the necessity of service provider access in decreeing "[i]t shall not be unlawful" for "an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service . . . to intercept, disclose, or use that communication" in qualified instances).

[148] *Id.*

[149] 877 F. Supp. 143 (S.D.N.Y. 1995).

machine[150] and the Assistant Attorney General were sought by the defendant Mid Hudson.[151] The plaintiff opposed the disclosure of transcripts, citing an attorney work product immunity.[152]

While attorney-client privilege was not addressed per se, the court did address extensively the issue of confidentiality with respect to teletype relay operators.[153] The court decided that where relay operators were prohibited by the ADA[154] from "disclosing the content of any relayed conversation and from keeping records of the content of any such conversation," deaf persons using the teletype technology were rightfully entitled to an expectation of confidentiality in their communications.[155] Therefore, despite the relay operator overhearing and participating in the entire conversation, there was no finding of disclosure and the motion to compel production of the documents was denied.[156]

This holding is directly relevant to the service provider access provisions, because under *Mid Hudson* the expectation of confidentiality is not destroyed simply because the conversation can be maintained despite a third party facilitator. The ADA provisions restrict the disclosure by a relay operator in the same way Title III protects against disclosure by the service provider. Therefore, this ruling lends support to the attachment of privilege to attorney-client e-mail despite the possibility that it may be intercepted by a service provider.

Commentators have argued that the laws against further disclosure by the service provider do not resolve the fact that the content of the communication is already known to a third party and total confidentiality is irretrievably lost.[157] Furthermore, the *Mid Hudson* holding may be dismissed by some as an judicial attempt to level the playing field for the deaf. Nevertheless, this

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[150] *See id.* at 151. The teletype process relies on a "relay operator" to translate the typewritten messages for the hearing party. *See id.*

[151] *See id.* at 145.

[152] *See* Hickman v. Taylor, 329 U.S. 495, 513 (1947). The work product immunity is closely related to the attorney-client privilege and protects material prepared by an attorney in anticipation of litigation and is discoverable only in limited circumstances. *See id.*

[153] *See People by Vacco*, 877 F. Supp. at 151.

[154] *See* 47 U.S.C. § 225(d)(1)(F) (1997). This section of the Americans with Disabilities Act amended the Communications Act of 1934.

[155] *See People by Vacco*, 877 F. Supp. at 151.

[156] *See id.* at 151-52.

[157] *See* Patricia M. Worthy, *The Impact of New and Emerging Telecommunications Technologies: A Call to the Rescue of the Attorney-Client Privilege*, 39 HOW. L.J. 437, 445-47 (1996). "[O]nce intercepted, confidential attorney-client communications are afforded little in the way of Title III protection." *Id.* Moreover, despite the Title III provision that intercepted communication does not lose its privileged character, the burden placed upon the claimant of proving that the communication is indeed privileged seems to undermine the objective of confidentiality. *See id.*

case is significant for the possibility that an expectation of confidentiality and third party access and awareness of comunication may co-exist.

2. Service providers are entitled to access messages in storage, but preservation of privilege is unsettled

An important difference between e-mail and wireless phone telephone technology is that the e-mail service provider possesses a copy of every e-mail message transmitted at least temporarily, as is necessitated by the technology.[158] Such retention would be comparable to the United States Postal Service holding a copy of every letter it delivered. However, recognizing the necessity of data access to a provider of a data manager, Congress has authorized service providers to access the stored copies of messages stored in its own memory under 18 U.S.C. § 2701.[159]

The act of accessing stored messages was distinguished from unlawful interception by the court in *United States v. Moriarty*.[160] The defendant successfully argued that separate charges of illegal wiretapping in violation of 18 U.S.C. § 2511(1)(a) and unlawful access to voice mail in violation of 18 U.S.C. § 2701 violated the Double Jeopardy Clause of the Fifth Amendment.[161] The court held that because the defendant listened only to stored voice mail messages, there was no "interception" which would warrant segregation of the conduct into two distinct charges.[162]

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[158] *See* PALME, *supra* note 7, at 60.

[159] *See* 18 U.S.C. § 2701(c)(1) (1994)(granting an exception from liability for obtaining access to a wire or electronic communication while it is in electronic storage to the person or entity providing a wire or electronic communications service).

[160] 962 F. Supp. 217 (D. Mass. 1997).

[161] *See id.* at 218-219. To prove a violation of 18 U.S.C. § 2511(1)(a) (Count II), the Government must prove that the defendant (i) "intentionally" (ii) "intercepted" (iii) "any wire, oral, or electronic communication." The comparable standard for a violation of 18 U.S.C. 2701(a)(1) is proof that the defendant (i) "intentionally" (ii) "accessed without authorization" (iii) "a facility through which an electronic service is provided" and (iv) "thereby obtained, altered, or prevented authorized access to a wire or electronic communication while it is in electronic storage." The defendant thus argued that if the government were able to prove that he had listened to people's voice mail under Count III, the same offering of proof would also satisfy the elements required to prove Count II. *See id.* The defendant asserted that the question of whether one or two offenses is properly chargeable depends on whether each statutory "provision requires proof of an additional fact which the other does not." *Id.* at 218. Therefore, according to his argument, the conduct with which he was charged should not constitute violations of two distinct statutes. *See id.* (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)).

[162] *See Moriarty*, 962 F. Supp. at 221.

The court did note that there are situations in which "access" and "intercept" would not be equivalent.[163] For example, "'intercept' is limited to contemporaneous acquisition, whereas 'access' could extend to both contemporaneous and stored transmissions."[164] This distinction is significant in the context of e-mail, for which both a transmission phase and a storage phase exist.[165] Therefore, different statutory provisions would be applicable depending on whether the wrongful acquisition occurred while in transmission under § 2511 or in storage under § 2701.[166]

An intriguing case which sheds light upon the judicial view of the effect of service provider access comes from the Military Court of Appeals in *United States v. Maxwell*.[167] This case involved the defendant's use of his personal computer to communicate indecent language and receive child pornography via e-mail.[168] The attorney-client privilege and requisite confidentiality were not at issue in this case. Rather, the court dealt with a related issue of whether the defendant had a reasonable expectation of privacy and Fourth Amendment protection from intrusion by the government or the service provider, AOL.[169]

The court decided that defendant did have a reasonable expectation of privacy from the interception of his e-mail transmissions by the government, and nothing in the record of his conduct suggested that he forfeited that

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[163] *See id.* at 220.

[164] *Id.*

[165] *See id.*

[166] *See* Thomas R. Greenberg, *E-Mail and Voice Mail: Employee Privacy and Federal Wiretap Statute*, 44 AM. U. L. REV. 219, 248 (1994). "While the distinction between the terms 'intercept' and 'access' has little significance for forms of communication that only exist as transmission, and are never stored, the distinction is critical when a transmitted communication is later electronically stored, because it is a the time of storage that a communication becomes subject to different provisions of the ECPA." *Id.*

[167] *See* United States v. Maxwell, 45 M.J. 406, *available in* LEXIS at *6-*7 (U.S. Armed Forces 1996). The service provider of e-mail and Internet access in this case was the popular AOL. While the case was solely concerned with the AOL e-mail service, the court anticipated that similar questions may eventually arise in connection with other existing or developing services provided by AOL or others. *See id.*

[168] *See id.* Although the trial was conducted in the military court system, all computer hardware, software, and accessories used by the appellant in the subject activities were purchased and maintained with his personal funds. Appellant's use of the AOL service was restricted to his home during off-duty hours and had no connection with his official duties. *See id.*

[169] *See id.* at *13. The unique nature of the search of appellant's e-mail raised some novel questions related to the constitutionality of the search. The search of the files was conducted by AOL employees at the request of the FBI, pursuant to a search warrant. Moreover, the search was conducted at the computer center of AOL and consisted of searching AOL's records and files, as opposed to a search of a private home or appellant's computer. The court was therefore forced to examine the relationship between appellant and AOL in determining whether appellant had a reasonable expectation of privacy in AOL's system. *See id.*

expectation.[170] However, appearing cognizant of the ongoing debate over e-mail confidentiality and service provider access, the court stated:

> [W]hile a user of an e-mail network may enjoy a reasonable expectation that his or her e-mail will not be revealed to police, there is the risk that an employee or other person with direct access to the network service will access the e-mail, despite any company promises to the contrary. One always bears the risk that a recipient of an e-mail message will redistribute the e-mail or an employee of the company will read e-mail against company policy. However, this is not the same as the police commanding an individual to intercept the message.[171]

Thus, according to the *Maxwell* court, an e-mail user may have a reasonable belief in privacy and enforceable protection from unauthorized government intrusion. However, the service provider's ease of access to messages and opportunity for misuse places the actual confidentiality of e-mail messages in doubt.

Another application of the service provider exception to the stored communication access statutes arose in *Bohach v. City of Reno*,[172] which involved an alpha-numeric paging message system similar in principle to e-mail.[173] The district court in *Bohach* rejected plaintiffs' asserted expectation of privacy in their use of the computerized message system.[174] The plaintiffs were police officers seeking to suspend an investigation into their suspected misuse of the Reno Police Department's "Alphapage" service.[175] Each officer assigned a pager was informed that incoming messages were electronically recorded and stored, and that certain types[176] of messages were prohibited.[177]

Finding that the Department was entitled to review the stored messages, the court denied the plaintiffs' request for a preliminary injunction on the Department's access.[178] The court drew a distinction between the wrongful

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[170] *See id.* at *14-*15. The government argued that appellant's use of the message forwarding feature of the e-mail service constituted a forfeiting of any expectation of privacy. The court agreed to a limited extent, but pointed out that expectations of privacy in e-mail transmissions depend on the type of e-mail involved and the intended recipient. For example, messages offered to the public at large in a "chat room" or e-mail forwarded from correspondent to correspondent lose the expectation of privacy. However, the loss of privacy extends only to those specific pieces of mail for which it was forfeited, and not necessarily to every e-mail sent by appellant. *See id.*

[171] *Id.* at *14-*15.

[172] 932 F. Supp. 1232 (D. Nev. 1996)

[173] *See id.*

[174] *See id.* at 1236-37.

[175] *See id.* at 1233.

[176] *See id.* at 1234. Improper messages included comment on department policy and those violating the Department's anti-discrimination policy. *See id.*

[177] *See Bohach*, 923 F. Supp. at 1234.

[178] *See id.* at 1236-37.

interception of messages in transmission,[179] and the Department's allowable retrieval of stored messages as the service provider.[180] It was determined that absent an "objectively reasonable expectation of privacy in the messages" and any evidence of an actual interception,[181] the messages were not protected under the Fourth Amendment or ECPA.[182] The court further decided that even if an interception occurred, an "implied consent" would likely be found by virtue of the sender's decision to utilize the Alphapage system.[183]

The significance of the *Bohach* holding is that it applies the rules set forth in 18 U.S.C. §§ 2701-2711 to definitively state that the service provider, here the employer, may retrieve and inspect messages stored on his computer. Given that capability, employees may not manifest a reasonable expectation that an employer will not intrude on their use of an internal message system. The same "implied consent" to retrieval and inspection by the service provider would lower the expectation of confidentiality in an Internet e-mail message.

3. Distinction between privilege treatment of communication obtained by interception and access of stored files

A telephone service provider is authorized to record and store the communication of its subscribers if done as a "necessary incident to the rendition of his service."[184] Such measures would be deemed an authorized interception of wire communication[185] under Title III,[186] instead of the stored communications provisions discussed above.[187] The distinction between these statutes holds special significance with respect to the retention of privilege.

Title III contains a special safeguard of all privilege in the form of 18 U.S.C. § 2517(4). This section reads, "[n]o otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character."[188] Therefore, a privileged communication which is intercepted, used or disclosed

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[179] *See* 18 U.S.C. §§ 2501-22 (1994).

[180] *See Bohach*, 923 F. Supp. at 1236.

[181] *See id.*

[182] *See id.*

[183] *See id.* at 1237.

[184] 18 U.S.C. § 2511(2)(a)(i) (1994).

[185] *See* 18 U.S.C. 2510(1) (1994)(defining "wire communications" as "any aural transfer . . . and such term includes any electronic storage of such communication" in contemplation of voice mail).

[186] See 18 U.S.C. §§ 2510-2522 (1994)(prohibiting unauthorized interception, use, or disclosure of wire, oral, or electronic communication).

[187] *See* 18 U.S.C. §§ 2701-2711 (1994)(prohibiting unauthorized accession of a wire or electronic communication while it is in electronic storage).

[188] 18 U.S.C. § 2517(4) (1994).

in a manner contemplated by Title III, whether authorized or not, remains privileged despite being exposed to a third party.

On the other hand, there is no comparable protection of privilege contained in the chapter relating to stored communications.[189] Whether by design or by oversight, a privileged electronic communication in storage is not entitled by statute to retain its privileged character upon retrieval and examination by a third-party. In the absence of legislation to the contrary, a copy of an e-mail message left on the service provider's computer after transmission may lose its privilege if the service provider were to retrieve the message as authorized under the stored communications access chapter. By contrast, an interception of the same communication in transit by the same service provider would not destroy the privileged character of the message.

The ramifications of this statutory discrepancy on the attorney-client privilege are yet unknown because of the lack of case law and absence of relevant legislative history. It would be reasonable to argue that the complementary nature of the communications interception and stored communications access provisions would suggest that the 18 U.S.C. § 2517(4) protection of privilege be extended to stored communications as well. On the other hand, the ease of accessibility of stored communications as opposed to interception of those in transmission would justify a denial of a privilege safeguard.

On balance, however, it appears that courts would find privilege retained in the case of stored communications accessed by the service provider. The current movement has been in the direction of preserving privilege, even when the mode of communication is known to be susceptible to intrusion, as is the case with cordless and cellular phones. Congress would be well advised to adopt legislation relating to the extension or denial of 18 U.S.C. § 2517(4) treatment to accessed stored communications. Such a definitive statement would assist all e-mail users, particularly parties to privileged communication, to manifest realistic confidentiality expectations for their communications and take appropriate precautions to preserve security.

V. THE UNCERTAIN PARAMETERS OF PRIVILEGE EXTENDED TO COMMUNICATION BETWEEN ATTORNEY AND CLIENT USING NOVEL MODES OF COMMUNICATION.

As the preceding explanation of the transmission process indicates, the potential for private e-mail to be intercepted by or revealed to unintended parties cannot simply be dismissed. Given that reality, this discussion shifts to examining whether e-mail technology or statutory protection supports an

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[189] See the Stored Wire and Electronic Communications and Transactional Records Access provisions of 18 U.S.C. §§ 2701-2711 (1994).

assertion of attorney-client privilege.

Privileged communication exists as an exception to the principle of full disclosure under which our legal system operates.[190] By protecting qualified communications between a client and another with whom a special relationship is shared, the free exchange of information is promoted.[191] In the legal context, full disclosure of facts by a client to the attorney is necessary for most effective representation.[192] Similarly, in the medical field, patients must provide complete background information to the physician in order to receive proper diagnosis and treatment.[193]

A party asserting a privilege bears the burden of demonstrating that the privilege applies to the information sought to be withheld.[194] Wigmore identified the following conditions as necessary for a privilege of any kind:

> (1) The communications must originate in a *confidence* that they will not be disclosed;
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
> (3) The *relation* must be one which in the opinion of the community ought to be seriously *fostered*; and
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[195]

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[190] *See* Fisher v. United States, 425 U.S. 391, 403 (1976). "The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. . . . [S]ince the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose." *Id.*

[191] *See* 8 WIGMORE, EVIDENCE § 2285 (McNaughton rev. ed. 1961). The most commonly recognized relationships warranting privilege are attorney-client, husband-wife, physician-patient, jurors, informant-government, and priest-penitent. Privileges are also recognized in communications with a partner, clerk, trustee, commercial agency, banker, journalist, broker, employee of an adjustment bureau, surety, accountant, public school teachers, and psychiatrists. *See id.*

[192] *See* United States v. Hodge & Zweig, 548 F.2d 1347, 1355 (9th Cir. 1977). In dicta, the Ninth Circuit Court explained that "[i]n our legal system the client should make full disclosure to the attorney so that the advice given is sound, so that the attorney can give all appropriate protection to the client's interest, and so that proper defenses are raised if litigation results." *Id.*

[193] *See* 61 AM. JUR. 2D *Physicians, Surgeons & Other Healers* § 169 (1981).

> It is usually necessary for the patient to communicate to his physician all information having any bearing on his malady or injury, to enable the physician to administer the most helpful and efficacious treatment . . . . Statutes creating the physician-patient privilege are designed to prevent the doctor from disclosing information of a confidential nature communicated to him by the patient or which he acquires in examining or treating the patient.

Id.

[194] *See* Tornay v. United States, 840 F.2d 1424, 1426 (9th Cir. 1988).

[195] *See* WIGMORE, EVIDENCE § 2285 (McNaughton rev. ed. 1961) [hereinafter WIGMORE].

The first condition has been restated by other commentators to be that "[t]he communications must originate in an *expectation* that they will not be disclosed."[196] This expectation of confidentiality will prove to be a pivotal consideration as to whether a privilege may properly be extended to e-mail.[197] In the event that confidentiality was never intended or could not be reasonably expected under the circumstances, the privilege would not attach to a particular communication.[198] Where confidentiality was initially expected but subsequently breached, the privilege will be waived, or deemed destroyed.[199]

A. The Protection Provided by the Attorney-Client Privilege Is Limited to Confidential Communications

The attorney-client privilege is the oldest of privileges rooted in common law protecting confidential communication.[200] Wigmore identifies privileged information arising from the attorney-client relationship according to following elements:

> (1)[w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived."[201]

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[196] EDNA SELAN EPSTEIN AND MICHAEL M. MARTIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 2 (2d ed. 1989).

[197] *See* State v. Soto, 84 Hawai'i 229, 241, 933 P.2d 66, 78 n.13 (1997)(citing United States v. Melvin, 650 F.2d 641, 645 (5th Cir. 1981)). The *Soto* court noted, "[w]e do not mean to suggest by our holding that privileged 'confidential communications' cannot occur in a public place. We merely hold that such communications must transpire under circumstances justifying a reasonable expectation of confidentiality." *Id.* The court's statement suggests that while an expectation of confidentiality is necessarily based on the circumstances of the communication, the determining factor would be the expectation and not the circumstances. Thus, notwithstanding the perception of the Internet as a public domain, confidentiality should not necessarily be precluded.

[198] Griffith v. Davis, 161 F.R.D. 687, 694 (C.D. Cal. 1995).

[199] *See* HAW. R. EVID. 511. The rule provides that the attorney-client privilege may be waived by voluntary disclosure, stating in relevant part:

> Waiver of privilege by voluntary disclosure. A person upon whom these rules confer a privilege against disclosure waives the privilege if, while holder of the privilege, the person . . . voluntarily discloses or consents to disclosure of any significant part of the privileged matter.

Id. See also Garner v. United States, 424 U.S. 648, 654 (1976)("[A]n individual may lose the benefit of the privilege without making a knowing and intelligent waiver.").

[200] *See* 8 WIGMORE, *supra* note 195, § 2290.

[201] *See* 8 WIGMORE, *supra* note § 2292.

Most jurisdictions have adopted statutory provisions essentially codifying the common law privilege with the same protection in place.[202] Modern statutory privilege provisions typically expand the common law definition to also include communications made by the attorney to the client.[203] The United States Supreme Court has further limited the privilege, holding that the privilege only protects disclosures which might not have been made absent the privilege.[204] Furthermore, documents which could have been obtained through discovery from a client prior to their delivery to an attorney clearly do not fall within the attorney-client privilege.[205] In the context of e-mail, for a privilege to apply, the message must be communication which would not have been made if the privilege were not available. Thus, a discoverable e-mail forwarded by a client to an attorney does not become privileged by mere virtue of being attorney-client communication.[206]

The fourth part of Wigmore's definition, which relates to confidentiality, is the primary one under which e-mail appears especially vulnerable to an attack upon an asserted privilege.[207] Therefore, the crucial question is whether a privilege would extend to e-mail communication, given the strict requirements of confidentiality.

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[202] *See* Boston Auction Company, Ltd. v. Western Farm Credit Bank, 925 F. Supp. 1478, 1480 (D. Haw. 1996). The Hawai'i common-law of attorney-client privilege has been codified as Rule 503, *Hawai'i Rules of Evidence*, as the "lawyer-client privilege." The statute provides in relevant part that:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client of the client's representative and the lawyer or the lawyer's representative, or (2) between the lawyer and the lawyer's representative, or (3) by the client or the client's representative or the lawyer or a representative of the lawyer to a lawyer or a representative or a lawyer representing another party in a pending action and concerning a matter of common interest, or (4) between representatives of the client or between the client and a representative or the client, or (5) among lawyers and their representatives representing the same client.

HAW. REV. STAT. § 626-1, HAW. R. EVID. 503(b) (1996).

[203] *See* HAW. REV. STAT. § 503(b)(1) (1996). Hawai'i's lawyer-client privilege statute provides that a client may prevent the disclosure of confidential communications "between the client or the client's representative and the lawyer and the lawyer's representative . . . ." *Id.*

[204] *See* Fisher v. United States, 425 U.S. 391, 403 (1976).

[205] *See id.* at 403-04.

[206] *See* U.S. v. Chen, 99 F.3d 1495, 1501 (9th Cir. 1996)(quoting 8 WIGMORE, EVIDENCE § 2292 (McNaughton rev. ed. 1961)). "That a person is a lawyer does not, ipso facto, make all communications with that person privileged. The privilege applies only when legal advice is sought 'from a professional legal advisor in his capacity as such.'" *Id.*

[207] The other elements are related to the parties and content of message as opposed to the means of communication.

A Massachusetts court in *National Employment Service Corporation v. Liberty Mutual Insurance Company*[208] held that the attorney-client privilege may extend to communication by e-mail.[209] The plaintiff sought discovery of thirty-two e-mail messages which were either sent or received by defendant's corporate counsel.[210] Following in camera review, the court concluded that the disputed items were within the scope of the privilege and denied the plaintiff's motion to compel production.[211]

The court's decision that the e-mail was not discoverable turned on the issue of whether the defendant's in-house attorney was acting in his capacity as an attorney or that of a business advisor.[212] In the opinion of the court, the correspondence was sent as a request for legal advice or in anticipation of litigation. As such, the e-mail was in fact privileged attorney communication.[213] The court dismissed as unsupported by evidence plaintiff's contention that the e-mail had been disclosed to third parties, intentionally or otherwise, and therefore "consider[ed] only whether the e-mail is within the scope of the attorney-client privilege."[214]

The *National Employment* case was among the first reported cases to extend the attorney-client privilege to e-mail. However, the court left open the possibility that if third-party disclosure were proven, the privilege could have been waived.[215] Therefore, the case stands for the proposition that the attorney-client privilege can extend to e-mail containing legal advice sent via private intranet in the absence of evidence of distribution to others.

Beyond finding that a privilege is available to e-mail at all, courts have opted to extend the privilege even where the record is unclear as to whether it should apply. According to the West Virginia Supreme Court of Appeals in *United States Fidelity and Guaranty v. Canady*,[216] an e-mail message was entitled to protection as attorney-client privileged information in the absence of clear lower court findings to the contrary.[217] The message, which was sent from a claims examiner to in-house counsel, relayed a summary of legal advice provided by outside counsel.[218] Upon close examination of settled law

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[208] No. 93-2528-G, 1994 WL 878920 (Mass. Super. Dec. 12, 1994)(copy on file with author).

[209] *See id.* at *3.

[210] *See id.* at *1.

[211] *See id.* at *3.

[212] *See id.* at *2.

[213] *See id.* at *3.

[214] *Id.* at *2.

[215] *See id.* at *2

[216] 460 S.E.2d 677 (W. Va. 1995).

[217] *See id.* at 689 n.17.

[218] *See id.* at 689.

related to the attorney-client privilege, the supreme court reversed the lower court's order to disclose.[219]

Without sufficient findings of fact explaining the trial court's decision to order disclosure, the supreme court was left to examine the document on its face.[220] Considering the message to have been made (1) in contemplation of the existence of the attorney-client relationship, (2) as advice sought by the client from that attorney, and (3) identified as confidential, the court applied the privilege in accordance with West Virginia law.[221] In a footnote, the supreme court stated that the document could later be ordered disclosed if, upon reconsideration, the lower court found evidence of a waiver of privilege.[222]

The significance of the *United States Fidelity* holding is that in a case where the court had insufficient facts to assess the substantive nature of an e-mail message, it granted the privilege and opted for caution on the side of confidentiality. The party seeking disclosure did not argue against the privilege based on insecurity of electronic communications. Until that argument is raised, courts will presume that e-mail should be entitled to privilege no differently than other forms of correspondence.[223]

In *Edias Software International v. Basis International*,[224] a district court recognized that e-mail "does not differ substantially from other recognizable forms of communication."[225] The dispute arose after Basis allegedly sent e-mail to Edias customers expressing dissatisfaction with the performance of Edias as an authorized distributor.[226] The court held that e-mail messages could give rise to libel and defamation claims and establish personal

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[219] *See id.* at 689 n.17.

[220] *See id.*

[221] *See id.* at 688.

[222] *See id.* at 689 n.17.

[223] *See* Karen L. Hagberg & A. Max Olson, *Shadow Data, E-Mail Play a Key Role in Discovery, Trial*, N.Y. L.J., June 16, 1997, at S3 (citing Aviles v. McKenzie, 1992 U.S. Dist. LEXIS 3656, at *30 (N.D. Cal. Mar. 17, 1992))(arising from e-mail messages demonstrating that plaintiff was fired for whistleblowing about unsafe and illegal practices); Monotype Corp. v. International Typeface Corp., 43 F.3d 443, 449-50 (9th Cir. 1994)(relating to plaintiff's assertion that an evaluation of his font contained in the e-mail of a Microsoft employee was proof that Monotype illegally copied his font and sold it to Microsoft). The "insecurity of the Internet" argument against privilege for e-mail, although novel, will undoubtedly be raised in the near future. E-mail has already proven itself to be a valuable source of evidence and attorneys can be expected to devote more effort to its discovery beyond the now commonplace demands for production of e-mail. Contents of e-mail have already played a significant role in a number of cases. *See id.*

[224] 947 F. Supp. 413 (D. Ariz. 1996).

[225] *Id.* at 419.

[226] *See id.* at 415.

jurisdiction over the sender just as traditional means of publication do.[227] Based on the individual addresses associated with e-mail, the court found no relevant difference between e-mail and traditional mail or phone calls.[228]

In view of the lack of case law addressing the expectation of confidentiality in e-mail messages, broad doctrines of confidentiality and waiver must be considered in developing ascertainable standards. Simply put, a waiver is a surrender of confidentiality, and the two are mutually exclusive.[229] The question of whether confidentiality has been waived typically turns on whether the the communicating party manifested a subjective belief that the message was and would remain confidential.[230] The communicant must possess a reasonable expectation of confidentiality, based on his perception of the circumstances surrounding the communication, for the confidentiality element of privileged communications to be satisfied.[231]

1. Confidentiality is the most fundamental element of privileged communication

The seminal case in the area of attorney-client confidentiality is *Upjohn v. United States*.[232] The dispute arose after the petitioner refused an IRS demand for the surrender of responses to a survey conducted by petitioner's General Counsel, who was investigating rumored illegal payments to foreign governments.[233] The Court held that the disputed communications should be protected against compelled disclosure because the company regarded them as "highly confidential" when made and they were "kept confidential by the

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[227] *See id.* at 419-20.

[228] *See id.* at 419 ("[E]-mail does not differ substantially from other recognizable forms of communication, such as traditional mail or phone calls, where one person has an address or phone number to reach another person.").

[229] *See generally Inadvertent Disclosure of Documents Subject to Attorney-Client Privilege*, 82 MICH. L. REV. 598, 598 (1983). Even unintentional or inadvertent disclosure may waive the attorney-client privilege because courts view such disclosure as evidence that the client did not intend to keep the disclosed material confidential. Courts have alternatively decided that "inadvertent disclosure renders the privilege useless to the client" once the confidentiality has been breached. *See id.*

[230] *See* DiCenzo v. Izawa, 68 Haw. 528, 536, 723 P.2d 171, 176 (1986)(citing In re McGlothen, 663 P.2d 1330, 1334 (Wash. 1983)). In a dispute over whether communications to an insurer prior to the commencement of litigation may be privileged, the Hawai'i Supreme Court looked to the client's subjective belief and intent that the communication would remain confidential as primary determinants of the validity of the asserted privilege. *See id.*

[231] *See* State v. Soto, 84 Hawai'i at 241, 933 P.2d at 78 n.13 (1997).

[232] 449 U.S. 383 (1981).

[233] *See id.* at 386-87.

company."[234] Under the *Upjohn* reasoning, the element of confidentiality relates to a present and future intent that communications are not to be disclosed.[235] This view is echoed by commentary suggesting that the client's desire for confidentiality need not be expressed; rather, it is sufficient if one could reasonably assume that there would not be disclosure to others.[236] Whether or not the client understood the communication to be confidential is therefore the critical factor in the trigger of a privilege.[237] One may infer that an understanding of confidentiality would logically require a belief that the means of communication employed are sufficiently secure.[238]

Cases considering whether secure means have been utilized in communication make it clear that the inquiry is very fact specific. Courts have traditionally held that face-to-face conversations overheard by a bystander or eavesdropper are not privileged because the communicants could have prevented their being overheard without significant difficulty.[239] On the other hand, where documents are stolen and disclosure occurs involuntarily, the movement has been to recognize privilege for policy reasons.[240] The courts seem to base their decisions based on whether the parties took reasonable

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[234] *Id.* at 395. The responses were not disclosed to anyone besides Upjohn's vice-president who was also general counsel and outside counsel). *See id.* at 395 n.5.

[235] *See Inadvertent Disclosure of Documents Subject to Attorney-Client Privilege, supra* note 229, at 610-19. An objective test is suggested to determine whether a client actually intended to maintain confidentiality of documents, as opposed to a subjective test based upon a client's self-serving assertions that he did not intend disclosure. An objective test would require the client to bring forth evidence which demonstrates his intent, and inform him of the level of precautions required to prevent waiver despite disclosure. Courts and commentators have proposed two different objective tests. The Voluntary Disclosure Test focuses on the client's "voluntariness," or degree of negligence, in allowing an inadvertent disclosure. The Reasonable Precautions Test is based on the level of precautions taken to prevent disclosure of documents for which privilege is sought. *See id.*

[236] *See* STRONG ET AL., MCCORMICK ON EVIDENCE 128 (4th ed. 1992).

[237] *See Griffith*, 161 F.R.D. 687, 695 (C.D. Cal. 1995).

[238] *See* Stephen A. Saltzburg, *Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited*, 12 HOFSTRA L. REV. 817, 847 (1984). Professor Saltzburg believes that entities securing legal advice should be able to claim privilege in situations where there is reason to be concerned about possible disclosure of communications, and absent the privilege the party would be reluctant to fully provide the information necessary to an attorney in providing effective legal services. However, "[o]ut of respect for the rationale that supports the privilege, entities should not be permitted to claim the privilege for communications made by persons who speak without a guarantee of confidentiality." *See id.*

[239] *See* State v. Vennard, 270 A.2d 837 (Conn. 1970), *cert. denied*, 400 U.S. 1011 (1971)(holding police officer who overheard conversation in station may testify in absence of defendant's effort to ensure confidentiality); People v. Castiel, 315 P.2d 79 (Cal.App. 1957)(deciding that person who openly overhears may testify).

[240] *See In re* Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863, 869 (D. Minn. 1979), *modified*, 629 F.2d 548 (8th Cir. 1980).

precautionary steps to avoid disclosure.[241]

The duty to preserve confidentiality was at issue in *Suburban Sew 'N Sweep v. Swiss-Bernina*,[242] a dispute over the admissibility of discarded documents.[243] There the court decided that documents which would otherwise be privileged as confidential attorney-client communications lost their privileged character after being recovered by a third party from a trash container.[244] Plaintiffs developed a routine of searching trash dumpsters used exclusively by defendant, and over the course of two years they recovered hundreds of documents relevant to their antitrust claims.[245] In reversing a magistrate's order to protect against disclosure, the court held that defendant had not taken adequate precautions to ensure confidentiality considering the likelihood of disclosure.[246]

The court reiterated the "need to take all possible precautions to insure confidentiality" as a requirement of the privilege.[247] While a breach of confidentiality was held to not necessarily eliminate privilege, the intent to maintain confidentiality as manifested in the precautions taken was viewed as the determining factor.[248] Finally, the court reasoned that denying privilege under these circumstances did not pose a threat of deterring open attorney-client communication but rather would motivate communicants to take appropriate precautions.[249]

The open trash container belonging to defendant can be compared to the Internet, which is a similarly public vessel.[250] The rejection of privilege for

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[241] *See* United States v. de la Jara, 973 F.2d 746, 750 (9th Cir. 1992)(explaining that in the event of an involuntary disclosure, "we will find the privilege preserved if the privilege holder has made efforts 'reasonably designed' to protect and preserve the privilege"). *See also* Transamerica Computer v. International Bus. Mach., 573 F.2d 646, 651 (9th Cir. 1978).

[242] 91 F.R.D. 254 (N.D. Ill. 1981).

[243] *See id.*

[244] *See id.* at 255-56.

[245] *See id.*

[246] *Id.* at 260-61.

[247] 91 F.R.D. at 260 (citing 2 WEINSTEIN'S EVIDENCE § 503(b)(2)).

[248] *Id.* at 259 n.4. The *Suburban* court cites Proposed *Federal Rules of Evidence* § 503(a)(4) and 503(b) and quotes advisory committee notes stating that "[t]he requisite confidentiality of communication is defined in terms of intent . . . . The intent is inferable from the circumstances. Unless intent to disclose is apparent, the attorney-client communication is confidential". *See id.*

[249] *Id.* at 260-61.

[250] *See* Reno v. American Civil Liberties Union, 117 S. Ct. 2329, 2334 (1997). Individuals currently have countless points of access to the Internet available to them, including universities, corporations, community libraries, and even computer coffee shops. Internet users have a variety of communication and information retrieval methods at their disposal, including e-mail, newsgroups, chatrooms, and the World Wide Web. Collectively, "these tools constitute a unique medium—known to its users as 'cyberspace'—located in no particular geographical

documents recovered from the trash emphasizes the necessity of taking measures to preserve confidentiality.[251] The court recognized that:

> [t]his case lies between the inadvertent disclosure cases, where information is transmitted in public or otherwise clearly not adequately safeguarded, and the involuntary disclosure cases, where the information is acquired by third parties in spite of all possible precautions.[252]

A strong argument may be made that unintended third-party access to Internet e-mail would similarly fall between the categories of inadvertent and involuntary disclosure. Under the *Suburban* guidelines, such a disclosure would not be inadvertent, because it is not clear that unencrypted e-mail is "transmitted in public" or "otherwise . . . not adequately safeguarded." The Internet may be geographically vast and accessible to the public, but computer messages are not realistically susceptible to an "accidental overhear," as effort and expertise are required to access a message intended for another.[253] Although The *Suburban* court rejected privilege for documents retrieved from containers of garbage, the added technical difficulty in obtaining another's e-mail could lead a court to find a lower threshold of "appropriate precautions."

An e-mail transmission may not be viewed as involuntary either, because the standard of taking "all possible precautions" includes using an alternative mode of communication. Additional precautions which would likely avert disclosure and preserve confidentiality include encoding the message or routing the message through more secure stations.[254] In *Suburban*, the court called for "rendering [documents] unintelligible before placing them in a trash dumpster" as an adequate preventive measure.[255] Extending this analogy to e-mail transmissions suggests that available technology to encrypt messages be implemented in order to justify privilege.

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location but available to anyone, anywhere in the world, with access to the Internet." *See id.*

[251] *See Suburban*, 91 F.R.D. at 259 n.4 (quoting advisory committee notes applicable to Proposed FED. R. EVID. 503, which states "[t]aking or failing to take precautions may be considered as bearing on intent").

[252] *Id.* at 260.

[253] *See* Smith, *supra* note 39, at 6 (cautioning attorneys to avoid the excessive paranoia about using e-mail for private communications, because those intent on unauthorized access to e-mail face technical obstacles).

[254] *See* United States v. de la Jara, 973 F.2d 746, 750 (9th Cir. 1992). The *de la Jara* court explained that the attorney-client privilge would be preserved if the holder of the privilege has made efforts "reasonably designed" to protect the privilege. However, the court cautioned that the holder is to be held to a high standard of precaution in order to preserve privilege. "Conversely, we will deem the privilege to be waived if the privilege holder fails to pursue all reasonable means of preserving the confidentiality of the privileged matter." *Id.*

[255] *See Suburban*, 91 F.R.D. at 260.

Another case worth noting in the area of attorney-client privileged communication via an unsecured mode of communication is *Green v. Green*.[256] There the court upheld the trial judge's finding that a tape recorded message left by a client on her attorney's answering machine remains protected by the attorney-client privilege.[257] Although the court did not elaborate with respect to that particular evidentiary ruling, it can be inferred the client's expectation of confidentiality in using the attorney's answering machine was sufficient, despite the fact that most answering machines are unsecured.

There are no reported cases in which a court has directly addressed the issue of the expectation of confidentiality in the use of e-mail.[258] In both the *National Employment* and *United States Fidelity* cases, attorney-client privilege was extended to e-mail sent within a corporate intranet.[259] Under these holdings, it appears from the extension of privilege that a reasonable expectation of confidentiality may be formed by parties to intranet communication.

In *Steel v. General Motors Corporation*,[260] intranet confidentiality was further clarified as an attorney who received a password to log into GM's e-mail system was deemed to have gained "access to confidential information."[261] However, in view of the larger Internet population[262] and the potential for password protection to be broken, it remains to be seen whether account passwords can provide a reasonable level of security for Internet communications as well.[263]

The Internet is promoted as an electronic forum for the exchange of information and ideas which the public is able to access with minimal

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[256] 642 A.2d 1275 (D.C. 1994).

[257] *See id.* at 1282.

[258] *See* Leibowitz, *supra* note 4, at A1 ("There is no case law yet," still "[n]othing has stirred greater concern than sending unencrypted e-mail over the Internet.")

[259] *See* National Employment, 3 Mass. L. Rptr. 221, 1994 WL 878920 (Mass. Super. 1994); *see also* United States Fidelity, 460 S.E.2d 677 (W.Va. 1995).

[260] 912 F. Supp. 724 (D. N.J. 1995).

[261] *Id.* at 737.

[262] Online subscriber communities, such as those of AOL and CompuServe, generally have access to a directory of the screen names of other members. It is certainly conceivable that members may attempt to log in under another member's identity by figuring out the other's secret password. Though difficult, such an unauthorized access would give the rogue user access to all e-mail and downloaded files in the account.

[263] *See* United States v. Sissler, 1991 U.S. Dist. LEXIS 16465 (W.D. Mich. Aug. 30, 1991). The *Sissler* court recognized that passwords and other security devices are commonly used to protect the data in computer memory, but such security measures can nevertheless be "cracked" by a computer expert with some time and effort. Thus, courts are not likely to find password and other programmed security measures to be absolute safeguards of confidentiality. *See id.* at *12.

restrictions or controls, in contrast to a private intranet.[264] Along with the increased "publicness" comes a lowered expectation of security for communication via the Internet.[265] Courts will ultimately decide whether that level of security is enough to support an expectation of confidentiality and attachment of a privilege.[266]

2. *Actions by holder may constitute a waiver of attorney-client privilege*

In contrast to the doctrine of privilege is the concept of waiver.[267] Just as litigants are entitled to the benefit of certain rights and privileges, they are also entitled to waive such benefits.[268] A waiver occurs when confidential communications are disclosed to a third party outside the attorney-client relationship,[269] at which point the communication does not merit the protection of the court.[270]

Typically, cases involving a disputed waiver of privilege occur in the event of an unintended disclosure.[271] Such an occurrence could be the result

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[264] *See* Religious Tech. Ctr. v. Arnaldo Pagliarina Lerma, Digital Gateway Sys. 908 F. Supp. 1353 (E.D. Va. 1995)(describing the Internet as "rapidly evolving into both a universal newspaper and public forum"). *But see* Cyber Promotions, Inc. v. American Online, Inc., 948 F. Supp. 436, 446 (E.D.Pa. 1996)(distinguishing AOL servers from the traditional public forum such as a street, park or college, as AOL's servers are privately owned and are only available to paid subscribers).

[265] *See* United States v. Maxwell, 45 M.J. 406, at *13 (comparing the internal protection accorded AOL subscriber e-mail with the Internet which "has a less secure e-mail system, in which messages must pass through a series of computers in order to reach the intended recipient").

[266] *See* American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 165 (S.D.N.Y. 1997)(providing introductory discussion distinguishing e-mail from first-class letters based on the level of security that protects the communication, noting "the relatively easy accessibility of e-mail communications").

[267] Strictly speaking, in arguing against privileged communication through Internet e-mail, it may not be accurate to say that a sender of such e-mail has "waived" privilege, as is commonly phrased in publications. A waiver would technically occur subsequent to the communication of information between client and attorney, and the attachment of privilege thereupon. It may be more technically correct to argue that privilege could never attach to Internet communication. Nevertheless, for purposes of this discussion focusing on confidentiality, the doctrine of waiver provides a useful framework for determining whether or not privilege should extend to Internet e-mail.

[268] *See* Theodore Harman, *Fairness and the Doctrine of Subject Matter Waiver of the Attorney-Client Privilege in Extrajudicial Disclosure Situations*, 1988 U. ILL. L. REV. 999, 1006.

[269] *See* In re von Bulow, 828 F.2d 94, 102 (2d Cir. 1987).

[270] *See id.* at 103.

[271] *But see* Conley, Lott Nichols Machinery Co. v. Brooks, 1997 Tex. App. LEXIS 2998, at *5 (June 9, 1997). At issue in this proceeding were an attorney's obligations upon receiving confidential documents inadvertently disclosed to him by the opposing party. The court looked

of an inadvertent disclosure or failure to protect confidential materials,[272] both of which are likely to occur with increasing frequency with the use of facsimile machines and e-mail.[273]

Opinion is divided, from both the judicial and ethical standpoints, as to the treatment of privilege in the event of an inadvertent or accidental disclosure.[274] In *United States v. Keystone Sanitation Company*,[275] the court held that the inadvertent disclosure of e-mail constituted a waiver of attorney-client privilege.[276] In the underlying dispute over environmental cleanup liability, the Keystone defendants had unknowingly included two strategic e-mail messages between its attorneys[277] in a production of documents.[278] The court granted the co-defendants' motion to compel production of Keystone's legal billing records without redaction of attorney names or precise services rendered,[279] finding that the e-mail disclosure constituted a waiver of privilege for that category of information.[280]

The court applied a five-prong test in its holding to determine that the documents had lost their privilege through inadvertent disclosure.[281] The factors included:

(1) The reasonableness of the precautions taken to prevent the inadvertent disclosure in view of the extent of the document production;
(2) The number of inadvertent disclosures;
(3) The extent of the disclosure;

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to ethics opinions issued by the American Bar Association and several state bar associations several years earlier, but noted "[s]ince then, communications technology has advanced dramatically. As the ethics opinion observes, society now makes frequent use of facsimile machines and electronic mail. Inadvertent disclosures of confidential information frequently occur, and today's beneficiary of such disclosures may likely become tomorrow's victim." *Id.*

[272] *See* Wichita Land & Cattle Co. v. American Fed. Bank, 148 F.R.D. 446 (D.D.C. 1992)(ruling that privilege is waived for documents left unattended by attorney reviewed by opposing attorney).

[273] *See* Cornelia Honchar, *Authorities Split on Disclosure of Client Files*, CHI. DAILY L. BULL., Sept. 6, 1996, at 5.

[274] *Compare* Trilogy Communications v. Excom Realty, 652 A.2d 1273 (N.J. Super. 1994)(holding inadvertent production does not constitute waiver).

[275] 885 F. Supp. 672, *reconsideration denied* 899 F. Supp. 206 (M.D. Pa. 1995).

[276] *See id.* at 676.

[277] *See id.* at 675. The two e-mail messages disclosed advised the removal of assets from the corporation and discussed strategies to achieve that goal. *See id.*

[278] *See id.*

[279] *See id.* at 674-75. Technically, the proceedings were initiated by correspondence addressed to the court from Keystone Sanitation Company and Arcata Graphics Fairfield regarding a discovery dispute. The court decided to treat the letters as a motion to compel by Keystone. *See id.*

[280] *See id.* at 676.

[281] *See id.*

(4) Any delay and measure taken to rectify the disclosure; and
(5) Whether the overriding interests of justice would or would not be served by relieving a party of its error.[282]

On balance, the court decided that Keystone had not taken reasonable precautions to prevent the disclosure.[283] As a result, Generator was put on notice of Keystone's efforts to hide assets in avoidance of its legal responsibility to pay for environmental cleanup.[284] The *Keystone* decision demonstrates that in inadvertent disclosure cases, the public interest in the information for which protection is sought may factor into the decision of whether privilege has been waived.[285]

Also relevant to *Keystone* is the recent case of *Stopka v. Alliance of American Insurers*,[286] where the plaintiff sued her employer for alleged employment discrimination.[287] In discovery, the plaintiff sought the production of privileged company documents including notes, recordings, and e-mail to which she was a party.[288] The plaintiff contended that she had standing as a party to the communications to waive the attorney-client privilege held by the company.[289] Her assertion was rejected by the court based on her admitted lack of an express attorney-client relationship, and the limited production of requested documents was ordered with privileged portions redacted.[290]

As the *Stopka* decision demonstrates, the issue of whether or not privilege has been waived depends on whether one has authority to waive the privilege.[291] The majority of courts recognize the rule that a privilege is

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[282] *Id.* at 676 (citing Advanced Med., Inc. v. Arden Med. Sys., Inc., No. 87-3059, 1988 WL 76128, at *2 (E.D. Pa. July 18, 1988)).

[283] *See id.* at 676.

[284] *See id.*

[285] *See* David S. Smallman, *The Purloined Communications Exception to Inadvertent Waiver: Internet Publication and Preservation of Attorney-Client Privilege*, 32 Tort & Ins. L.J. 715, 718 (1997). The article cites Brown & Williamson Tobacco Corp. v. Regents of the University of California, No. 967298 (Cal. Sup. Ct., May 25, 1995)(Hearing Tr.) for denying Brown & Williamson's request to enjoin the University of California, San Francisco, from disseminating purloined documents, some of which were privileged attorney-client communications. Among the court's reasons for refusing to enjoin dissemination was the "strong public interest in the documents." *Id.*

[286] 1996 WL 204324, at *1 (N.D. Ill. Apr. 25, 1996).

[287] *See id.*

[288] *See id.* at *1.

[289] *See id.* at *5.

[290] *See id.* at *12.

[291] *See* Audrey Rogers, *New Insights on Waiver and the Inadvertent Disclosure of Privileged Materials: Attorney Responsibility as the Governing Precept*, 47 FLA. L. REV. 159, 164 (1995)(regarding the determination of who has the authority to waive the privilege as the first step in deciding the question of waiver).

personal to the client and may only be voluntarily waived by the client.[292] However, the client's attorney "can be held to possess implied authority as an agent to effect a waiver whether voluntary or inadvertent."[293] The reality that a privilege may be waived by the acts of either the attorney or client is important because is e-mail is commonly utilized for its ability to conveniently bounce reply correspondence between the two.

2. The Attorney's Ethical Responsibility to Preserve Confidentiality and Privilege of Client Communications

From an ethical standpoint, attorneys must consider their duty to preserve confidentiality in light of the (in)security of e-mail and the uncertainty of the law with respect to privilege. The significance of the attorney-client privilege is not limited to the discoverability of information. These provisions are rooted in the attorney's ethical obligation to preserve the confidentiality of communication in order to safeguard the privacy and advantage of a client.

Bar associations in various jurisdictions have provided advisory opinions to assist attorneys in information management in view of emerging technologies. Attorneys have looked to an opinion of the ABA Committee on Ethics and Professional Responsibility which tackles the issue of inadvertent disclosure related to misdirected faxes.[294] The committee concluded that the recipient of a fax clearly intended for another is obliged to notify the sender and return the document without using it to allow the privilege to remain viable.[295] While it seems this "ethical" approach could seemingly be applied to e-mail as well, it is difficult to reconcile the ABA hypothetical with *Keystone*, where the privilege was waived under similar circumstances.

Presently, there is clearly no definitive statement as to whether there is an inherent lack of confidentiality or waiver of privilege in the transmission of e-mail. The question hinges on whether it is possible for the parties to possess an expectation of confidentiality sufficient to allow privilege to attach to the communication. In light of the uncertainty of the law, the responsible attorney would be advised to take added precautions in the interest of her client.

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[292] *See* Hydraflow, Inc. v. Enidine Inc., 145 F.R.D. 626, 636 (W.D.N.Y. 1993).

[293] *Id.* (citing *In re* von Bulow, 828 F.2d 94, 101 (2d Cir. 1987)).

[294] *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992).

[295] *See id.*

VI. CONCLUSION: AS THE CONFIDENTIALITY OF INTERNET E-MAIL IS NOT ABSOLUTE, STRICT PRECAUTIONS ARE REQUIRED TO PRESERVE PRIVILEGE.

There remains an absence of definitive case law addressing the application of the attorney-client privilege to e-mail with consideration given to confidentiality concerns. Based upon analysis of the limited e-mail evidentiary disputes that have been reported, and consideration of other related sectors of law, this Article concludes that attorneys may not manifest an expectation of confidentiality in unencoded messages sent via the Internet. Rights of privilege are intended to insulate qualified communication which is legitimately intended to be kept from all others outside the attorney-client relationship. Financial transactions and credit card numbers are typically transmitted via encrypted messages precisely because e-mail users believe such precautions are necessary for their own protection.

Current e-mail technology leaves users at the mercy of each individual employee of the service provider, who is legally able to access messages, but cannot realistically be prevented from abusing the authority. Furthermore, the copies of the message left on servers en route are easily accessible to the server manager and could be forwarded to countless third parties.

As mentioned earlier with respect to Internet commerce, encryption devices appear to serve as a reasonable precaution to ensure confidentiality. By significantly reducing the ability of third parties to comprehend the sent e-mail, including copies stored on the service provider's system, the expectation of confidentiality rises to a sufficient level to justify privilege.

Furthermore, it would be advisable for Congress to enact a statute comparable to 18 U.S.C. § 2517(4) (applicable to stored communication) in order to ensure that third-party retrieval, whether authorized or not, does not result in the loss of privilege[296] Other jurisdictions would be well advised to follow the lead of those states which have acknowledged the growth of e-mail in judicial functions and issued advisory precautions to prevent the loss of information.[297]

Finally, it is critical that attorneys advise their clients of the realities and limitations of e-mail communication and their confidentiality expectations. Upon realizing that e-mail communication is an option, the participants should consult and formulate a method which maximizes the privacy of their mess-

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[296] The State of New York and others have enacted similar provisions ensuring that otherwise privileged communication does not lose its privileged character due to unlawful access of stored electronic communications. *See* N.Y. PENAL LAW § 40, Pt. Three, T.J, Art. 156 (McKinney 1997) (making reference to 18 U.S.C.A. § 2701).

[297] *See In Re* Amendments to Rule of Judicial Administration 2.051-Public Access to Judicial Records, 651 So. 2d 1185 (Fla. 1995).

ages. Wyith the privilege issue unsettled, the attorney is obliged to exercise the highest level of care to protect her client's interest of confidentiality.

The ease and convenience of e-mail will continue to increase its popularity. Inevitably, the technology will be challenged as being an inadequate vehicle for privileged communications. However, the unfortunate position of serving as the test case for privilege applied to e-mail communication can be avoided with simple planning and reasonable precaution.

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STOPPING SPATS OVER THE SPECKS CALLED SPRATLY SHARING THE RESOURCES OF THE SOUTH CHINA SEA by Mark J. Valencia, Jon M. Van Dyke, and Noel A. Ludwig.

Carolyn Stephenson*

This is a marvelous book, captivating even a political scientist with only the most remote interest in these remote and virtually nonexistent islands. It is marvelous because it brings to life the politics of the South China region while detailing like the pieces of a complicated puzzle the elements of international law that underlie the conflict over the "scattered fly specks"[1] called the Spratly Islands. Perhaps more important for a conflict researcher, it not only lays out thoroughly the elements of the conflict, but it presents a carefully thought through plan for cutting through some of those elements. On top of all that, it has wonderful intricate color-coded maps that make understanding the complexities of the proposed movements toward resolution much easier.

Predicated on the notion that "Post-Cold War Southeast Asia is in a state of geopolitical flux,"[2] due largely to beliefs that a reduction in the U.S. presence may lead major powers in the region to feel less constraints on exercising their power, the book argues for consideration of a regional multi-national, multi-purpose management or coordinating authority to govern what could be considered a regional common property resource regime. In the course of the development of this argument, the authors analyze competing claims to the South China Sea under international law, examine the political dimensions of the various disputers between the claimants, and discuss the various Two Track and confidence-building approaches that have been attempted. Noting the danger of the status quo, they consider the possible allocation options, and discuss international organization and treaty precedents for a regional common property resource regime, before proposing their own models. Two appendices contain detailed descriptions of each feature of the Spratly Islands and proposals, organized according to subject matter, from the South China Sea Dialogue.

The multidisciplinarity of the authors' backgrounds forms the basis for the complexity and comprehensiveness of treatment of a subject which clearly requires such treatment. Mark Valencia, a Senior Fellow with the East-West Center, has used his background in marine affairs and political and economic analysis to produce numerous works on maritime policy and regimes in Asia and the Pacific. Jon Van Dyke, Professor of Law at the William S. Richardson School at the University of Hawai'i, has written books and articles on both

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[1] M. VALENCIA, J. VAN DYKE & N. LUDWIG, SHARING THE RESOURCES OF THE SOUTH CHINA SEA 7 (1997)[hereinafter LUDWIG].

[2] *Id.* at 5.

marine and international environmental policy, distinguishing himself both with an award-winning book on ocean governance with respect to the environment and with teaching awards. Noel Ludwig, a Ph.D. candidate in Geography, has been associated with both the University of Hawai'i and the East-West Center, and has published on Asia and Pacific marine resource issues before his work producing the computer-generated figures for this book. Both the depth of the authors' background in the area and the multidisciplinary breadth of their training and writing have made this a book valuable to a variety of disciplines in the social and natural sciences as well as to policy-makers and negotiators who work, not only on the South China Sea, but in any area of conflict where such matters collide.

After a brief introductory overview, the book situates the Spratly Islands conflict in its regional political context. The authors argue that perceptions of the erosion of a Pax Americana in the Pacific have heightened concerns with the potential future hegemony of China or Japan and led to attempts at security cooperation in and out of the Association of South East Asian Nations (ASEAN). They argue that "the dispute over the Spratly Islands in the South China Sea presents a particular obstacle to realizing the goal of peace and stability."[4] Disregarding oil as the chief conflict motivation, they argue that these islands—25-35 islets that are above water at high tide plus many submerged reefs—have generated "disputes that are not only about oil but are also about the strategic significance of the islands and the nationalism behind the sovereignty claims thereto."[5]

Chapter III, the longest and most carefully spelled out chapter of the book, analyzes both the sovereignty claims to the islands themselves and the maritime boundary delimitation principles that govern entitlement to adjacent and seabed resources under international law. China, Taiwan, and Vietnam each claim all the parts of the Spratly Islands that are above sea level, while China and Taiwan claim submerged features as well. In addition, the Philippines claims some islets and submerged features. Malaysia and Brunei also make partial competing claims. Vietnam occupies the most features, followed by China and the Philippines, with Taiwan and Malaysia also occupying features. The chapter presents the claims of each claimant and the weaknesses of each of those claims. Drawing both on arbitral awards and International Court of Justice (ICJ) decisions, the authors argue that discovery claims, accompanied by "effective occupation," with acquiescence by other nations, govern sovereignty in cases of uninhabited islets, and that these are not unambiguously demonstrated by any claimant. On boundary delimitation issues, drawing largely on the 1982 United Nations Law of the Sea Conven-

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[4] *Id.*

[5] *Id.* at 11.

tion, to which all of the claimants except Taiwan (which is not eligible) are parties, the authors conclude that some of the Spratly Islands may generate territorial seas, but not Exclusive Economic Zones (EEZ), or continental shelf claims. The ICJ and arbitral awards have consistently ruled that islands "do not generate full zones in relation to opposing larger land areas."[6] After thorough examination of other international law principles, the conclusion is that "each claimant's position is weak under international law and thus each should consider a shared management approach."[7]

In Chapter IV on the political dimensions of the disputes, the authors, like most writers on the subject, acknowledge that "China is the key player by virtue of its size and growing political, economic, and military power, as well as its sweeping undefined claim and related aggression."[8] Noting China's preference for bilateral negotiations on this conflict and its lack of clarity as to whether it claims only the islands or a surrounding EEZ and continental shelf, the authors review and place in context China's violent clash with Vietnam on Johnson Reef in March 1988, its detention of 35 Philippine fishermen in January 1995 (following Philippine detention of 55 Chinese fishermen in September 1994), and its occupation of Mischief Reef, charged as illegal by the Philippines in February 1995. The lack of considerable force projection capability by both Vietnam and the Philippines is noted. Examining the involvement of China's relationships with Vietnam, Taiwan, and ASEAN in this conflict, they note the 1992 ASEAN Declaration on the South China Sea and the September 1992 Non-aligned Movement endorsement of this over China's objection. Much of the chapter is devoted to a careful examination of the ambiguity of China's intent, and to the feasibility of military action, to domestic politics, especially possible contradictions between the People's Liberation Army and the Foreign Ministry, as well as the uncertain impact of the succession question.

What is puzzling to this political scientist is what appears to be a severe underestimate of the difficulties of the China/Taiwan question. Only two pages of this chapter are devoted to this conflict.[9] Since Chinese and Taiwanese legal claims are based in similar historical claims, there may be room for cooperation here but, as the authors indicate, competing broader political claims may lead to escalation of both sets of claims here. More significantly, the China/Taiwan conflict would seem to form the framework of unwillingness to resolve the Spratly conflict. In the final chapter, the authors speak of a China/Taiwan allocation of shares or votes, as if the issue

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[6] *Id.* at 54.
[7] *Id.* at 59.
[8] *Id.* at 77.
[9] *See id.* at 95-97.

of how allocation would be made within that share or vote would be easy. In Chapter VIII they say that "the precedent set by the Antarctic treaties regarding accession by nongovernmental bodies could find application in allowing accession to a Spratly regime by representatives of Taiwan."[10] Yet Taiwan is not a nongovernmental organization in any sense of the word except as a legal fiction; it is a state which other states and itself have found convenient to represent as nongovernmental for the time being, while China and Taiwan debate the question of its sovereignty/unification. At the moment, agreement on the China/Taiwan issue would seem to be the major stumbling block. Yet the authors maintain, again in the final chapter, that "finding a solution to the Vietnam/China dispute is the key to resolving [the] larger Spratly problem."[11]

Chapter V reviews a variety of approaches which have been or might be taken in this conflict. Taken in conjunction with Appendix 2, which lists proposals for cooperation emanating from the South China Sea Dialogue, this is a good catalogue of approaches, but one wishes for a more systematic look at those proposals in particular and a bit more clarity as to which proposals are those of the authors, of others, or mixed. The informality of the South China Sea track two process hosted by Indonesia and funded by Canada since 1991 is noted as both strength, in prompting frank discussion, and weakness, in that governments can disregard the results. The authors note both positive results and the fragility of the process. Events since the publication of the book back up this analysis; in fall 1997 the Chinese refused to sign on to a proposed cooperative project on biodiversity, generated by the workshop, which had attracted outside funding, arguing that scientists could not visit the islands.[12]

In a section on preventive diplomacy, the authors group together unilateral, bilateral and third party approaches. They argue that third party methods, including both conciliation and mediation (based on facilitating communication) and arbitration and adjudication (based on authoritative decision-making) "are highly unlikely in this case,"[13] yet Indonesia's facilitation of the multilateral dialog, as a quasi-mediator, has been a significant contribution, although results are not evident yet. In the previous chapter the authors reminded us that Indonesia "has a direct stake in the disputes because China's historic claim encompasses its Natuna gas resources and areas that have been leased to U.S. companies."[14] They note that this may compromise its neutrality in China's eyes. Many conflict resolution researchers argue that a

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[10] *Id.* at 180.

[11] *Id.* at 213.

[12] *See* Barry Wain, *The Smiling but Unrelenting Dragon*, ASIAN WALL STREET JOURNAL, Oct. 7, 1997.

[13] VALENCIA, *supra* note 1, at 118.

[14] *Id.* at 98.

facilitator or mediator's neutrality is important, while others simply ask for fairness.

After a brief chapter on the instability of the status quo, the authors review in Chapter VII the criteria for allocation of the features alone, or with the maritime space, and identify five allocation scenarios, in all of which they find serious shortcomings. They find lack of agreement both on what should be allocated and on what constitutes equity. Perhaps more important, they find that China would be likely to be excluded under any allocation from areas with good hydrocarbon potential. Similarly, leaving some waters in the "high seas" category would allow outside exploitation, requiring sharing of profits with the rest of the world, a result also likely to be unacceptable to most claimants, including China.

In Chapter VII precedents for marine regional regimes are explored. Arguing that a regional common heritage area, to be exploited only by either original claimants or regional nations, may be supported by Article 123 of the Law of the Sea Convention, the authors examine the evolution of marine regionalism. They review the organizational and decision-making structures of global and regional resource and non-resource international intergovernmental organizations, looking at voting systems which range from simple majority to unanimity to consensus to weighted voting as possible models. They examine treaty models which range from the Antarctic (and its amendments), which sets aside sovereignty claims, to the Svalbard Treaty, which recognizes full Norwegian sovereignty and then puts considerable limits on that sovereignty, as well as other joint development precedents and the notion of a marine park. The chapter, while coming to no conclusion, prefaces the final chapter of what might be an ideal maritime regime.

While the authors' proposal for a model multilateral maritime has some important suggestions to be made to the negotiations over this conflict, the material is so concisely presented that some of the argument seems absent. Reading Chapter IX is a bit like reading shorthand. Much of its first six pages is essentially in outline form. First, the authors cite as features of an ideal maritime regime the factors which Young and Osherenko identified as conditions under which successful international regimes form. Among these are: perceptions of cooperation; benefits exceeding costs; equitability; an outside catalyst; expectations of progress; starting small; clear objectives and functions; fit with natural systems; decentralized decision-making; alternative regime designs; and clear power distribution, with strong leadership but no hegemonic use of power. Many of these are echoed by other projects evaluating the causes and correlates of success in regime formation and continuation, with some earlier works separating these into background and process conditions. While the conditions are significant, one wishes that more attention had been given to evaluating whether those conditions were or were

not met by the potential marine regional regime the authors are proposing for the Spratlies.

After listing principles, objectives, and observations on confidence and security-building measures, there is a solid discussion of the range of options for critical and controversial elements of a regime, such as: the definition of the area, whether it will include maritime zones, the organizational structure, membership issues (to include claimants only, regional nations, maritime powers), decision-making structures, and executive positions. Three examples of such a regime are provided, with the authors showing a clear preference for a robust Spratly Management Authority governing the equidistant area. This would include weighted voting and/or a combined chambered system, with sovereignty claims set aside, but not abandoned, gradual demilitarization, and eventual resolution of the remaining issues. Two other models, one a series of twelve joint development companies under a Spratly Coordinating Agency, the other an "archipelagic option" with a robust Spratly Management Authority to manage hydrocarbon development and fisheries in a smaller area, are discussed in one page each. While one wishes for more discussion here, the chapter, combined with proposals and models from earlier chapters, certainly is enough to assist the claimants to begin the process of examining such options, as the authors urge.

Moving away from the claiming of sovereignty in order to claim resources and toward the solving of a mutual problem with mutual benefit is of course enticing to a conflict resolution practitioner or researcher. The legal arguments for the difficulties of maintaining or allocating the competing claims are convincing. But the conclusion is not so obvious; neither the legal nor political arguments for a regional maritime regime seem overwhelmingly convincing. For such a regime to come into being over the obstacles, there would seem to be a need for more cooperation than is obvious at present, and that cooperation would seem to be best generated by further facilitated dialogue, coupled by success in the small cooperative actions proposed for a start. These proposed models could be a vehicle for such conversations, and the rich analysis which accompanies them should help propel them into motion. There are important legal and political insights here, to which every participant should pay attention.

UNDERSTANDING CHINESE COURTS AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS by Ronald C. Brown

Jon M. Van Dyke*

This book is a wonderful resource for anyone interested in the legal system of the People's Republic of China. Written in clear, concise, and lively language, it introduces the reader to all the different aspects of the Chinese court system. It is a book about legal procedure, and it focuses on a court system that has evolved from earlier times but is practically brand new as a meaningful and somewhat independent branch of the government.

Professor Ronald C. Brown has prepared this book based on many recent trips to China and long interviews and discussions with the key participants in this system. Because of his first-hand observations of the courts in operation, he is able to explain how they actually work, and compare them to the judicial systems in the United States, the United Kingdom, and elsewhere. He gives practical tips on how litigants can take advantage of China's courts and also provides cautionary remarks about matters that remain unsettled.

The descriptions about Chinese courts are optimistic, in the sense that Professor Brown sees the individuals working in these courts as primarily well-meaning and committed to fairness and justice. But he is not oblivious to the continuing role of the Communist Party when sensitive issues are at stake, or to the corruption that is a serious problem in many parts of China. He encourages us to understand and use the Chinese legal system, but he recognizes that the verdict is not yet final on whether these courts will continue to grow in stature so that they can do justice and protect individual rights in all situations.

Professor Brown explains to the reader that the Chinese legal system is not like the Anglo-American common law system nor is it modeled on the European civil-law system. Although it takes ideas from these two systems, it is a uniquely Chinese creation with its own cultural nuances and flavors.

After the 1949 revolution, the role of lawyers declined dramatically, and courts were operated to serve the Communist Party agenda. But once Deng Xiaoping took control in 1979, and economic modernization became a national priority, more professional and independent courts were needed to protect business interests and promote predictability and stability.

This book explains how judges are trained, and how they proceed through their career paths in the judicial system. It addresses the role of lawyers at several points and explains how they contribute to the system. It explains in detail the different departments of the judicial branch, focusing in particular detail on the central role of the "Procuratorate," which combines the role of

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the prosecuting attorney in the U.S. system with the role of the investigative magistrate in the European system. The organizational charts are especially helpful in providing a visual overview of the complexities of the various subunits within the judicial branch.

More than half of this book contains English versions of China's Constitution and its key statutes. Having these materials readily accessible will be a great advantage to everyone working in this field.

Although Professor Brown is careful not to criticize the Chinese court system in any direct way, his concerns do come through in his writing. Although he shies away from any direct discussion of the human rights abuses and lack of political freedoms that still tarnish the Chinese legal system, he is clearly aware of these problems and alludes to them at appropriate times in his analysis. He encourages the Chinese to be more transparent, to publish more of their opinions, to emphasize the rule of law rather than allowing the Party to intrude in sensitive areas, and to adhere to strict judicial ethics as a way to counter the pervasive bureaucratic corruption.

This book itself will serve in a positive way to promote transparency, because it demystifies the Chinese court system and allows English-speakers to understand the procedures and substantive laws that operate in China. Professor Brown carefully documents his statements, and explains what is going on in detailed but easily-readable language. By allowing those of us who have not had the opportunity to experience the flowering of China's court system to gain an in-depth view of the current situation, and thus by encouraging many others to take advantage of this system and use it in a positive way, Professor Brown is contributing to further maturation of this court system. It would be helpful to all if he could return to this subject in another five or ten years to tell us what further changes have taken place.